THE US ATTORNEY FOR CIA SCRAMBLES TO COVER-UP CIA'S TORTURE, AGAIN

Bmaz just wrote a long post talking about the dilemma John Kiriakou faces as the government and his defense lawyers attempt to get him to accept a plea deal rather than go to trial for leaking the names of people—Thomas Donahue Fletcher and Deuce Martinez—associated with the torture program.

I'd like to look at four more aspects of this case:

- The timing of this plea deal—reflecting a realization on the part of DOJ that their efforts to shield Fletcher would fail
- CIA's demand for a head
- The improper cession of a special counsel investigation to the US Attorney for Eastern Virginia
- The ongoing efforts to cover-up torture

The timing of the plea deal

Intelligence Identities Protection Act cases will always be risky to bring. By trying someone for leaking a CIA Agent's identity, you call more attention to that identity. You risk exposing sources and methods in the course of proving the purportedly covert agent was really covert. And—as the case against Scooter Libby proved—IIPA often requires the testimony of spooks who lie to protect their own secrets.

There is a tremendous irony about this case in that John Kiriakou's testimony in the Libby case would have gone a long way to prove that Libby knew Valerie Plame was covert when he started leaking her name, but now-Assistant Attorney General Lanny Breuer talked Patrick Fitzgerald out of having Kiriakou testify. Small world.

Bmaz notes that the docket suggests the rush to make a plea deal came after Leonie Brinkema ruled, on October 16, that the government didn't need to prove Kiriakou intended to damage the country by leaking the names of a bunch of torturers. That ruling effectively made it difficult for Kiriakou to prove he was whistleblowing, by helping lawyers defending those who have been tortured figure out who the torturers were.

But the rush for a plea deal also comes after Matthew Cole and Julie Tate filed initial responses to Kiriakou's subpoena on October 11. And after the government filed a sealed supplement to their CIPA motion that same day.

While both Cole and Tate argued that if they testified they'd have to reveal their confidential sources, Tate also had this to say in her declaration.

> In 2008, my colleagues and I were investigating the CIA's counterterrorism program now known as Rendition, Detention and Interrogation Program" (the "RDI Program").
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> [snip]
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> I understand that defense counsel has subpoenaed me to testify about the methods I may have used to obtain the identity of CIA officers during 2008 while I was researching the RDI program.

Tate doesn't say it explicitly, but it's fairly clear she was able to get the identity of CIA officers involved in the torture program. Her use of the plural suggests she may have been

able to get the identity of more than just Thomas Fletcher and Deuce Martinez. And she says she would have to reveal the research methods by which she was able to identify CIA officers who were supposedly covert.

Now, both Tate and Cole have a weak case to make that they were acting as journalists; Tate because she is a researcher and her byline only appears on one of the articles the WaPo published on the program. And Cole because he never published anything, and ultimately served as a go-between to a bunch of lawyers defending Gitmo detainees. And what privilege they might have is being destroyed, by the government, in its efforts to get James Risen to testify in the Jeffrey Sterling case.

In other words, the responses of Cole and especially Tate made it likely that either the government would have to argue the exact opposite of what they've argued in the Sterling case, or they'd have to let information on how to identify CIA officers into the public record.

And then they scrambled for a plea deal.

CIA's demand for a head

Now think back to how this entire case started, as I explained two and a half years ago.

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

> the info independently, which basically means the contractors in question just got caught using bad tradecraft.
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> 2) DOJ appears to believe no crime was committed and was preparing a report to say as much for John Brennan, who will then brief Obama on it.
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> 3) But CIA cried foul at DOJ's determination, claiming that because one of the lawyers involved, Donald Vieira, is a former Democratic House Intelligence staffer, he is biased. They seem to be suggesting that Vieira got briefed on something while at HPSCI that has biased him in this case, yet according to the CIA's own records, he was not involved in any of the more explosive briefings on torture (so the claim is probably bullshit in any case). After CIA accused Vieira of bias, he recused himself from the investigation.
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> 4) So apparently to replace Vieira and attempt to retain some hold on DOJ's disintegrating prosecutorial discretion, DOJ brought in Patrick Fitzgerald to pick up with the investigation. Fitz, of course, a) has impeccable national security credentials, and b) has the most experience in the country investigating the Intelligence Identities Protection Act, having investigated the Torturer-in-Chief and his Chief of Staff for outing CIA spy Valerie Plame. In other words, DOJ brought in a guy whom CIA can't bitch about, presumably to shut down this controversy, not inflame it.

The CIA panicked because the subjects of CIA torture were learning the identities of their torturers. DOJ did an investigation to see whether any crime had been committed, and determined it hadn't. CIA then started politicizing that decision, which led to

Fitzgerald's appointment.

Fitzgerald confirmed what DOJ originally determined: the defense attorneys committed no crime by researching who their clients' torturers were.

But along the way Fitzgerald gave the CIA a head—John Kiriakou's—based partly on old investigations of him. And, surprise surprise, that head happens to belong to the only CIA officer who publicly broke the omerta about the torture program.

This entire case was an attempt to punish someone to restore the omerta on CIA's illegal activities.

The cession of a special counsel investigation to the US Attorney for Eastern Virginia

The whole thing was a distasteful witch hunt when Fitzgerald was finding the CIA their head. But at least, at that point, it had the legitimacy of someone purportedly independent of DOJ and—more importantly—the CIA.

But then Fitzgerald retired.

As I've pointed out before, after he retired, the entire reporting structure of the prosecution team got very unclear, though Neil MacBride, the US Attorney for the CIA's district, EDVA, got brought into the structure. From there on out, regardless of Brinkema's rulings (which didn't consider the argument I made), the prosecution lost a lot of the legitimacy introduced precisely because this case necessitated an independent reporting structure.

> For better or worse, it would be difficult for John Kiriakou to prove that Patrick Fitzgerald, the guy who once indicted the Vice President's Chief of Staff for obstruction into an investigation into whether he leaked a CIA officer's covert identity, selectively prosecuted him for leaking a

> CIA officer's covert identity. After all, Fitzgerald was willing to go after one of the most senior national security officials in the country for precisely this alleged crime; going after Kiriakou (and indicting him for the lies told over the course of that investigation) would be consistent with that history.
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> But to prove that the US Attorney for Eastern District of VA is not entitled to the presumption of regularity on a prosecution involving our nation's torturers? Kiriakou need only point to the USA EDVA's (then held by Paul McNulty) decision not to prosecute the Salt Pit murder—by some of Covert Officer A and Deuce Martinez' colleagues—of Gul Rahman to show that the USA Attorney for EDVA in fact should not be entitled to the presumption of regularity. On the contrary, EDVA has already affirmatively covered up the torture crimes of the CIA.
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> And Kiriakou's job is made easier still with the reference to David Passaro's appeal. Passaro was the only CIA person (he was a contractor training Afghan paramilitaries) to be prosecuted in relation to abusive interrogation. But he would never have been prosecuted if it weren't for the government's blatant failure to provide him with discovery of a bunch of documents that would have shown the techniques he used on Ahmed Wali were approved by the CIA Director, acting pursuant to the President's authorization. In other words, Passaro's entire prosecution was built around prosecutorial abuse that served to hide that they were prosecuting the wrong guy—the guy who followed orders allowing abuse rather than the high level officials who authorized that abuse.

As soon as MacBride took over the case, the

government argued that Kiriakou was not being selectively by citing a case in which a CIA contractor was prosecuted as a scapegoat, improperly withholding documents that would have implicated Cofer Black, George Tenet, and George Bush.

Perhaps prosecutors would have cited a prior example of a cover-up even had Fitzgerald remained on the case. But coming from EDVA—the district has been covering up CIA's torture for 8 years—it reeks of further cover-up.

It seems the CIA was entitled to independent counsel when they were demanding a head, but American citizens are not entitled to independent counsel when the CIA's covering up its own actions.

The ongoing efforts to cover-up torture

Finally, consider the context of these current plea deals.

All week, the government has been making arguments in the kangaroo court in Gitmo to prevent the detainees who were tortured from mentioning they were tortured. As Daphne Eviatar describes, to do so the government went so far as to claim the detainees' memories were classified.

> "The government is using a clever interpretation of this derivative classification scheme to protect someone from describing conduct to which they were exposed," said Lt. Cmdr. Kevin Bogucki, who represents Ramzi bin al Shibh. "His exposure to the conduct is not an exposure to secret information. This is the problem with trying to classify his memories and experiences."
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> Whether the government can classify an individual's own memories and experiences is at the heart of the argument over secrecy in this case. On the one hand, the memories and experiences are his own, and the

> government can't control them. On the other, argues the government, these individuals were exposed (albeit involuntarily) to government secrets by having been subjected to the CIA's classified interrogation program — which we now know included "enhanced interrogation" methods that amounted to torture. The government doesn't want any information about those programs made public.

And then, on Wednesday, the Attorney General rewarded a bunch of lawyers for not prosecuting torture.

So we've got the US Attorney for the CIA's own district overseeing this case. And below him (some, though not all, of the other lawyers are from Chicago and NY), we've got a bunch of people who know they will get a reward if they continue the CIA cover-up.

That's the background of this plea negotiation. I realize in the normal world of legal representation, pleas look really great.

At this point, however, DOJ has serially served not to achieve justice, but to cover up the CIA's illegal torture program. John Kiriakou and his lawyers will decide what they will. But that doesn't make this plea deal a legitimate exercise of justice.