

INADEQUATE BRIEFING ON THE DRONE PROGRAM SHOWS CONGRESS HASN'T FIXED THE GLOVES COME OFF MON

I need to finish my series (post 1, post 2, post 3, post 4, post 5, post 6) on the Obama Administration's efforts to hide what I've dubbed the "Gloves Come Off" Memorandum of Notification. As I described, the MON purportedly gave CIA authority to do a whole slew of things, but left it up to the CIA to decide how to implement the programs Bush authorized. And rather than giving the Intelligence Committees written notification of the details of the programs, CIA instead gave just the Gang of Four deceptive briefings on the programs, which not only gave a misleading sense of the programs, but also prevented Congress from being able to limit the programs by refusing to fund the activities.

Yet, as MadDog and I were discussing in the comments to this post, these aspects of the MON set up did not entirely elude the attention of Congressional overseers. In fact, the very first Democrat to be briefed that torture had been used (remember, Pelosi got briefed it might be used prospectively) asked questions that went to the heart of the problem with the structure of the MON.

The CIA won't tell Jane Harman whether the President approved torture from a policy standpoint

Jane Harman was first briefed on the torture program, with Porter Goss, on February 5, 2003. We don't actually know what transpired in that briefing because CIA never finalized a formal record of the briefing. But five days after the

briefing, Harman wrote a letter to CIA General Counsel Scott Muller. In addition to using a word for the torture program CIA has redacted and objecting to the destruction of the torture tapes, Harman asked questions that should have elicited a response revealing the Gloves Come Off MON was what authorized the torture program.

It is also the case, however, that what was described raises profound policy questions and I am concerned about whether these have been as rigorously examined as the legal questions. I would like to know what kind of policy review took place and what questions were examined. In particular, I would like to know whether the most senior levels of the White House have determined that these practices are consistent with the principles and policies of the United States. Have enhanced techniques been authorized and approved by the President?

The whole point of a MON, after all, was to get the President on the record asserting that the programs authorized by it are “necessary to support identifiable foreign policy objectives of the United States and [are] important to the national security of the United States.” Here, Harman was asking whether the President was part of a policy review on torture.

Just over a week after Harman sent this letter, the CIA met with the White House to decide how to respond to Harman’s letter.

Now, granted, Harman’s question did not explicitly ask about a MON. But the CIA did not even answer the question she did ask. Muller basically told her policy had “been addressed within the Executive Branch” without saying anything about Bush’s role in it.

While I do not think it appropriate for me to comment on issues that are a matter of policy, much less the nature

and extent of Executive Branch policy deliberations, I think it would be fair to assume that policy as well as legal matters have been addressed within the Executive Branch.

Kudos to Harman for actually asking questions. But at this point, she should have known that there was something funky about the legally required MON for the torture program.

Two years later, she was still trying to get answers about the MON. In her third briefing on torture (PDF 29-31; see also this post)—on July 13, 2004, which was almost 3 weeks after Harman should have received the Inspector General Report—Muller first claimed that the legal foundation for the torture program were the Bybee Memos (he provided this explanation in the context of explaining considerations of whether the program complied with Article 16 of the Convention against Torture).

The General Counsel said that the effort was working effectively under the DOJ 1 August 2002 memo which was the legal foundation for the debriefings and interrogations.

But later in the briefing, Harman appears to have noted that the MON didn't authorize torture, it only authorized capture and detention.

Rep. Harman noted that the [redaction] did not specify interrogations and only authorized capture and detention. She asked whether we had questioned detainees before the [redaction] The GC said yes, but no enhanced techniques had been used before Abu Zabayda and there was [1.5 line redaction] Abu Zabayda and enhanced techniques which started in August 2002. In August 2002 there was a lengthy unclassified opinion by DOJ generally discussing interrogations. In

a separate and classified opinion addressed to John Rizzo, OGC, DOJ concluded the ten specific CIA techniques, which included the waterboard, were legal for use with Abu Zabayda.

From Harman's questions, it's unclear whether she had read the IG Report, which appears to have mentioned the MON but which would have also given her the false narrative told here about the Bybee Memo preceding the torture (note, there appears to have been no mention of Ibn Sheikh al-Libi's or Binyam Mohamed's treatment, the latter of which was done by US interrogators before the Bybee Memo).

Mary McCarthy gets fired for blowing the whistle on CIA's lies to Congress

That was in 2004. By 2006—when former CIA Deputy Inspector General Mary McCarthy got fired from the CIA for allegedly leaking to Dana Priest—Harman (and some other intelligence committee members in Congress) would have known or discovered more about CIA's lies to them.

A senior CIA official, meeting with Senate staff in a secure room of the Capitol last June, promised repeatedly that the agency did not violate or seek to violate an international treaty that bars cruel, inhumane or degrading treatment of detainees, during interrogations it conducted in the Middle East and elsewhere.

But another CIA officer — the agency's deputy inspector general, who for the previous year had been probing allegations of criminal mistreatment by the CIA and its contractors in Iraq and Afghanistan — was startled to hear what she considered an outright falsehood, according to people familiar with her account. It came during the discussion of legislation that would constrain the

CIA's interrogations.

[snip]

In addition to CIA misrepresentations at the session last summer, McCarthy told the friends, a senior agency official failed to provide a full account of the CIA's detainee-treatment policy at a closed hearing of the House intelligence committee in February 2005, under questioning by Rep. Jane Harman (Calif.), the senior Democrat.

What's particularly interesting about McCarthy is that she served in the Clinton White House overseeing covert programs.

In 1996, then-national security adviser Anthony Lake, who shared her intense interest in Africa, recruited her to a White House job in which she helped conduct an annual review of all presidentially authorized covert-action programs.

[snip]

As the National Security Council's director and then senior director of intelligence programs, McCarthy helped enforce the classification rules at the White House and sometimes blocked staff access to documents or CIA programs.

That doesn't mean that's why she objected to CIA's lying to Congress. But it does make her an interesting person to expose the degree to which CIA was deceiving Congressional oversight committees.

Leon Panetta reveals Bush never briefed on assassination squads—and Obama tries to maintain status quo

In addition to the drones and torture, the Gloves Come Off MON also authorized paramilitary assassination squads (for use in 80 countries!)

which, in practice, turned out to be another Blackwater contract.

That detail was revealed when Leon Panetta got briefed on the program and immediately realized he had to brief the Intelligence Communities.

But even after Panetta revealed that CIA had not briefed Congress on yet another aspect of the Gloves Come Off MON, the Obama Administration still clung to the status quo of not briefing the Intelligence Committees fully.

June 24: Panetta's briefing on this program

June 26: HPSCI passes a funding authorization report expanding the Gang of Eight briefings

July 8: The Administration responds with an insulting appeal to a "fundamental compact" between Congress and the President on intelligence matters

July 8: Reyes announces CIA lied to Congress

Which is when Silvestre Reyes announced an investigation into all the lies CIA told Congress (though see Bill Leonard's lack of sympathy here). Which, six months later, documented 5 different programs or events CIA lied to Congress about.

In response, both intelligence committees passed intelligence authorization to mandate further briefings. Which the White House, again, tried to defeat with a veto threat.

Which really pissed Nancy Pelosi off. In an interview with me in July 2010, Pelosi stated that if the Administration did not expand the briefing on programs, it would have to take responsibility if anything went wrong.

And if they don't want to do that then it has to be very clear. I think the Administration does not make, I think

it's not right to deprive the members of Congress of information with the idea that we're going to jeopardize the national security of our country. Of course we are not. And every safeguard is built into what we have in our legislation, sources and methods, you know what the list would be.

[snip]

if the Administration wants to take full responsibility for anything that happens. But that's not right. Because we passed these bills. And we should be able to pass a bill that gives us the the right—how dare the Administration say they would veto the bill?

Ultimately, the 2010 Intelligence Authorization did normally require briefing of the full committees within six months after a program started.

The Administration still isn't fully briefing Congress on the Gloves Come Off MON

Which brings us to today. To where, 9 months after the Administration first briefed the Intelligence Committees on the Anwar al-Awlaki targeting—and 4 months after his death—they still hadn't answered very basic questions about the limits on targeted killings of American citizens ... such as whether the Administration believed it could target US citizens in the United States.

Here we are, over a decade after George Bush signed the Gloves Come Off MON, and the Executive Branch is still refusing to brief adequately on the programs purportedly authorized by it.

WHY JOSE RODRIQUEZ SHOULD BE IN PRISON, NOT ON A BOOK TOUR

As Marcy noted, Adam Goldman and Matt Apuzzo of the AP have gotten their hands on an early copy of Jose Rodriquez's new screed-book, "Hard Measures".

The one substantive point of interest in their report involves the

destruction of the infamous "torture tapes". What they relate Rodriquez saying in his book is not earth shattering nor particularly new in light of all the reporting of the subject over the years, but it is still pretty pretty arrogant and ugly to the rule of law:



The tapes, filmed in a secret CIA prison in Thailand, showed the waterboarding of terrorists Abu Zubaydah and Abd al-Nashiri.

Especially after the Abu Ghraib prison abuse scandal, Rodriguez writes, if the CIA's videos were to leak out, officers worldwide would be in danger.

"I wasn't going to sit around another three years waiting for people to get up the courage," to do what CIA lawyers said he had the authority to do himself, Rodriguez writes. He describes sending the order in November 2005 as "just getting rid of some ugly visuals."

As you may recall, specially assigned DOJ

prosecutor John Durham let the statute of limitations run out on prosecuting Jose Rodriquez, and others directly involved, including four Bush/Cheney White House attorneys (David Addington, Alberto Gonzales, John Bellinger and Harriet Miers) involved in the torture tapes destruction, as well as two CIA junior attorneys, on or about November 9, 2010. There was really never any doubt about what Rodriquez's motivation was in light of the fact he destroyed the tapes of Abu Zubaydah and al-Nashiri within a week of Dana Priest's blockbuster article in the Washington Post on the US "black site" secret prisons.

But, just as there was no doubt, then or now, as to the motivation of Rodriquez and/or the others, there was similarly never any doubt about the legitimate basis for criminal prosecution. The basic government excuse was they could not find any proceeding in which the torture tapes were material to so as to be required to have been preserved. For one thing, Judge Alvin Hellerstein determined the tapes were indeed material to the ACLU FOIA suit and within the purview of their evidentiary hold (even though he refused to hold CIA officials in contempt under the dubious theory they may not have had notice).

More important, however, was the immutable and unmistakable fact that the torture tapes were of specific individuals, al-Qaeda members Abu Zubaydah and Abd al-Rahim al-Nashiri, who, at the time of destruction of the tapes, were in detention awaiting trial, whether it be in an Article III court or a military commission. With al-Nashiri there was the added fact that he was a named co-conspirator (though unindicted) in the open indictment of his Cole bombing mates al-Badawi and al-Quso. It was, and is, patently duplicitous to claim there were no possible cases the tapes had pertinent evidentiary value to. And the DOJ knew it. Because I told them in a letter prior to the expiration of the statute of limitations:

Secondly, I would like to point out that should you be thinking about relying on some rhetoric that Mr. Durham simply cannot find any crimes to prosecute and/or that there were no proceedings obstructed, it is intellectually and legally impossible to not consider the tapes to be evidence, and as they almost certainly exhibit torture to some degree and to some part they would almost certainly be exculpatory evidence, in the cases of Abu Zubaydah and al-Nashiri themselves. The United States government continues to detain these individuals and they have charges that will putatively be brought against them in some forum (civil or tribunal), Habeas rights and/or indefinite detention review processes that will occur in the future.

In short, there exist not just the potential, but the necessity, of future proceedings, and agents of, or on behalf of, the United States government have destroyed material, and almost certainly exculpatory, evidence. Crimes have been committed. At a bare root minimum, it is crystal clear Jose Rodriquez has clear criminal liability; there are, without question, others culpable too.

In short, the tapes were material evidence in multiple ways, in multiple forums, and the crime of obstruction of justice by destruction of evidence is patently obvious. If you have any questions about the willingness of the DOJ to charge obstruction of justice for evidence destruction, look no further than yesterday's charging affidavit for destruction of text messages in the BP Gulf Oil Spill case. The DOJ knows how to charge the kind of crimes Jose Rodriquez and the others committed when they want to. Thing is, the DOJ of Barack Obama and Eric Holder did NOT want to charge any crime, even patently obvious obstruction, that impinged

on the Bush/Cheney illegal torture program.

Marcy made a very salient point in that “the problem with the torture tapes is not what they showed, but what they didn’t show”. That may well be true, but it does not detract from the fact the tapes were directly material evidence to Abu Zubaydah and al-Nashiri, in fact it only confirms the malicious intent the government had with respect to covering up their torture – the blank spots and erasures are powerful evidence. In and of themselves, the blank spots, erasures and inoperability of some of the tapes, in conjunction with the corresponding torture session logs, demonstrate malicious intent to cover up torture.³ And let’s not mince words, whatever was still on the tapes was so powerful that it shocked the conscience of CIA Inspector General John Helgerson and displayed, at a minimum, waterboarding. So, there was critical evidence of many varieties possessed in and on the tapes Jose Rodriquez et. al wantonly destroyed.

So, why is Jose Rodriquez out running free, pimping his book and slamming President Obama, instead of in a federal prison? Well, it most certainly is not because he could not have been charged and convicted, it is because the Administration of Barack Obama refused to do so. Jose Rodriquez is one wired in spooky guy, and the CIA, well there is no telling what they might do to protect themselves. Maybe Dianne Feinstein and the Senate Intel Committee could investigate what levers Rodriquez and the Company pushed to obtain this result before the reach they looming completion of their “investigation” of the Bush/Cheney interrogation program.

[UPDATE] And Dana Priest has just weighed in this morning with her take on Rodriquez and his book. The entire article at the Washington Post is worth a read, but the pertinent part for this post is:

In late April 2004, another event forced his hand, he writes. Photos of the abuse

of prisoners by Army soldiers at the Abu Ghraib prison in Iraq ignited the Arab world and risked being confused with the CIA's program, which was run very differently.

"We knew that if the photos of CIA officers conducting authorized EIT [enhanced interrogation techniques] ever got out, the difference between a legal, authorized, necessary, and safe program and the mindless actions of some MPs [military police] would be buried by the impact of the images.

"The propaganda damage to the image of America would be immense. But the main concern then, and always, was for the safety of my officers."

Readers may disagree with much of what Rodriguez writes and with the importance of some of the facts he omits from his book, but the above sentence speaks volumes about why this book is important. In this case, a loyal civil servant – and the decision-makers above him who blessed these programs – were not thinking about the larger, longer-lasting damage to the core values of the United States that disclosure of these secrets might cause. They were thinking about the near term. About efficiency. About the safety of friends and colleagues. In their minds, they were thinking, too, about the safety of the country.

And after some back-and-forth with agency lawyers for what seemed to him the umpteenth time, he writes, Rodriguez scrutinized a cable to the field drafted by his chief of staff, ordering that the tapes be shredded in an industrial-strength machine. The tapes had already been reviewed, and copious written notes on their content had been taken.

"I was not depriving anyone of information about what was done or what was said," he writes. "I was just getting rid of some ugly visuals that could put the lives of my people at risk.

"I took a deep breath of weary satisfaction and hit Send."

Priest is exactly right about "the larger, longer-lasting damage to the core values of the United States". One of those values is fairness and the rule of law. Those values demand that the rights of the accused rate just as much or more moment than the self serving cover you rear desires of the accusers and abusers.

(Graphic by the one and only Darkblack)

JOSE RODRIGUEZ' IDEA OF "UGLY VISUALS": BLANK AND ALTERED TAPES

Jose Rodriguez, not exactly a squeamish guy, is spreading a myth that the reason he destroyed the torture tapes was because the torture depicted on them was so bad that people would kill CIA officers in response to the violence

Especially after the Abu Ghraib prison abuse scandal, Rodriguez writes, if the CIA's videos were to leak out, officers worldwide would be in danger.

"I wasn't going to sit around another three years waiting for people to get up the courage," to do what CIA lawyers said he had the authority to do himself, Rodriguez writes. He describes sending

the order in November 2005 as “just getting rid of some ugly visuals.”

Except there’s a problem with that claim.

The problem with the torture tapes is not what they showed, but what they didn’t show. Such as the two separate waterboarding sessions that were, for some reason, not captured on tape at all.

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.

Or the way many of the tapes showed some sign of tampering that hid their content.

[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.”

In other words, the tapes probably didn’t show the worst torture sessions. On the contrary, the tapes were enduring proof that the torturers tampered with the tapes to make sure they didn’t show the torture sessions.

Apparently, Jose Rodriguez thinks a bunch of snowy taped over tapes—proof that the torturers covered up evidence of what they did—constitutes “ugly visuals.” And I guess it does, but not in the way he’s claiming in his book.

THE ~~CIA’S~~ NSC’S PRESIDENT’S TORTURE PROGRAM

One more diversionary post before I delve into why the Administration is so worried about releasing a short phrase that, I suspect, acknowledges that George Bush’s September 17, 2001 Memorandum of Notification authorized the torture program.

National Security Advisor Jim Jones submitted a declaration supporting Administration efforts to keep the authorization behind the torture program secret

I want to reflect on what it means that then-National Security Advisor Jim Jones submitted a declaration—sometime in Fall 2009—to keep this short phrase hidden. The government revealed that, though without hinting at what Jones had to say, in the October 29, 2009 closed hearing with Judge Alvin Hellerstein.

MR, LANE . We think the first Issue before we get to documents is your Honor had asked us to specifically identify the second declarant. There is a second declaration in this case. And we wanted to put that on the record that that declaration is from James L. Jones, Assistant to the President for National Security and National Security Advisor,

AUSA Sean Lane then goes on to make clear that

Jones' declaration argues why Hellerstein should withhold the few word acknowledgment that the Memorandum of Notification authorized the torture program.

THE COURT: Both [Jones' declaration and a second sealed one from CIA Associate Information Review Office Wendy Hilton] support the argument for maintenance of the redactions.

MR. LANE: Correct, your Honor. They both address what the government ties been calling "the Intelligence method" withheld from the two OLC memos, and the Court has been referring to as "The source of the CIA's authority."

So it's not just that—as I inaccurately suggested the other day—that the CIA is trying to keep this short phrase noting that the President authorized the torture program secret. The National Security Advisor—for all intents and purposes, the President himself—is going to some lengths to keep that phrase secret as well.

Now, it is rather unusual for an NSA to submit a declaration like this (a rather telling exception to this rule came when NSA Brent Scowcroft submitted one in the original Glomar case, though that was not sealed, as this one is). Usually, it's Information Security Officers like Hilton or—when they need the really big guns—the head of the Agency that controls the information in question. Leon Panetta, for example, submitted a declaration in this case, in which he stated,

I also want to emphasize that my determinations expressed above, and in my classified declaration, are in no way driven by a desire to prevent embarrassment for the U.S. Government or the CIA, or to suppress evidence of unlawful conduct,

But such declarations are almost always

submitted by an Agency head—that is, someone outside of the White House. Yet here, the White House is sufficiently determined to keep this very short phrase secret that they had the NSA write a declaration on top of what Panetta had already written.

NSA Jones' declaration may indicate that the National Security Council has more ownership over this program than we've understood.

The NSC exerted some ownership over the torture program by making it a Special Access Program

We've already seen hints of that in the way the program was made a Special Access Program. In her January 5, 2007 declaration supporting the withholding of the September 17, 2001 MON I believe is at issue in this case, CIA Information Review Officer Marilyn Dorn claimed the NSC told CIA to make the torture program a SAP.

In accordance with the NSC's direction to the CIA to establish a special access program for information relating to the CIA terrorist detention and interrogation program, the CIA is charged with strictly controlling access to the information contained in the [MON].

Leon Panetta offered a slightly different version of what happened in his June 8, 2009 declaration.

Section 6.1(kk) of the Executive Order defines a "special access program" as "a program established for a special class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level." Section 4.5 of the Order specifies the U.S. Government officials who may create a special access program. This section further provides that **for special access programs pertaining to**

intelligence activities (including special activities, but not including military operations, strategic, and tactical programs), or intelligence sources or methods, **this function shall be exercised by the Director of the CIA.**

[snip]

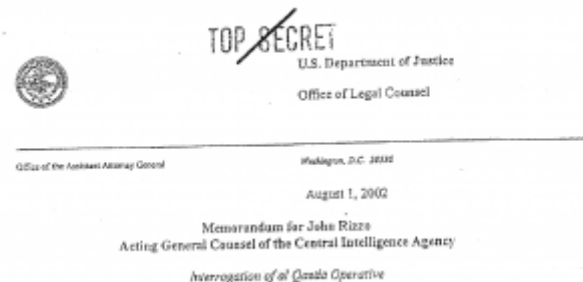
Officials at the National Security Council, (NSC) determined that in light of the extraordinary circumstances affecting the vital interests of the United States and the sensitivity of the activities contemplated in the CIA terrorist detention and interrogation program, **it was essential to limit access to the information in the program. NSC officials established a special access program** governing access to information relating to the CIA terrorist detention and interrogation program. As the executive agent for implementing the terrorist detention and interrogation program, the CIA is responsible for limiting access to such information in accordance with the NSC's direction. [my emphasis]

So in 2007, while Bush was still in office, the CIA said NSC told CIA to make the torture program a SAP, and CIA obeyed. In 2009, when Obama was in office, the CIA said that "NSC officials" actually made the SAP, not the CIA. And Panetta provided that explanation after acknowledging that the CIA Director is the one who is supposed to make SAPs for intelligence programs.

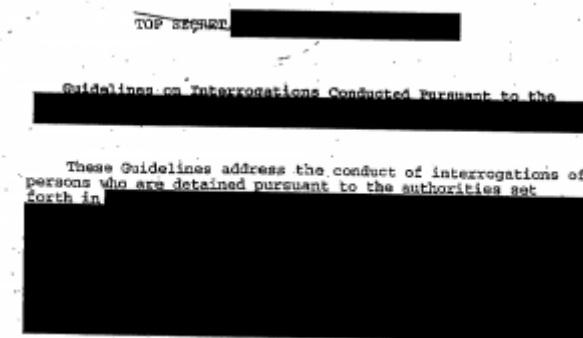
There's one more curious detail about this, which I laid out here. It at least appears that the torture program wasn't treated as a SAP when first initiated in 2002. We know, for example, that the cables from the Thai black site back to Langley were originally classified Secret, and only classified Top Secret in 2009, when the ACLU started FOIAing it. Best as I can tell,

those discussing the torture tapes were doing so in cables classified Secret as late as December 20, 2002 (see PDF 20; there are, however, some cables from earlier that were later forwarded under Top Secret designation), with the first document reflecting a compartment dated January 9, 2003 (see PDF 24).

More intriguing is a comparison of the Bybee Techniques memo, which has no compartment markings...



... with the George Tenet memo at issue in this dispute. That one does appear to have compartment information to the right of the Top Secret mark.



Mind you, we know that only a very limited set of people had access to what was really going on. And at least according to John Kiriakou, the CIA was telling a false story even to people within the Agency (which is why he claimed waterboarding worked so well).

In other words, the folks involved in the torture program were treating it like a compartment, but it appears not to have formally been one yet. And, as least as Leon Panetta tells the story, the NSC—not the CIA—made it a SAP.

New factual developments surrounding the government's concerns about this phrase changed as recently as February 2010

There's one more detail about Jim Jones' declaration of note. His declaration was never formally noticed in the FOIA suit docket. Best as I can tell, the first public notice of it came when Hellerstein released his ruling requiring the government to release either substitutions or the actual language in the phrase; in it, he described referring to the Jones and Hilton declarations. In that order, Hellerstein rejected the government's attempts to keep the language about the authorization for torture secret, requiring either that the language itself be revealed or substitute language he provided.

On January 15, ACLU moved to reconsider Hellerstein's order. They didn't have a problem with his requirement that the government release the information on the authorization for torture. They just wanted more released. But during the period of that reconsideration, the government stalled on complying with Hellerstein's order to release the information pertaining to the authorization of the torture program, as follows:

January 28, 2010: AUSA Sean Lane asks Hellerstein for two more weeks (until February 12) to comply

February 17, 2010: Lane asks Hellerstein to stay his order regarding the authorization language until he decides the ACLU's motion to reconsider

March 1-3, 2010: Hilton submits a new declaration regarding the authorization language, claiming new factual developments in the case; US Attorney Preet Bharara also submitted a letter urging Hellerstein to reconsider his ruling in light of the new facts

Faced with an order to release language

describing the authorization for the torture program, the CIA found new factual developments to urge Hellerstein not to release a very short phrase describing who or what authorized the torture program. Ultimately, Hellerstein found that new information unpersuasive, and—after a several month delay period requested by the government—on October 1, 2010, ordered them to release the language, with a stay pending appeal.

Now, I'm not suggesting that the government invented new facts to try to get this short phrase redacted. On the contrary, I suspect the new factual developments made the ultimate authorization for the torture program—particularly that torture which preceded the August 1, 2002 Bybee memos—far more problematic. On February 10, 2010, the British government published this language:

It was reported that **a new series of interviews was conducted by the United States authorities prior to 17 May 2002** as part of a new strategy designed by an expert interviewer.

v) It was reported that at some stage during that further interview process by the United States authorities, [Binyam Mohamed] had been intentionally subjected to continuous sleep deprivation. The effects of the sleep deprivation were carefully observed.

vi) **It was reported that combined with the sleep deprivation, threats and inducements were made to him. His fears of being removed from United States custody and “disappearing” were played upon.**

[snip]

x) The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is

not necessary for us to categorise the treatment reported, **it could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities.**

Mind you, the British High Court first made it clear to the British government it intended to release that language on October 26, 2009, just around the time Jim Jones was submitting a very rare NSA declaration in support of a FOIA exemption.

Now, I think Obama's unwillingness to release proof that President Bush authorized the torture program, particularly that torture that took place—as some of Mohamed's did—before the Bybee declarations gave them OLC cover, may be just one of the reasons why the Administration is going to such lengths to keep this short phrase redacted.

But I do think it a significant one.

JOHN RIZZO: WE SHOULD HAVE BEEN PROUDER OF OUR COVER-UP

John Rizzo's second regret is that after the CIA destroyed torture tapes in 2005, they should have briefed Congress and the Courts on their attempt to cover-up their own torture.

Mind you, that's not exactly what he says. Here's his version:

We should have made damn sure that the intelligence committees' leadership—if not the full committees—were told about the destruction as soon as it happened. To take

whatever lumps we deserved (and we clearly deserved some) then and there. We should have done the same thing with judges presiding over then-pending court cases potentially implicating the tapes, even if we weren't obligated to do so as a technical legal matter. In short, we should have told everyone in all three branches in the Government who had even an arguable need to know.

To some degree this looks like a statement designed for John Durham's benefit: a performance of real regret for doing something bone-headed (though why bother now that Durham has already let the statute of limitations expire on the case?). Though Rizzo probably overstates the outcome of Durham's investigation here, as there is a difference between "no evidence of a cover-up" and "insufficient evidence to charge when your President is demanding you look forward."

Ultimately, the various investigations would find no evidence of a cover-up, but rather that the whole thing was one monumental screw-up.

I'm particularly amused, however, by this statement.

In 2002, CIA videotaped the interrogation of the first captured Al Qaeda terrorist to be water-boarded. It was lawfully conducted, but the tapes were graphic and hard to watch. Almost immediately, those in CIA who made the tapes wanted to destroy them, fearing the faces of the interrogators on the tapes would put them in danger if and when they were ever made public.

We know the "hard to watch" and "fearing the faces of the interrogators" lines at most describe one, the smallest one, problem with the tapes. There were at least two other problems with them. First, they proved the torturers had exceeded DOJ 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.

In addition, the tapes show that the torturers had already altered the tapes to hide something on 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.

One potential problem would be if the interrogators used a coffin—as they had planned to—after John Yoo judged that mock burials would be illegal. Or maybe they just broke the law in other ways.

But given that Rizzo's explanation for why the tapes were destroyed is so obviously a fiction, I'm guessing he knows well that the interrogation of Abu Zubaydah was not "lawfully

conducted.”

I’m most interested, though, in this BS from Rizzo:

While we had informed the intelligence committee leadership in early 2003 of the tapes’ existence, we did not tell them on a timely basis about their unauthorized destruction. It was not our intent to hide that fact; it was simply a communications breakdown inside CIA in which then-Director Porter Goss neglected to inform the leadership as we agreed he would do the day he and I learned about the destruction. To this day I am convinced it was an unintentional oversight on his part, and I blame myself for not following up to make sure he had informed the Hill. The whole thing had just fallen through the cracks, something I saw happen far too often in my long Agency career.

Oh, my. Poor Porter Goss forgot to tell Congress that Jose Rodriguez had covered up illegal torture.

Or did he?

How is it that Crazy Pete Hoekstra got his very own briefing on torture on the very day the torture tapes were destroyed?

What went on at Crazy Pete’s briefing—a briefing for Crazy Pete alone, without his counterpart Jane Harman, who had long expressed opposition to destroying the torture tapes, or his own staff—on the very day CIA destroyed the torture tapes?

That’s right. As I have noted in the past, Crazy Pete Hoekstra (and Duncan Hunter, in a separate briefing) got a “complete brief” on the torture program on November 8, 2005, the day the torture tapes were destroyed.

An MFR lacking real detail (see PDF 32) at least reveals that Office of Congressional Affairs head Joe Wippl and C/CTC/LGL (who I

believe would still be Jonathan Fredman) gave the briefing. A number of chronologies on Member Briefings included in this FOIA set note that no staffers attended these two briefings (see, for example, page 100 of this PDF), and those **appear** to be the only briefings for which CIA noted that no staffers attended. And note, minimal as the MFR on this is, it is one of just five or six briefings in the years before the torture tapes were destroyed for which CIA actually **did** do an MFR (one of the others is the briefing at which Pat Roberts okayed the destruction of the torture tapes).

In other words, this was one of the few torture briefings CIA's Office of Congressional Affairs saw fit to memorialize. They don't say what was briefed, really, but they've got proof that two men from the CIA briefed Crazy Pete and just Crazy Pete on something related to the torture program the day CIA destroyed the torture tapes.

It's not definitive they were talking about the torture tapes, mind you; after all, the torture apologists were in full court press trying to prevent McCain's Detainee Treatment Act from taking away all the torture toys.

But one more thing suggests there may be a connection. On the evening of the same day Crazy Pete got this briefing, the same day CIA destroyed the torture tapes, someone sent an email with a list of *all* Congressional briefings related to the torture program (see page 90-92 of the second PDF). It says only, "Per your request please find attached List of Members who have been briefed and a couple of other categories." The list is interesting for two reasons. First, because the email forwarded a list with some key errors, in that it listed Harman, not Pelosi, as having been briefed at the first torture briefing in

September 2002 (with a handwritten note, “error, it is Pelosi per 145166”). It also includes an error that remained in the CIA’s own records until last year, showing Goss, not Crazy Pete, as the Chair in a meeting in March 2005 (it’s unclear the meeting with Harman happened; what appears to have happened instead is an extra briefing with Dick Cheney for Pat Roberts and Jay Rockefeller).

More interestingly, the Crazy Pete and Hunter briefings—which had taken place that very day—**were already in the Excel spreadsheet showing all the briefings**. It’s as if they briefed Crazy Pete and Hunter just so they could print this out as part of a CYA attempt to say that Congress had approved the torture tape destruction. And maybe Crazy Pete and Hunter did just that.

Goss’ so-called oversight seems a lot more suspicious given that one of Dick Cheney’s lackies, Joe Wippl, and one of the people involved in the tape cover-up from CTC was off briefing Hoekstra that same day.

Now, we’ll never know, because as with most key briefings, the CIA didn’t make a record of what went on the briefing (and why would you, if you had gone to the trouble of excluding even Hoekstra’s aides?).

But as with Rizzo’s first regret, this seems to be more about rehashing the fictions that got him out of legal trouble than any actual regret.

DOJ SITS ON ITS THUMBS A YEAR AFTER

MACONDO'S MOUTH OF HELL ROARED

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

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

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

- Require the CIA to do a report for him to explain how they'll prevent such a thing from happening in the future
- Meet with John Durham to hear what he learned in his investigation and make as

much of that public as possible

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

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

It's what they do.

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

It has to go further than the torture tapes themselves.

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

- Before May 2003: 15 of 92 torture tapes erased or damaged
- Early 2003: Gitmo commander Mike Dunlavey's paper trail documenting the torture discussions surrounding Mohammed al-Qahtani "lost"

- Before August 2004: John Yoo and Patrick Philbin's torture memo emails deleted
- June 2005: most copies of Philip Zelikow's dissent to the May 2005 CAT memo destroyed
- November 8-9, 2005: 92 torture tapes destroyed
- July 2007 (probably): 10 documents from OLC SCIF disappear
- December 19, 2007: Fire breaks out in Cheney's office

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

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

It's not just the CIA that treated Judge Hellerstein's order with contempt. So did DOJ.

And yet our Justice Department is not even being held to the very low standard that our nation's spooks are.

THE MISPLACED US DETERMINATION TO INDICT ASSANGE

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

GOVERNMENT TRYING TO FUDGE ON ITS CLAIM TO ABSOLUTE POWER

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

In the meantime, though, I wanted to point to Adam Serwer's summary of yesterday's hearing on the Anwar al-Awlaki suit. The most amusing detail in Adam's story is that the government only wants to rely on its invocation of State Secrets as a fallback position.

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

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

on it anyway.

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

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

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

There was an exchange at the end of arguments that, beyond the legalese, really crystallized what this case is about. Both sides had offered their final rebuttals, but ACLU attorney **Jameel Jaffer** stood again and stated that the lawsuit was really about whether the president possesses an

“unreviewable authority to order the assassination of an American citizen.” It moved Bates to ask Letter if he wanted to respond.

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

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

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

lie.

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

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

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

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

DURHAM TORTURE TAPE CASE DIES, US DUPLICITY IN GENEVA & THE PRESS SNOOZES

Just how inattentive and asleep at the wheel does the government think the American media and

citizenry are, to brazenly engage in the simultaneous duplicity of relying on the Durham investigation in Geneva for the UN UPR On Human Rights at the same moment it was using the Durham investigation to bleed out the statute of limitation on the primary jurisdiction of the investigation at home? Well, they think the media and people are completely asleep and, sadly, they are quite correct.