

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

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

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

[snip]

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

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

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

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

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## THE TIMING OF THE RAMZI BIN AL-SHIBH TAPES

I wanted to point out two details of timing on the Ramzi bin al-Shibh tapes:

- The tapes were made after CIA started getting worried about making interrogation tapes
- The tapes were disclosed after the CIA started trying to figure out what happened to the Abu Zubaydah tapes

The tapes were made after CIA already started getting worried about making interrogation tapes

The AP says the tapes were made while al-Shibh was in Morocco for the first time—sometime between September 17, 2002 and March 7, 2003.

When FBI agents finally had a chance to interview Binalshibh, they found him lethargic but physically unharmed. He projected an attitude suggesting he was unconcerned he had been caught.

Before the FBI made any real headway, the CIA flew Binalshibh on Sept. 17, 2002, to Morocco on a Gulfstream jet,

according to flight records and interviews.

Current and former officials said this was the period when Binalshibh was taped. His revelations remain classified but the recordings, the officials said, made no mention of the 9/11 plot. It's unclear who made the tapes or how they got to the agency's Langley, Va., headquarters.

In March 2003, Binalshibh was moved to a Polish facility code-named Quartz soon after his mentor, Mohammed, was nabbed in Pakistan.

This would mean al-Shibh arrived in Morocco (and therefore the tapes were made) sometime after some people met at Langley and decided they should destroy the Zubaydah tapes.

On 05 September 2002, HQS elements discussed the disposition of the videotapes documenting interrogation sessions with ((Abu Zubaydah)) that are currently being stored at [redacted] with particular consideration to the matters described in Ref A Paras 2 and 3 and Ref B para 4. As reflected in Refs, the retention of these tapes, which is not/not required by law, represents a serious security risk for [redacted] officers recorded on them, and for all [redacted] officers present and participating in [redacted] operations.

[snip]

Accordingly, the participants determined that the best alternative to eliminate those security and additional risks is to destroy these tapes [redacted]

The CIA appears to have already been manipulating briefing records, possibly to give the appearance of Congressional support for

either the program or the destruction of the tapes.

Note, too, that there are only two video tapes (plus the "audio" tape I've raised questions about here). If the audio tape were, in fact, just an audio tape, that would leave two video tapes. Which is how many tapes existed of Rahim al-Nashiri's interrogations, at least by the time they did the inventory. That's presumably because al-Nashiri was taken into CIA custody after the point when—on October 25, 2002—HQ told the Thai black site to record over tapes every day.

It is now HQS policy that [redacted] record one day's worth of sessions on one videotape for operational considerations, utilize the tape within that same day for purposes of review and note taking, and record the next day's sessions on the same tape. Thus, in effect, the single tape in use [redacted] will contain only one day's worth of interrogation sessions.

Now we know they kept two (or maybe three) tapes for al-Nashiri (presumably taking notes off one day's tape while the other was being used to record new interrogations) because the tape inventory shows the following:

Detainee #2  
[Tape] 91 [Redacted]tape and rewind #2  
[Tape] 92 3 [Redacted] use and rewind #3  
[redacted] final

While obviously we have no such inventory showing the al-Shibh tapes, it is possible that they were used in the same manner as the al-Nashiri tapes were—to collect just one day's worth of interrogation to assist in transcription or note-taking. (And remember, ultimately there were transcriptions made of the al-Shibh tapes, though we don't know when that

happened). It's possible then—though this is just a wild guess—that the existence of just three tapes suggests they were started after HQ decided to tape over tapes (so after October 25), or that they first implemented the policy for al-Shibh sometime before October 25.

Also note the content of the last three—presumably chronologically—tapes of Abu Zubaydah. Tapes 89 and 90 are “use and rewind” #1 and #2. But the tape just before that—tape 88—has “no video but there is sound.” Thus, the last three tapes from Abu Zubaydah consist of two video tapes and one “audio” tape, just like the three tapes from al-Shibh.

If in fact the 2-3 al-Shibh tapes only include the last days of his interrogation on which taping was used, then the AP source's claim that they simply show him sitting in a room being interrogated doesn't mean that the tapes contained no forensic evidence of something else—more abusive interrogations that happened on earlier days. After all, the tapes would no longer “show” what had happened during earlier interrogation sessions.

One more note about this early period. One question the AP raises is when and how the tapes were moved from Morocco to Langley.

It's worth remembering that the Zubaydah and al-Nashiri tapes were also moved at one point. In a cable from HQ to the field (we know this from Vaughn Indices that described this cable before it was released) written on December 3, 2002, just days after John McPherson reviewed the torture tapes and presumably discovered they had been tampered with, someone says:

It was a mistake to move [redacted] tapes [redacted] in light of Ref C guidance.

Notably, given that this refers to tapes being moved in the past tense on December 3, this may suggest the tapes were moved from the black site before it was finally closed. Mind you, the

detail may be completely irrelevant to al-Shibh's tapes, but they do suggest people in the field were moving tapes without clear approval from HQ.

The tapes were disclosed after the CIA started trying to figure out what happened to the Abu Zubaydah tapes

As I noted here, the story the AP's sources told (that a person stumbled across a box under a desk with all three al-Shibh tapes in it) and the story DOJ told Leonie Brinkema (that they learned first of one tape, and then, after asking CIA to make sure there were no more) differ in key ways.

But that difference gets all the more interesting given indications that CIA was trying to figure out what had happened to the Zubaydah tapes in precisely the same time period. Here's how the chronology works (with some potentially-related personnel moves included):

August 27, 2007: Alberto Gonzales resigns

September 13, 2007: A CIA attorney notifies DOJ of the existence of one of the al-Shibh tapes

September 14, 2007: CIA reports Michael Sulick will replace Jose Rodriguez

September 17, 2007: Bush nominates Michael Mukasey Attorney General

September 19, 2007: DOJ reviews the al-Shibh tape and compares it to the transcript; DOJ subsequently asks CIA to check to see if there were more tapes and to provide the cables they had reviewed as part of the discovery review

September 25, 2007: White House withdraws John Rizzo's nomination to be CIA General Counsel in response to pressure from Democrats about the legality of torture methods

September 25, 2007: A CIA email reports:

Below is the information for the cable granting approval to destroy the [redacted] tapes

DIRECTOR [redacted]

Document Date: 08 NOV 2005

File Number [redacted] – No clue about this file number, searched in [redacted] with zero returns.

Subject: EYES ONLY FOR [REDACTED] –  
DDO APPROVAL TO DESTROY  
[REDACTED] VIDEO TAPES

September 30, 2007: Rodriguez' last day at CIA

October 5, 2007: Someone forwards, with no comment or explanation, the September 25 email searching for the destruction approval cable

October 15, 2007 (roughly): A group of conservatives test Michael Mukasey on whether or not torture is illegal

October 18, 2007: DOJ reviews the second and third al-Shibh tape

October 18, 2007: In confirmation hearings, Michael Mukasey refuses to say waterboarding is torture

October 25, 2007: DOJ informs Leonie Brinkema of factual errors in two declarations submitted in Moussaoui case

November 8, 2007: Mukasey confirmed as Attorney General

Mind you, we don't know how long after CIA discovered the first al-Shibh tape they told DOJ about it. But the known dates show that CIA told DOJ about just one of three tapes the day before CIA announced publicly that Rodriguez would be leaving (I think one possible explanation for

the discovery of the tapes is just that they were discovered in boxing up Rodriguez' worldly belongings). The fact that a CIA lawyer revealed the singular tape to DOJ is all the more intriguing given that it occurred at about the same time as Rizzo—then Acting General Counsel—had to withdraw his nomination because of his role in approving torture (and potentially, in covering it up); was he the lawyer who told DOJ about the al-Shibh tapes? And again, though we don't know the actual date when CIA told DOJ there were two more tapes, in what appears to be the interim period, someone at CIA started looking for the cable approving the destruction of the Zubaydah tapes, without much immediate luck (though presumably they would have at least hints of Rodriguez' central role in destroying the tapes).

Given how all this coincides with Alberto Gonzales' resignation and his replacement by Michael Mukasey, it is possible that the September 25 and October 5 searches for the torture tape destruction approval were a response to a DOJ request—either in conjunction with their preparation to reveal the al-Shibh tapes to Brinkema, or possibly in conjunction with another inquiry. (Note, OPR first got copies of the Combine and CAT OLC memos on August 29, so for some reason new torture information was being shared at DOJ at precisely this time). But it certainly seems possible that DOJ first learned of the destruction of the Zubaydah tapes as they learned about the al-Shibh tapes, such that when DOJ told Brinkema that CIA's review was complete, they included within that the Zubaydah tapes.

Aside from suggesting that the al-Shibh videos may have been tied to a more general early inquiry into the destruction of the torture tapes (one presumably stymied by Michael Mukasey, who had had to promise to do no torture investigation in order to be appointed AG), it raises questions about the declaration to Brinkema. It's worth looking at the hedged language DOJ used in their October 25 letter:



The Government respectfully submits this letter to inform the Court that two ex parte declarations previously submitted by the Central Intelligence Agency ("CIA") in this case contain factual errors concerning whether interrogations of certain enemy combatants were audio or video recorded.

[snip]

We are unaware of recordings involving the other enemy combatant witnesses at issue in this case [half line redacted].

[snip]

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case.

[snip]

1 [redacted] was one of the enemy combatant witnesses whom Moussaui wanted to call to testify on his behalf; [two lines redacted]

[snip]

The fact that audio/video recording of enemy combatant interrogations occurred, and that the United States was in possession of three of those recordings is, as noted, inconsistent with factual assertions in CIA declarations [dated May 9, 2003 and November 14, 2005]

Start with the final passage: "audio/video recording ... occurred" and the US was "in possession of three of those recordings." This language would be consistent with knowledge of the Zubaydah tapes, provided that the person making the statement knew they had been destroyed. As to the rest of it, look how

carefully DOJ seems to emphasize Moussaoui's focus on al-Shibh's interrogations. The redactions noted here may include a reference to Zubaydah or al-Nashiri. Or it may be that DOJ was simply very careful to always caveat those statements to refer to the enemy combatants that Moussaoui had asked about by name by the May 2003 declaration.

In any case, it sure seems to reflect a knowledge on the part of DOJ that someone had destroyed the torture tapes. And given the identification of the date that destruction was approved—November 8, 2005—DOJ would have known that the tapes had been destroyed days before DOJ told Leonie Brinkema they didn't "have" video tapes of the interrogations at question.

Good thing for the Bush Administration they were able to convince someone already implicated in torture (through the Padilla case) to promise not to investigate torture, huh? Because it sure seems like DOJ already knew of this obstruction when Mukasey took over at DOJ.

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## **WERE THE RAMZI BIN AL-SHIBH TAPES ALTERED LIKE THE ABU ZUBAYDAH TAPES WERE?**

Given that the AP has filled in some details about the Ramzi bin al-Shibh tapes someone had hidden under a desk at CIA, I wanted to look back at the letter DOJ wrote to Leonie Brinkema in 2007, when the government first admitted it had been sitting on those tapes.

AP says the tapes were found all at once while DOJ only learned about them over a month's time

As you recall, DOJ sent this letter on October 25, 2007, to tell Judge Leonie Brinkema (who had presided over the Zacarias Moussaoui trial) and a judge who had presided over appeals in that case that two CIA declarations DOJ had submitted—on May 9, 2003 and on November 14, 2005—“had factual errors.”

Here’s how the AP describes the tapes and their discovery:

The CIA has tapes of 9/11 plotter Ramzi Binalshibh being interrogated in a secret overseas prison. Discovered under a desk, the recordings could provide an unparalleled look at how foreign governments aided the U.S. in holding and questioning suspected terrorists. The two videotapes and one audiotape are believed to be the only remaining recordings made within the clandestine prison system.

[snip]

When the CIA destroyed its cache of 92 videos of two other al-Qaida operatives, Abu Zubaydah and Abd al-Nashiri, being waterboarded in 2005, officials believed they had wiped away all of the agency’s interrogation footage. But in 2007, a staffer discovered a box tucked under a desk in the CIA’s Counterterrorism Center and pulled out the Binalshibh tapes.

[snip]

The CIA first publicly hinted at the existence of the Binalshibh tapes in 2007 in a letter to U.S. District Judge Leonie M. Brinkema in Virginia. The government twice denied having such tapes, and recanted once they were discovered. But the government blacked out Binalshibh’s name from a public copy of the letter. [my emphasis]

The DOJ letter describes a slightly different (though not necessarily inconsistent) chronology. It claims the CIA informed DOJ first of one videotape, and then roughly a month later, of the second videotape and audiotape.

On September 13, 2007, an attorney for the CIA notified us of the discovery of a video tape of the interrogation of [1.5 lines redacted] On September 19, 2007, we viewed the video tape and a transcript [redacted] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution. The evidence of the video tape, however, is at odds with the statements in two CIA declarations submitted in this case, as discussed in detail below.

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case. CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape, both of which pertained to interrogations [redacted]. On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts [redacted] Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution—they neither mention Moussaoui nor discuss the September 11 plot. We attach for the Courts' review ex parte a copy of the transcripts for the three recordings.

At our request, CIA also provided us

with intelligence cables pertaining to the interviews recorded on the two video tapes. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the [redacted] videotapes, and keeping in mind that the cables were prepared for the purposes of disseminating intelligence, we found that the intelligence cables accurately summarized the substance of the interrogations in question. [my emphasis]

So the AP's sources suggested that a staffer simply pulled out a box [Christmas in September!] and found all three tapes—presumably at the same time—whereas DOJ only found out about one tape at first, then sent CIA back to see if there were more. If, as the AP suggests, the CIA found the tapes all at once, then it suggests that the CIA withheld two of the tapes from DOJ until DOJ asked for them specifically. Given that DOJ reviewed the first tape on September 19 and the second and third on October 18, there seems to have been a delay in getting those second two tapes, which might either suggest the tapes weren't found at the same time, or CIA was very slow in turning over tapes they already knew existed.

The DOJ's explanation of why CIA didn't mention the tapes assumes CIA didn't check with CTC before writing the Declarations

Now, the AP reports that John Durham has expanded his investigation to cover the Ramzi bin al-Shibh tapes as well.

A Justice Department prosecutor who is already investigating whether destroying the Zubaydah and al-Nashiri tapes was illegal is now also probing why the Binalshibh tapes were never disclosed.

The Brinkema letter provides this explanation why the people who wrote the Declarations in 2003 and 2005 didn't mention the tapes.

Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. We asked the CIA to ascertain the reason for such an error. [1.5 lines redacted] As best as can be determined, it appears that the authors of the Declarations relied on assurances of the component of the CIA that [one line redacted] unknowing that a different component of the CIA had contact with [one line redacted]

While this passage is heavily redacted, it seems to suggest DOJ claims the authors of the Declarations didn't know which components of the CIA had had contact with Ramzi bin al-Shibh (and, potentially, Abu Zubaydah). But the AP reports the tapes were found lying around the Counterterrorism office. That seems to suggest (though we can't be sure with all the redactions) that the people who wrote the Declarations had no clue that CTC was running the torture program.

Which is really only plausible if you ensure the people who wrote the Declarations were completely compartmented out of the most basic information about the interrogation program.

But I guess ensuring unbelievable levels of ignorance on the part of the CIA Declarants would be a good way to ensure none of the tapes were released pursuant to discovery in the Moussaoui trial.

The reviews DOJ did of the tapes recall the earlier CIA whitewash of the tape content

What I'm particularly interested in—particularly given the news that John Durham has expanded his investigation to cover the obstruction involved with these tapes—is the description of the review that DOJ conducted of the tapes.

On September 13, 2007, DOJ learned of the first tape. On September 19, they viewed the videotape and a transcript—the provenance of which they redact (so we don't know if it was contemporaneous or whether it were done for the benefit of DOJ, and we don't know who did it or whether it also involves translation). Then on October 18, CIA admitted it had another “video tape” and an “audio tape.” Once again, DOJ reviewed the tapes and read the transcript. Then, DOJ reviewed the intelligence cables based on just the “video tapes,” but not, apparently, the “audio tape,” “to ensure that the cables accurately captured the substance of the interrogations.” After assuring themselves that the version of the tapes they had reviewed the first time—the cables—was close enough “keeping in mind that the cables were prepared for the purposes of disseminating intelligence,” they then gave Brinkema the transcripts for all three tapes, but not the tapes themselves, to review.

I've got a couple of questions about DOJ's actions here:

- Why would they review the cables at all?
- Why would they review the cables for the “video tapes” but not the “audio tape”?
- Why would they give Brinkema the transcripts but not the videos?

I'd love to have the lawyer folks—or anyone else—weigh in in comments. But here is one possible explanation. It's possible that when DOJ reviewed the tapes they saw something on the tapes that they thought might be pertinent, even if it did not constitute a mention of Moussaoui or 9/11. You know—like the physical condition of al-Shibh, or some physical coercion? If so, that might explain why they didn't review the cables from the “audio tape”—because they “saw” nothing on those tapes. (Alternately, it's possible that

CIA withheld the cables based on the audio taped interrogation when DOJ did its discovery review, which would be damning all by itself.)

They say they wanted to review the cables "[b]ecause we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations." This sounds, partly, like CYA: they wanted to make sure the representations DOJ had made—as distinct from the CIA Declarations—were accurate and fair. But the fact they even did the review of the cables suggests they had their doubts. Add in the heavily caveated judgment that the cables did reflect the content of the interrogation (they seem to conclude the cables reflect the intelligence gained during the interrogation, but not some other aspects of it), and it sure seems like there's a discrepancy between the "video tapes" and the cables. Just not one DOJ felt they were responsible for, given the terms of Brinkema's order on discovery, at least not after Moussaoui had already plead guilty.

Now onto the description of the three tapes: 2 "video" tapes and 1 "audio" tape. Which, in plain language, would seem to suggest that the CIA had means to both record video (as they did with Abu Zubaydah and Rahim al-Nashiri in the same time period) as well as means to record audio. There are no indications the torturers in Thailand made audio tapes. There is, however, proof that by late 2002, the CIA had already altered the Zubaydah tapes such that the video in some of them had been destroyed; they showed nothing but snow.

In other words, I think it distinctly possible—particularly given that the tapes showed up in a box under a desk in the same CTC department that had knowingly tried to cover up the earlier tampering with the Zubaydah tapes—that the one "audio" tape didn't start out that way, that it got altered in similar fashion to the Zubaydah tape.

That's all wildarsed speculation, mind you.



But there is some evidence that Durham is not only investigating the 2005 destruction of the torture tapes but also the earlier, 2002, tampering with them. (And his investigation seems to have taken on new energy when he gave John McPherson—who was involved in CIA’s first attempt at covering up this tampering—immunity.) If Durham is collecting evidence that the CIA engaged in a cover-up of torture in its treatment of the Zubaydah tapes, then both the condition of the al-Shibh tapes (if they still exist) and CIA’s earlier treatment of them (including such things as making sure those who wrote Declarations for Brinkema were ignorant of who was running the torture program) would serve to round out his case (and potentially provide the forensic evidence now lacking for the Zubaydah tapes).

All of which probably answers my third question, why DOJ didn’t give Brinkema the tapes themselves. Mind you, I’m sure they accounted for that in the name of protecting sources and methods (you know? methods? fly them to Morocco for the scalpel-on-penis treatment!). But by withholding the tapes themselves, they prevented Brinkema from seeing whatever it is they saw when they decided they needed to review the cables to see if they were accurate.

Note how carefully the AP’s sources claim that the tapes show no “harsh interrogation methods” like waterboarding.

But current and former U.S. officials say no harsh interrogation methods, like the simulated drowning tactic called waterboarding, were used in Morocco. In the CIA’s secret network of undisclosed “black prisons,” Morocco was just way station of sorts, a place to hold detainees for a few months at a time.

“The tapes record a guy sitting in a room just answering questions,” according to a U.S. official familiar with the program.

But if Binyam Mohamed is telling the truth about the scalpel-on-the-penis treatment in Morocco (and thus far, his claims have held up against the documentary evidence), we know the claim that “Morocco was just a way station of sorts” is an out and out lie. But it still may be true that the tapes don’t show—or didn’t, before one of them became an audio tape, if that’s what happened—the approved methods of the CIA program itself. That doesn’t rule out the tapes showing other things—like the outright beatings that Mohamed describes having happened in Morocco.

Which appears to be one way the DOJ review of these tapes exactly matches McPherson’s review of the Zubaydah tapes in 2002. Both reviewed the tapes and the cables to see whether the cables were a reasonably accurate version of what appeared on the tapes. But both apparently stopped short of comparing the tapes to the limits on interrogation DOJ laid out in 2002. Because if you’re DOJ, it would sure suck to be looking at evidence of torture, huh?

Update: papau’s comment about the implausibility that CIA found the tapes under a desk reminded me I wanted to note one more difference between the DOJ version and the AP one. DOJ says the “CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution.” AP almost suggests the discovery was accidental.

But in 2007, a staffer discovered a box tucked under a desk in the CIA’s Counterterrorism Center and pulled out the Binalshibh tapes.

There seems to be a related story here about why they were looking and discovering boxes full of torture evidence in 2007.

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# CIA STORES THEIR TORTURE TAPE THE SAME PLACE JUDY MILLER DOES!

Remember how Judy Miller stored the notes showing that the Vice President's lackey had leaked Valerie Plame's identity to her under her desk in a shopping bag? Remember how we mocked that kind of record keeping? Well, the AP reports that the CIA uses the same archival system as Judy:

The two videotapes and one audiotape are believed to be the only remaining recordings made within the clandestine prison system.

The tapes depict Binalshibh's interrogation sessions at a Moroccan-run facility the CIA used near Rabat in 2002, several current and former U.S. officials told The Associated Press. They spoke on the condition of anonymity because the recordings remain a closely guarded secret.

When the CIA destroyed its cache of 92 videos of two other al-Qaida operatives, Abu Zubaydah and Abd al-Nashiri, being waterboarded in 2005, officials believed they had wiped away all of the agency's interrogation footage. But in 2007, a staffer discovered a box tucked under a desk in the CIA's Counterterrorism Center and pulled out the Binalshibh tapes.

I look forward to learning whether this particular box of torture tapes once belonged to Jose Rodriguez, who when the tapes were discovered had just retired as head of Clandestine Services but who was head of CTC when the tapes were made, or whether someone

else is a Judy Miller-style packrat.

Now, elsewhere in the AP story they make it clear that—as I have suspected—the tapes first revealed to Leonie Brinkema in 2007 were of Ramzi bin al-Shibh. That’s particularly significant because Brinkema had specifically given Zacarias Moussaoui permission to question al-Shibh in January 2003. So when the government told Brinkema they had no tapes (the AP says that since Morocco maintained control of the prison at which al-Shibh was held, CIA claimed it wasn’t “part” of the CIA program), they were denying evidence she had permitted to Moussaoui by name.

And this discovery has implications not just for Moussaoui, and for al-Shibh himself (the AP suggests the tapes may show that al-Shibh’s mental state declined very quickly after he was taken into custody; he had a pending competence assessment order in military commissions that—when al-Shibh was slotted for civilian trial—was thus negated), but also for Binyam Mohamed.

Mohamed, after all, has long claimed that the worst torture he suffered—the scalpels to his genitals—occurred while in that same Morocco prison in roughly the same time frame (though Mohamed was in Morocco longer). Mohamed made it clear the British were feeding questions to the US to ask while in Morocco (in interrogations, remember, they claim they weren’t running). Subsequently, documents showed that a member of MI5 visited Morocco while Mohamed was there. So Mohamed’s evidence refutes US claims that they—and their ally the UK—weren’t in charge of the interrogations. But at the same time, the videos may provide video evidence of the kind of treatment used in Morocco.

Now, the AP’s sources these tapes show “no harsh methods ... like waterboarding.”

But current and former U.S. officials say no harsh interrogation methods, like the simulated drowning tactic called

waterboarding, were used in Morocco. In the CIA's secret network of undisclosed "black prisons," Morocco was just way station of sorts, a place to hold detainees for a few months at a time.

"The tapes record a guy sitting in a room just answering questions," according to a U.S. official familiar with the program.

But as I noted, al-Shibh would have been in Morocco at the same time that Mohamed was, during which time he was cut and beaten. What are the chances that the Moroccans acting as our proxy treated al-Shibh much differently than they treated Mohamed?

These tapes may well undo at least three of the lies the government told to cover up its torture and its counterterrorism mistakes. If John Durham—who the AP notes has expanded his investigation to include possible obstruction tied to these tapes—does anything with the tapes.

Update: All you timeline aficionados should check out this cool timeline/map of where Ramzi bin al-Shibh was when.

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## **JAY ROCKEFELLER AND THE TORTURE TAPE INVESTIGATION**

I've been writing a lot about the way CIA gamed briefings with Congress so they could destroy evidence of torture: how they created potentially misleading records about the September 2002 briefings with destroying the torture tapes in mind, how they created a record of Pat Roberts' approval for destroying the

torture tapes in February 2003 but not Harman's disapproval of them, and how Crazy Pete Hoekstra got a really suspicious briefing the morning the torture tapes were destroyed.

But I've been neglecting the role Jay Rockefeller may play in all this.

Yesterday's AP-hosted CIA spin made a big deal of Harriet Miers' early 2005 order that CIA not destroy the torture tapes.

In early 2005, Rizzo received a similar order from the new White House counsel, Harriet Miers. The CIA was not to destroy the tapes without checking with the White House first.

It's in that context where they list all the requests that might cover the videotapes and explain why they weren't legally binding on the CIA: three judges orders and the 9/11 Commission request.

But that narrative left out a few more data points. Oddly, the AP seems to make nothing of John Negroponte's warning to Porter Goss—issued on or before July 28, 2005—not to destroy the torture tapes. Maybe that's because it reveals that months after Rizzo got the order from Harriet Miers, the Director of CIA was still actively discussing destroying the tapes. Maybe that's because, given Goss' apparent happiness with Rodriguez' destruction of the tapes in November 2005, the evidence that Goss was considering destroying them three months earlier suggests complicity.

Now consider the two requests from Jay Rockefeller for John McPherson's report on the torture tapes.

In May 2005, I wrote the CIA Inspector General requesting over a hundred documents referenced in or pertaining to his May 2004 report on the CIA's detention and interrogation activities. Included in my letter was a request for

the CIA to provide to the Senate Intelligence Committee the CIA's Office of General Counsel report on the examination of the videotapes and whether they were in compliance with the August 2002 Department of Justice legal opinion concerning interrogation. The CIA refused to provide this and the other detention and interrogation documents to the committee as requested, despite a second written request to CIA Director Goss in September 2005.

It was during this 2005 period that I proposed without success, both in committee and on the Senate floor, that the committee undertake an investigation of the CIA's detention and interrogation activities. In fact, all members of the congressional intelligence committees were not fully briefed into the CIA interrogation program until the day the President publicly disclosed the program last September. [my emphasis]

So in May 2005, Rockefeller asked John Helgerson for McPherson's report. Then in September 2005, Rockefeller asked Porter Goss for the report directly. And Porter Goss—the guy who was actively considering destroying the torture tapes in July 2005 and who ultimately applauded Rodriguez' success in destroying them—completely blew off Rockefeller's request.

Mind you, Rockefeller asked for the report on the tapes, not the tapes themselves. But we now know that the report lacked any mention of the things noted in the IG Report: descriptions of the broken and blank tapes. We also know that the report didn't do what it was purportedly intended to do: review whether the torturers had followed guidelines on torture.

Had Rockefeller gotten that report in 2005—in response to either his request of Helgerson or his request directly of Goss—he would have had good reason to at least suspect that the CIA had

been engaging in a cover-up in November 2002 to January 2003, when it claimed to have reviewed whether Abu Zubaydah's torturers followed DOJ guidelines but really did no such thing. He would have had reason to wonder why a lawyer, having reviewed tapes with abundant evidence of tampering, hadn't even bothered to mention that tampering.

Which probably would have led him to ask for the tapes.

Mind you, like the 9/11 Commission, Rockefeller didn't subpoena the report (as he noted, his push for a torture investigation was thwarted, presumably by then SSCI Chair Pat Roberts, the guy who had signed off on destroying the tapes).

But for some reason the CIA doesn't want to admit it had this request pertaining to the torture tapes, in addition to all the requests from judges.

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## **THE AP'S "MOST COMPLETE PUBLISHED ACCOUNT" THAT LEAVES OUT TORTURE**

The AP's DOJ and intelligence writers have a story out on the Durham investigation that purports to be "the most complete published account" of the destruction of the torture tapes. Only, it ignores key details that have already been published which paint a much more damning picture of the tapes and their destruction.


First, the news. The AP story does reveal the following new details:

- The name of the guy in



Thailand—then station chief Mike Winograd—involved in the destruction of the tapes

- The news that the guy who destroyed the torture tapes—former CTC and Clandestine Services head Jose Rodriguez—is still lurking around Langley as a contractor with Edge Consulting
- The observation that Rodriguez did not include the two CIA lawyers who “approved” the torture tape destruction (Steven Hermes and Robert EATINGER, who have been identified before) on his order to destroy them, which is perceived within CIA as highly unusual
- The hint that prosecutors may use Sarbanes-Oxley to establish the requirement to keep the tapes as well as the detail that John Durham has prosecuted two of the only half a dozen cases that have used this Sarb-Ox provision
- A list of reasons why all the requests that should have covered the tapes purportedly don't:

\_In early May 2003, U.S. District Judge Leonie M. Brinkema told the CIA to reveal whether there were interrogation

videos of any witnesses relevant to the case of Zacarias Moussaoui, who was charged as a Sept. 11 conspirator. But that order didn't cover Zubaydah, who Brinkema ruled was immaterial to the Moussaoui case, so the CIA didn't tell the court about his interrogation tape.

\_A judge in Washington told the agency to safeguard all evidence related to mistreatment of detainees at Guantanamo Bay. But Zubaydah and al-Nashiri were held overseas at the time, so the agency regarded the order as not applicable to the tapes of their interrogations.

\_A judge in New York told the CIA to search its investigative files for records such as the tapes as part of a Freedom of Information Act suit. But the CIA considered the tapes part of its operational files and therefore exempt from FOIA disclosure and did not reveal their existence to the court.

\_The Sept. 11 commission asked for broad ranges of documents, but never issued a formal subpoena that would have required the agency to turn over the tapes.

As such, the story adds valuable insight into the strategies that John Durham may be using to prosecute Jose Rodriguez and others.

But the story buys into certain well-cultivated CIA myths that obscure some other important details of the story:

- The story replicates CIA's favored narrative about why the tapes were made—"to prove that interrogators followed broad new rules Washington had laid out"—and why they were destroyed—to protect the identities of

officers involved in the interrogation.

- The story presents Winograd's justification for destroying the tapes—"the inspector general had completed its investigation and McPherson had verified that the cables accurately summarized the tapes"—without any discussion of the fact that McPherson acknowledged evidence of tampering with the tapes during the IG Report and couldn't say whether the techniques reflected the guidance given to the torturers.
- The story ignores all evidence of earlier destruction of evidence and cover-up of criminal acts.
- This claim—"The White House didn't learn about the tapes for a year, and even then, it was somewhat by chance"—is either further evidence of a cover-up or simply false.

Let's start with the primary fiction—that the tapes were designed solely "to prove that interrogators followed broad new rules Washington had laid out." Aside from indications they were used for research purposes about the efficacy of the methods they were using, this claim suffers from a fundamental anachronism. After all, when the taping started on April 13,

2002, Washington had not yet laid out the broad new rules ultimately used to authorize Abu Zubaydah's torture on August 1, 2002. Bruce Jessen didn't even complete his proposed interrogation plan until three days after taping started.

Although, if "Washington" had indeed given Abu Zubaydah's torturers broad rules three and a half months before the Bybee Memo was signed—reports have said that Alberto Gonzales authorized that treatment on a day to day basis—then that by itself would provide an entirely different logic for why the tapes were made and then destroyed (which is sort of the argument Barry Eisler makes in his book *Inside Out*).

That said, we know that already in April 2002, the torturers had exceeded the 24-48 limits on sleep deprivation set by DOJ and NSC. Which sort of blows the whole claim that CIA believed the torturers had remained within established guidelines...

But we also know that CIA not only knew that it had blown by the broad rules it had been given, but that the tapes provided some indication that they had. That's why AP's uncritical acceptance of Winograd's justification is so problematic—it ignores the evidence reported in the IG Report that significant portions of the torture tapes—including two waterboarding sessions—had been altered or destroyed. McPherson, of course, didn't find this earlier destruction of evidence "noteworthy." But he did say, when asked five months after his report on the tapes whether the techniques on them reflected the guidance given to the torture team, that he would have to consult that guidance before he answered.

Now, to be fair, AP is only reporting Winograd's justification for destroying the torture tapes. I'm not challenging that he did say that (indeed, it reflects the publicly available cable traffic). But the AP ought to point out to its readers the wiggle room here. The AP accepts the CIA claim that they made the tapes to make

sure the torturers followed the rules set for them in Washington. But then why not point out that their justification for destroying them adopts a different standard—whether the tapes matched the log, rather than whether the tapes matched the guidelines? Why not note that McPherson himself admitted that he hadn't reviewed for the latter standard, and that the IG Report clearly concluded the torture had exceeded the standards laid out for the torturers. Had the AP laid this critical detail out, then it might not be so mystified about why McPherson needed immunity or what his testimony might be able to reveal about the reasons why Jose Rodriguez ordered the tapes destroyed.

Which gets to the earlier evidence of a cover-up. We know—and Jay Bybee has confirmed—that the torturers did not follow the rules laid out for them. Further, there are hints that the tapes might have shown far more severe sleep deprivation than approved in the rules, sleep deprivation the CIA would use to authorize using that amount of sleep deprivation. Add in the possibility that the torturers used the mock burial that John Yoo would later refuse to approve and subsequently call torture.

There are very clear reasons why the torturers and those in CTC who authorized that torture—starting with Jose Rodriguez—might not want evidence that they exceeded limits on torture lying around in a safe in Thailand. And there are pieces of evidence that suggest the cover-up of what, since it exceeded DOJ guidelines, would be torture by anyone's measure, started in 2002. In addition to McPherson's odd report, there are also the curious details about the briefing record to Congress. Starting with the three day period in which Jose Rodriguez gave Nancy Pelosi and Porter Goss an incomplete briefing, followed the next day by the decision to destroy the tapes, followed the next day by some alteration of the only record of the Pelosi briefing. The Pelosi briefing, similar games with Bob Graham's briefing, and the odd briefing Crazy Pete

Hoekstra got the day the torture tapes were destroyed suggest that CIA's briefings were all an attempt to put some legal fig leaf on the destruction of evidence of torture.

But that's not the most important oddity about Congressional briefings on torture and the torture tapes. The AP reports that the White House didn't know of the tapes until May 2004.

That's funny.

If that's true, then what happened at the meeting between CIA and the White House some time before February 22, 2003 regarding how to respond to Jane Harman's letter that—among other things—objected to the destruction of the torture tapes? And why did the CIA go to apparent lengths to share the Pat Roberts briefing with the White House differently than they did the Jane Harman one? Mind you, it is possible that none of these documents show documentary evidence that the CIA consulted with the White House when deciding what to do with Harman's written warning not to destroy the torture tapes (though, if as it appears, the White House got Pat Roberts' MFR showing his approval to destroy the torture tapes, then the White House did know about the torture tapes). But if the CIA was working so closely with the White House on these briefings—one of three stated intents of which was to get approval to destroy the torture tapes—then the only way the White House didn't know about the tapes is if the CIA very carefully gave the White House plausible deniability.

Which would, itself, provide yet more evidence that CIA knew it was involved in a cover-up.

Here's the bottom line. There is a great deal of evidence that Jose Rodriguez knew as early as September 6, 2002 that he needed to destroy evidence of the torturers exceeding the guidelines set in DC. According to anyone's definition, that means Rodriguez knew years before he had the tapes destroyed he was destroying evidence of torture, even by Jay

Bybee's and possibly John Yoo's measure.

Yet the AP—in their “most complete published account”—doesn't even mention that torture?

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## **BRIEFING CONGRESS AND DESTROYING TORTURE TAPES**

As I mentioned in this post, I've been weeding through the documents released under FOIA to Judicial Watch last week. I think they suggest there's a much closer relationship between the CIA misrepresentations on Congressional Briefings and the destruction of the torture tapes than we've known before.

Nancy Pelosi Was Proved Fucking Right

As you might recall, Judicial Watch pursued this FOIA because they thought they were going to catch Nancy Pelosi in a lie.

After the torture memos were released, the torture apologists tried to claim that Congress had been briefed on—and had approved—of torture. But Pelosi pointed out that when CIA briefed her in September 2002, they did not tell her and Goss that CIA had already gotten into the torture business. In spite of the fact that that was completely consistent with Porter Goss' tales of Congressional briefing, the press took Pelosi's story as an accusation that the CIA had lied. So the right wing transparency group Judicial Watch FOIAed the records of Congressional briefings, with a focus on proving that Pelosi had lied about having been briefed about the torture that had already happened.

Perhaps in response to this hullabaloo, the CIA's Inspector General started a review of Congressional—particularly Pelosi—briefings on

June 2, 2009. After about six weeks of reviewing their documentation, they came to the following conclusion (starting on PDF 27):

- Pelosi was briefed on April 2002, before CIA started torturing Abu Zubaydah, and in September 2002, in the briefing under discussion.
- CIA's own records regarding the September 4, 2002 briefing are so erroneous they show Jane Harman, not Pelosi, received the briefing.
- The only CIA record on the content of the September 4, 2002 briefing is the set of cables between Jose Rodriguez, (probably) Jonathan Fredman, and one other CTC person; this is the cable altered after the fact.
- People from the Directorate of Operations, and James Pavitt personally, repeatedly made claims about the content of the Pelosi briefing over the years, yet none of that sourced any first-hand knowledge or documentation.

That is, as is the case with CIA's other briefings on torture, they have no fucking clue what they briefed to Pelosi.

Which leaves Pelosi and Goss' consistent claim that CIA didn't even tell them they had already



waterboarded Abu Zubaydah 83 times by the time they briefed them.

### Creating the Illusion of Congressional Oversight

But the bigger news, as I pointed out earlier, is that the CIA appears to have been crafting a record of Congressional Briefing in conjunction with their efforts to destroy the torture tapes.

As my earlier post laid out, Jose Rodriguez briefed Pelosi and Goss on September 4, 2002. That was the the day before—according to an October 25, 2002 cable (see PDF 3)—folks at CIA HQ started talking in earnest about the danger of the torture tapes. The following day, the briefers altered their record of the meeting (see PDF 84 and PDF 11-12), though we don't know what the change entailed. No official Memorandum for the Record was ever made of the briefing and there is no record of Stan Moskowitz weighing in on the accuracy of CTC's version of the meeting (though he did receive a BCC of it). In other words, CTC made a record of the briefing at the same time as they were laying a plan to destroy the torture tapes, and CIA deviated from standard policy by not making any other record of the briefing (though not completing MFRs of torture briefings appears to have become a habit).

As a side note, I'm not certain, but I believe Jonathan Fredman is one of the other two people involved—along with Jose Rodriguez—in this. On PDF 7 of this set, the IG investigation into Pelosi's briefings describe the last set of documents in its possession as one that someone turned over to DNI leadership on March 23, 2009. On that date, Jonathan Fredman worked at DNI, making him a likely person to have been asked for his documentation on briefing Congress. The description notes that "he, Director (D)/CTC [Jose Rodriguez]" and someone else did the briefing. PDF 11 of the same set quotes from that email: "On 4 September, D/CTC, C/CTC/LGL, and [redacted] provided notification..." which I believe means Fredman—C/CTC/LGL—was the second of three people in the briefing. PDF 84 of this

set shows the actual email. This notes that the third person at the briefing was a CTC/Reports person. If I'm right and Fredman had to turn over his documentation, the notice of the "BCC" to Stan Moskowitz would mean that he wrote the email (because otherwise the BCC wouldn't show up). A later description says someone—whom I believe to be Fredman, given the CTC/LGL return address—showed it to Rodriguez who determined it to be "short and sweet." In other words, Fredman, one guy on the hook for translating (or mistranslating) DOJ's limits to the torturers in the field, may have been the guy helping Rodriguez to tweak that record of the briefing.

But the alteration of the email on the Pelosi-Goss briefing is not the only temporal tie between the destruction of the tapes and the claims about Congressional briefings. As the exchange of emails from PDF 77-81 makes clear, it took almost a month for the CIA to get around to finalizing a cable describing what happened when they briefed Bob Graham and Richard Shelby on September 27. In an email exchange dated October 24, there was some discussion about what should be included, with one email asking "Why not include the names—we did in the HPSCI cable." It appears that this person wanted Graham, Shelby, and their staffers named by name in the CIA's records (the draft of the cable at that point referred to them only by title, whereas later versions of the cable—see PDF 88—include Graham and Shelby's names, and presumably those of their staffers). This exchange—the effort to tailor the record of Congressional notification—took place the day before CIA HQ tried to authorize the taping over of videotapes each day (see PDF 3).

The pattern of discussion about Congressional briefing continued as CTC kept up its efforts to destroy the torture tapes. Just two days before a meeting with George Tenet about destroying the torture tapes held on January 10, 2003, someone from CTC/LGL (perhaps Jonathan Fredman) forwarded the altered version of the cable recording CTC's version of the Pelosi briefing;

the invite to the meeting with Tenet (see PDF 36) directs CTC to put together a report detailing, among other things, CTC's "plan to ensure that both the Hill and NSC will support the decision." (See PDF 104-105) And that email was forwarded again by CTC/LGL on June 27, 2003, between the time CIA's Inspector General had interviewed John McPherson about the contents of the torture tapes on June 18 and when, on July 18, 2003, operatives in the Field asked for instructions to destroy media again (recall that CIA had told Jane Harman they would destroy the torture tapes after the Inspector General concluded its review).

In other words, CTC kept pointing back to that cable—the one they had altered—purportedly recording the September 4, 2002 briefing as they made repeated attempts to destroy the torture tapes.

#### Crazy Pete's Timely Briefing

Which brings us back to Crazy Pete Hoekstra's role in all of this. As you might recall, Crazy Pete is the guy who set off the witch hunt against Pelosi last year when—in response to widespread horror about the torture memos—he wrote a WSJ op-ed insisting that Congress was briefed on and had approved the torture.

It was not necessary to release details of the enhanced interrogation techniques, because members of Congress from both parties have been fully aware of them since the program began in 2002. We believed it was something that had to be done in the aftermath of the 9/11 terrorist attacks to keep our nation safe. After many long and contentious debates, Congress repeatedly approved and funded this program on a bipartisan basis in both Republican and Democratic Congresses.

[snip]

Members of Congress calling for an investigation of the enhanced

interrogation program should remember that such an investigation can't be a selective review of information, or solely focus on the lawyers who wrote the memos, or the low-level employees who carried out this program. I have asked Mr. Blair to provide me with a list of the dates, locations and names of all members of Congress who attended briefings on enhanced interrogation techniques.

Any investigation must include this information as part of a review of those in Congress and the Bush administration who reviewed and supported this program.

Presumably, when he made this and subsequent claims about who had been briefed, he at least had some basis for the assertion that Democrats and Republicans in Congress had been briefed and had approved of the torture going back to 2002. He wasn't at those early briefings. So where did his (mistaken) certainty come from?

That leads me to a somewhat related question. 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.

#### The Briefings and John Durham's Investigation

All of which leads me to wonder whether the false claims about CIA's briefing of Congress plays into the investigation of the torture tape destruction.

One thing that suggests there might be a connection between these Congressional briefing issues and the torture tape destruction is the release of documents—for the first time—points to Jose Rodriguez directly. In the same way the last major document dump appears to have been tied to John McPherson's testimony before the grand jury (and therefore seemed to be triggered by events in Durham's investigation), this one seems to be triggered, at least partly, from a willingness on the part of CIA or DOJ to release documents on Jose Rodriguez.

And they name Rodriguez directly, not just by title. I find that particularly odd, because his role in briefing Pelosi has been religiously guarded over the last year, even from reporters with great ties to CIA.

Then there's this other detail. The email and briefing list from November 8, 2005—recording Crazy Pete and Duncan Hunter's briefings—has a Bates stamp in a form that several of the last big torture FOIA documents did, reading 5/12/08 TCG 145226-145228. The Bates number is stamped roughly 12,000 numbers—and 11 days—after the "Timeline Regarding Destruction of Abu Zubaydah Videotapes" (see PDF 38-39). Mind you, I've just guessed that those TCG numbers are a Durham-related Bates, but the date shows an interest from someone in 2008. And it must be an interest in one original copy, since all show the

correction regarding Pelosi's briefing (though, curiously, at least three copies of this very document appear in the FOIA set, suggesting it was circulated after the stamp was attached).

None of that is definitive, of course. But the picture of alterations and errors in Congressional briefing, along with the way in which some of those events coincided with others known events in the torture tape destruction, suggests there may be a connection.

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## **CIA CHANGED THE PELOSI BRIEFING DESCRIPTION AFTER DECIDING TO DESTROY TORTURE TAPES**

I'm working on some deep weeds for a post later on Monday (hopefully).

But as a preliminary to them, I wanted to point out a minor—but very critical—bit of timing.

As I pointed out in the comments to this thread, someone (I'll show in my new weedy post why it might be then-Counterterrorism Center Legal Counsel Jonathan Fredman) changed the initial description of the briefing that Jose Rodriguez and two others (I believe Fredman was one of the two) gave to Porter Goss and Nancy Pelosi on September 4, 2002. To see the documents showing discussing the alteration (but not the content of it), see PDF 84 of this set and PDF 11-12 of this set.

That's suspicious enough. But as the email discussions of destroying the torture tape show (see PDF 3), the briefing and the alteration to the briefing record happened the day before and

the day after—respectively—the day “HQS elements” started talking seriously about destroying the torture tapes.

On 05 September 2002, HQS elements discussed the disposition of the videotapes documenting interrogation sessions with ((Abu Zubaydah)) that are currently being stored at [redacted] with particular consideration to the matters described in Ref A Paras 2 and 3 and Ref B para 4. As reflected in Refs, the retention of these tapes, which is not/not required by law, represents a serious security risk for [redacted] officers recorded on them, and for all [redacted] officers present and participating in [redacted] operations.

[snip]

Accordingly, the participants determined that the best alternative to eliminate those security and additional risks is to destroy these tapes [redacted]

So here's what this looks like in timeline form:

September 4, 2002: Jose Rodriguez, C/CTC/LGL (probably Fredman) and a CTC Records officer brief Porter Goss and Nancy Pelosi on Abu Zubaydah's treatment. According to both Goss and Pelosi, CIA briefs them on torture techniques, but implies they are hypothetical techniques that might be used in the future, not the past.

September 5, 2002: Unnamed people at CIA HQ discuss destroying the torture tapes, ostensibly because of danger to CIA officers conducting the torture.

September 6, 2002: Someone (possibly Jonathan Fredman or someone else in CTC's Legal department) alters the initial description of the Goss-Pelosi briefing, eliminating one sentence of



it. “Short and sweet” Rodriguez responded to the proposed change.

September 9, 2002: CIA records show a scheduled briefing for Bob Graham and Richard Shelby to cover the same materials as briefed in the Goss-Pelosi briefing. The September 9 briefing never happened; Graham and Shelby were eventually briefed on September 27, 2002 (though not by Rodriguez personally).

September 10, 2002: The altered description of the briefing is sent internally for CTC records. This briefing is never finalized by Office of Congressional Affairs head Stan Moskowitz into a formal Memorandum for the Record.

Or, to put it more plainly, they briefed Pelosi, decided they wanted to destroy the torture tapes (there’s no record Pelosi was told about the tapes), and then tweaked the record about what they had said to Pelosi.

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## **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.

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# THE ABU ZUBAYDAH DOCUMENT

One of the most curious documents turned over in last week's FOIA dump is the last one, titled "The CIA Interrogation of Abu Zubaydah" (PDF 110-122). While these are just wildarsed guesses, I suspect it may either have been a summary developed for the CIA Inspector General's office for use in its review of the torture program or a summary to prepare Stan Moskowitz, then head of CIA's Office of Congressional Affairs, to brief the Gang of Four in early February 2003.

## The Timing

This document must have been written between January 9 and January 28, 2003. On PDF 117, the document describes CIA's Office of General Counsel completing its review of the torture tapes; that report was finalized on January 9. The same page describes the "Guidelines on Interrogation Standards," which was ultimately signed by George Tenet on January 28, as not yet having been approved. The document makes no mention of the Inspector General's plan to review the torture tapes impacting the decision on destroying the torture tapes, that decision was initiated in early February. It also refers to the need to brief Congress on the torture tapes in the future.

## The Structure

The document includes a long Top Secret section, followed by a short summary of the document classified Secret. That suggests that the audience of this document might in turn have its own audience with which it could use the Secret summary. So, for example, if the IG were the audience, it might be permitted to use the summary description in its final report. If Gang of Four members were the audience, they might be permitted to keep the Secret summary but not to see the Top Secret report.

The Top Secret section of the document has the following sections (each section has its own classification mark, which shows in the margin, which is how we know where redacted titles appear):

- Abu Zubaydah: Terrorist Activities
- Injuries at Time of Capture
- Highlights from Reporting by Abu Zubaydah
- [Completely redacted section]
- Interrogation Techniques Used on Abu Zubaydah
- [Redacted title and page and a half, though this section includes discussion of videotapes and training, which suggests the section describes the management controls on the torture]
- [Completely redacted section]

#### The Hand-Written Notes

Curiously, this document showed up in the January 8, 2010 Vaughn Index but not—as best as I can tell—in the November 20, 2009 Vaughn Index (or, if it showed up in the earlier Index, John Durham had not yet protected it under a law enforcement privilege). That means that the document existed as an electronic document. Yet, as the Vaughn Index tells us, this document has “handwritten marginalia” on it. These are presumably what the redactions are to the right of the main text on PDF 111 and 112. The redactions on PDF 113 are also wider than other sections, suggesting there is marginalia there, too.

In other words, the reader of this document made

notes in response to the following claims (in addition to whatever appears in the long redacted section on PDF 113):

- [AZ] was heavily involved in al Qa'ida's operational planning, and had previously been an external liaison and logistics coordinator.
- Abu Zubaydah was provided adequate and appropriate medical care.
- Abu Zubaydah identified Jose Padilla and Binyam Muhammad as al-Qa'ida operatives who had plans to detonate a uranium-topped "dirty bomb" in either Washington DC, or New York City.

The first and third of these claims, of course, are somewhat dubious (though the first is more restrained than the CIA was publicly making at the time). So the reader may have been questioning these claims. And the notation next to the claim about AZ's "adequate" medical care reminds me of the Ron Suskind report that George Bush got enraged when he learned AZ had been given pain killers. In any case, these notations suggest the reader of this document may have had a very high level of information on AZ.

The Contents

Here are notable contents, by section:

*Abu Zubaydah: Terrorist Activities*

As I said above, the claims made in this section are more restrained than the CIA was making publicly in January 2003. Rather than call AZ the number 3 guy in al Qaeda, it calls him a lieutenant of Osama bin Laden (a claim that is still incorrect, however). The description of AZ

as “an external liaison and logistics coordinator,” however, is a much more accurate description of AZ’s true role than CIA has traditionally given.

#### *Injuries at Time of Capture*

The report describes two bullet wounds: one, in his leg. The description of the second is redacted (but I believe this was a gut wound, though it might refer to him losing a testicle, which AZ described in his CSRT). There is a separate bullet point describing another physical issue; I wonder whether this is a description of the lingering effects of his 1992 head wound?

#### *Highlights from Reporting by Abu Zubaydah*

There are seven bullet points of information here. Perhaps most telling is the admission that “Over time, he had become more willing to cooperate on many issues.” You’d think someone might have questioned whether AZ’s cooperation increased as he got further from his torture?

#### *First redacted section*

This section would be the logical sequitur between AZ’s past interrogation and the techniques used to interrogate him. I wonder whether they discussed either inaccuracies in his information, or described the things he had not yet revealed (such as the location of Osama bin Laden) that they thought he knew? Alternately, it might describe what they had planned for his interrogation going forward.

#### *Interrogation Techniques Used on Abu Zubaydah*

By far the most interesting detail in this section is the redaction in the section on which torture techniques they’ve used on Abu Zubaydah:

The Agency sought and received Department of Justice approval for the following [redacted] enhanced techniques. [Four and a half lines redacted] the waterboard.



What should lie behind those redactions are the word “ten” and the names of the techniques approved in the Bybee Two memo. The fact that the passage is redacted must mean that that’s not what this passage says—which suggests that this document claimed DOJ had approved techniques they had not actually approved (or, that DOJ approved techniques verbally that were not ultimately approved in the Bybee Two memo). Given that we know this document is one John Durham considered important to his investigation, it may support the notion that some things shown on the videos—perhaps things like mock burial—were one of the things CIA was trying to hide by destroying them.

Also, as I noted earlier, this passage suggests how AZ’s sleep deprivation got out of control in the early days. But it doesn’t admit how long they did use sleep deprivation with him.

This section makes the ludicrous claim that AZ “is the author of a seminal al Qaida manual on resistance to interrogation methods,” presumably referring to the Manchester Manual. (Though AZ would describe “the Encyclopedia” in interrogations in June 2003.)

I find this description of James Mitchell and Bruce Jessen laughable:

Agency employees engaged in the interrogation are complemented by expert personnel who possess extensive experience, gained within the Department of Defense, on the psychological and physical methods of interrogation (SERE) and the resistance techniques employed as countermeasures to such interrogation. These expert medical personnel were present throughout the interrogations.

I find it curious that this passage makes no mention that Mitchell and Jessen developed the torture program, nor that they were contractors. And I’m amused that they are described as

“medical” personnel, as if they had any concerns for AZ’s medical condition.

I find it really telling that this passage boasts of having done medical examinations before and during the torture, but not psychological evaluations before and after.

Medical evaluations were conducted on Abu Zubaydah before and during the interrogations. In addition, a psychological profile was conducted on him before the interrogation began.

You’d think someone at CIA would order up a psychological evaluation after all this torture, huh? But what this passage seems designed to do, instead, is spin the medical monitoring that was part of the experimental side of AZ’s torture as good medical care (which is also what the description of Mitchell and Jessen as “medical personnel” seems designed to do).

Which may be what the following section is designed to do, too:

It is not and has never been the Agency’s intent to permit Abu Zubaydah to die in the course of interrogation and appropriately trained medical personnel have been on-site in the event an emergency medical situation arises.

Let’s unpack this. First, the denial that the Agency ever intended to let AZ die suggests perhaps the denial itself is untrue. I’m curious why this passage describes these personnel as “appropriately trained medical personnel” and not something like “doctor,” “nurse,” or “medic”? Is it a way to try to explain away the presence of people collecting medical research information, to suggest that they had to have that kind of training? And the reference to “an emergency medical situation,” when we know that they had real concerns about AZ’s injuries and were closely tracking whether torture caused severe pain, is just cynical. The whole passage

is one of the creepiest in the entire document!

This section describes the terms of approval for torture from DOJ. But it never once mentions the Bybee memos (perhaps because it might lead someone to discover that the ten techniques in the Bybee Two memo don't match the techniques listed in this section)?

Finally, look at how underwhelming this claim about the effectiveness of torture is:

The use of enhanced interrogation techniques proved productive; Abu Zubaydah provided additional useful information.

It's telling, too, that they make this claim in an entirely different section from where they boast of all the good intelligence AZ provided. They chose not to tie the specific pieces of intelligence he gave to the techniques use.

*Redacted title—probably on management controls on interrogation*

As I said, the title of the section that includes the videotapes and training is redacted, along with three primary and two secondary bullet points (which span a page and a half) before the videotape section, and two more after the training section (which take up another half page). I'm wondering if this redacted section talks about the reporting from the Field to HQ?

The section on videotapes makes a claim that—from what we see of the McPherson interview report—appears to be false.

The attorney concluded that the cable traffic did in fact accurately describe the interrogation methods employed and that the methods conformed to the applicable legal and policy guidance.

At the time of his interview, it appears that McPherson said he'd have to review the guidance

again before he could say whether the torture portrayed in the videotapes matched the guidance (which, the IG team concluded, it did not). And here's how this document describes the state of the discussion on destroying the torture tapes.

After his review, the General Counsel advised the DCI that OGC had no objection to the destruction of the videotapes, but strongly recommended that the new leadership of the committees first be notified about the existence of the tapes and the reasons why the Agency has decided to destroy them.

Boy, I guess Jane Harman really screwed up their plans when she objected, in writing, to the destruction of the tapes? This passage is one of the things that makes me wonder whether this document wasn't written to fill in Stan Moskowitz before he briefed Congress; though I'm inclined to think CIA wouldn't give the Gang of Four this much information, even though it is very deceptive in parts.

#### *The Summary*

The Secret Summary section covers the following four areas:

- AZ's nationality
- His role in AQ (again using the "external liaison and logistics coordinator" language)
- The intelligence he gave
- His physical condition

Of note, the intelligence section includes this language, which is either redacted or not present in the Top Secret description of the intelligence he gave.

[AZ] has provided information on Al Qa'ida's CBRN program and on individuals

associated with that program.

Also compare how the Top Secret report refers to AZ's intelligence on Padilla and Binyam Mohamed...

Abu Zubaydah identified Jose Padilla and Binyam Muhammad as al-Qa'ida operatives who had plans to detonate a uranium-topped "dirty bomb" in either Washington, DC, or New York City. Both have been captured.

...to how the Secret summary refers to it:

Information from AZ was instrumental in the capture near Chicago of Jose Padilla, a "dirty bomb" plotter, explosives expert, and terrorist trainer at Qandahar.

#### Other Details

I'm interested, then, in what this says about Durham's investigation. Obviously, it provides a great snapshot of what CIA claimed it believed at the time it first planned to destroy the torture tapes. It may show CIA claiming it had approval for torture techniques it did not have approval for. Oddly, the document doesn't appear to explain why the tapes were first made—it appears that the first mention of them comes in the description of McPherson's review.

This document has three sets of Bates stamps on it: the five-number series, the six-number series, and the IG series from 2007. So it has been reviewed several times in a legal context.