

LAWYERING THE TORTURE TAPES

I speculated, a week ago, that the Directorate of Operations lawyers who gave Jose Rodriguez the green light to destroy the torture tapes did not know of the outstanding court orders that would have covered the tapes.

Most importantly, it sounds like the Directorate of Operations lawyer who purportedly authorized the destruction of the tapes only said there was no legal reason not to do so.

Included in the paper trail is an opinion from a CIA lawyer assigned to the Clandestine Service that advises that there is no explicit legal reason why the Clandestine Service had to preserve the tapes, according to both former and current officials. The document does not, however, directly authorize the tapes' destruction or offer advice on the wisdom or folly of such a course of action, according to a source familiar with its contents, who declined to be identified discussing the controversial topic.

Which suggests this lawyer had no fucking clue that Judge Leonie Brinkema had asked the government about such tapes explicitly, within weeks of the time when the tapes were destroyed. I'm guessing that was by design—the only way they could figure out how to get a legal opinion defending the indefensible, the destruction of evidence.

Which is why I think the description in today's NYT story on the torture tapes is so important.

The officials said that before [Jose Rodriguez] issued a secret cable directing that the tapes be destroyed, Mr. Rodriguez received legal guidance from two C.I.A. lawyers, Steven Hermes and Robert EATINGER. The officials said that those lawyers gave written guidance to Mr. Rodriguez that he had the authority to destroy the tapes and that the destruction would violate no laws.

The agency did not make either Mr. Hermes or Mr. EATINGER available for comment.

Current and former officials said the two lawyers informed the C.I.A.'s top lawyer, John A. Rizzo, about the legal advice they had provided. But officials said Mr. Rodriguez did not inform either Mr. Rizzo or Porter J. Goss, the C.I.A. director, before he sent the cable to destroy the tapes.

"There was an expectation on the part of those providing legal guidance that additional bases would be touched," said one government official with knowledge of the matter. "That didn't happen."

Look at the language of these two versions, taken together. Newsweek reports that Hermes and EATINGER offered "no explicit legal reason why the Clandestine Service had to preserve the tapes" but did not "directly authorize the tapes' destruction." NYT reports that they told Rodriguez that "he had the authority to destroy the tapes and that the destruction would violate no laws." Whether or not Hermes and EATINGER knew of the court orders and inquiries about torture tapes, their advice seems much more limited, perhaps discussing only the DO's obligations regarding interrogation evidence in general. And even within that context, these lawyers appear not to have commented on the wisdom of destroying evidence on interrogations, which even aside from the court orders is a

stupid idea. In other words, the NYT article adds support for my intuition that the legal opinion that everyone is claiming legalizes the destruction of the tapes was offered by two lawyers who may have been compartmented away from the discussions about the reasons not to destroy the tapes, and at the very least, may authorize the destruction of interrogation tapes in general, but possibly not these particular tapes.

And it is in that context that I'm most interested in the scoop-we-already-knew the story reports—the news that David Addington, Alberto Gonzales, John Bellinger, and Harriet Miers all participated in discussions of the torture tapes. After all, use of compartmentalization to gain legal authority for legally dubious acts has the all the hallmarks of David Addington's work. So I think this story is as much about how these White House lawyers operated to ensure the destruction of the terror tapes as it is about who.

As to the implication that, if Gonzales and Addington were involved in the torture tapes, then so were Bush and Dick? I think this passage implies that Dick, at least, was part of the discussion.

One former senior intelligence official with direct knowledge of the matter said there had been "vigorous sentiment" among some top White House officials to destroy the tapes. The former official did not specify which White House officials took this position, but he said that some believed in 2005 that any disclosure of the tapes could have been particularly damaging after revelations a year earlier of abuses at Abu Ghraib prison in Iraq.

Some other officials assert that no one at the White House advocated destroying the tapes. Those officials acknowledged, however, that no White House lawyer gave a direct order to preserve the tapes or

advised that destroying them would be illegal. [my emphasis]

There are relatively few people who would merit the "top White House officials." Add in the consideration that those people would have a national security role, and you're talking people like Condi, Scooter, Stephen Hadley. And Dick Cheney. If not Bush himself. So at least some sources are out there saying someone in the White House was actively lobbying to destroy this evidence. (Incidentally, it might be worth mentioning that Alberto Gonzales implemented the email policy that resulted in millions of lost emails, so he has a history of advocating the destruction of evidence.)

One more really important aspect of this story. Many stories that came out when this first broke named Harriet as the sole White House lawyer involved in the discussion of the torture tape. This story is perhaps most extensive in this same Newsweek article, which says that Harriet was involved for two years.

The CIA repeatedly asked White House lawyer Harriet Miers over a two-year period for instructions regarding what to do with "very clinical" videotapes depicting the use of "enhanced" interrogation techniques on two top Al Qaeda captives, according to former and current intelligence officials familiar with the communications (who requested anonymity when discussing the controversial issue).

Now, that story doesn't make sense entirely. After all Harriet wasn't in a *legal* position for most of the two years in question, she was Deputy Chief of Staff for Policy. Isikoff and Hosenball explained away that seeming oddity by saying the CIA wanted to deal with the political staff at the White House on this issue.

The reason CIA officials involved the

White House and Justice Department in discussions about the disposition of the tapes was that CIA officials viewed the CIA's terrorist interrogation and detention program—including the use of "enhanced" interrogation techniques—as having been imposed on the agency by the White House. "It was a political issue," said the former official, and therefore CIA officials believed that the decision as to what to do with the tapes should be made at a political level, by Miers—a former personal lawyer to President Bush and later White House staff secretary and counsel—or someone else directly representing the president. [my emphasis]

Which amounts to a claim that the White House never engaged with this issue (at least not until 2005, when Harriet became White House Counsel) legally. The early Harriet story suggested—falsely—that the only White House involvement with the torture tapes was on the part of Harriet, and that primarily in a political role. It was a story that claimed the White House never weighed in, legally, on the destruction of the torture tapes.

The NYT tells a different story. Not only does it list several lawyers—including Addington, who is really this Administration's chief lawyer—who were involved in the discussion. But it states that Harriet may not have been involved until she became White House Counsel.

The only White House official previously reported to have taken part in the discussions was Ms. Miers, who served as a deputy chief of staff to President Bush until early 2005, when she took over as White House counsel. While one official had said previously that Ms. Miers's involvement began in 2003, other current and former officials said they did not believe she joined the discussions until 2005.

It seems an early cover story for the torture tape destruction was to blame it—and any of the crappy legal advice—on Harriet Miers. Doing so makes her into the scapegoat and implies that the White House did not engage legally with this issue until she ascended to White House Counsel. But the NYT story debunks that cover story.

Now who do you think would want to pin this on poor Harriet?