

“THE WATERBOARD”

The ACLU has a bunch of new documents on water-boarding posted—including a very heavily redacted draft of the 2004 CIA OIG report on the CIA’s interrogation methods. The report is interesting for three reasons:

- The way they refer to water-boarding
- The timing
- The rationale

The Waterboard

One of the very few things they’ve left unredacted (in all these heavily redacted documents) are the references to water-boarding. But they don’t use it as a verb, “to water-board.” Rather, they almost always refer to it as “the waterboard.”

The water board technique

interrogators administered [redacted] the waterboard to Al-Nashiri

interrogators used the waterboard on Khalid Sheykh Mohammad

Cables indicate that interrogators [redacted] applied the waterboard technique to Khalid Sheykh Mohammad

waterboard session of Abu Zubaydah

waterboard on Abu Zubaydah

The waterboard has been used on three detainees: Aby Zubaydah, Al-Nashiri, and Khalid Sheykh Mohammad

I don’t know why this bugs me so much, but it does. It really emphasizes the clinical and bureaucratic nature of this practices, and pretends that human beings are not the ones inflicting it.

The Timing

The ACLU refers to this as a "draft document," though there is nothing on what is visible on the cover page to suggest this wasn't a final draft—so we can't be sure whether the date on the report is the date when it was finally released.

Still, I find the date worthy of note: May 7, 2004. Here's how that date works into the torture timeline:

April 7, 2004 (approximately): 60 Minutes II acquires photos authenticating Abu Ghraib story.

Mid-April, 2004: General Myers calls Dan Rather to ask him to delay story.

Mid-April, 2004: Taguba begins to brief officers on his report ("weeks" before his May 6 meeting with Rummy).

April 28, 2004: Hamdi and Padilla argued before SCOTUS. Paul Clement assures the Court that we don't torture. 60 Minutes breaks Abu Ghraib story and proves he's wrong.

May 2004 (within days after Abu Ghraib becomes public): CIA briefing for Addington, Bellinger, and Gonzales on torture tapes.

May 6, 2004: Taguba meets with Rummy, Wolfowitz, Cambone, Myers, and others

In the meeting, the officials professed ignorance about Abu Ghraib. "Could you tell us what happened?" Wolfowitz asked.

[snip]

"Here I am," Taguba recalled Rumsfeld saying, "just a Secretary of Defense, and we have not seen a copy of your report. I have not seen the photographs, and I have to

testify to Congress tomorrow and talk about this.”

May 7, 2004: Rummy testifies before Congress on Abu Ghraib.

May 7, 2004: CIA OIG draft report on interrogation techniques. Though this document is heavily redacted, reports say the investigation found interrogation techniques constitute cruel and inhuman treatment.

May 10 2004: Sy Hersh’s Abu Ghraib story.

In other words, this draft of the report, at least, bears the same date as Rummy had to testify before Congress. And the report came out right in the middle of the panic over Abu Ghraib and probably early enough to be included in the May briefing of Addington, Bellinger, and Gonzales on the torture tapes.

They would have freaked out about this report in any case. But the timing of it surely exacerbated their panic.

The Rationale

As Doug Jehl reported at almost the same time as the torture tapes were destroyed, the report concluded that some of the interrogation methods might constitute cruel and inhuman treatment, and as such, violate the Convention against Torture.

A classified report issued last year by the Central Intelligence Agency’s inspector general warned that interrogation procedures approved by the C.I.A. after the Sept. 11 attacks might violate some provisions of the international Convention Against Torture, current and former intelligence officials say.

The previously undisclosed findings from

the report, which was completed in the spring of 2004, reflected deep unease within the C.I.A. about the interrogation procedures, the officials said. A list of 10 techniques authorized early in 2002 for use against terror suspects included one known as waterboarding, and went well beyond those authorized by the military for use on prisoners of war.

The convention, which was drafted by the United Nations, bans torture, which is defined as the infliction of "severe" physical or mental pain or suffering, and prohibits lesser abuses that fall short of torture if they are "cruel, inhuman or degrading." The United States is a signatory, but with some reservations set when it was ratified by the Senate in 1994.

The report, by John L. Helgerson, the C.I.A.'s inspector general, did not conclude that the techniques constituted torture, which is also prohibited under American law, the officials said. But Mr. Helgerson did find, the officials said, that the techniques appeared to constitute cruel, inhuman and degrading treatment under the convention.

While the CIA isn't showing us **that** part of the conclusion, it does show enough of the discussion on the legal issues surrounding the interrogation methods to show how they got to that conclusion. I find two parts of that discussion noteworthy.

First, after reviewing how the US interpreted Article 16 of the Convention—which prevents cruel, inhuman, or degrading treatment or punishment which do not amount to torture—to be limited to that "cruel, unusual, and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th Amendments to the Constitution," it notes that:

Although the Torture Convention expressly provides that no exception circumstances whatsoever, including war or any other public emergency, and no order from a superior officer, justifies torture, no similar provision was included regarding acts of "cruel, inhuman or degrading treatment or punishment."

This suggests that one thing the OIG considered was whether this no exception provision would apply to the cruel and inhuman clause. After all, if it did, it would present trouble for all the Yoo Memos that invoke exceptional circumstances and Commander in Chief authority.

The report also notes that Yoo's August 2002 did not consider whether any law-aside from the torture statute-relevant to the detention and interrogation of detainees outside of the US, suggesting that Yoo didn't address these concerns about the Convention.

Then there's the part I really like. The report uses the State Department's own reporting to show that the techniques used by the US are considered offensive to the US:

Annual U.S. State Department Country Reports on Human Rights Practices have repeatedly condemned harsh interrogation techniques used by foreign governments.

[snip]

[from the 2002 Report issued in March 2003] In a world marching toward democracy and respect for human rights, the United States is a leader, a partner and a contributor. We have taken this responsibility with a deep and abiding belief that human rights are universal. They are not grounded exclusively in American or western values. But their protection worldwide serves a

core U.S. national interest.

The State Department Report identified objectionable practices in a variety of countries including, for example, patterns of abuse of prisoners in Saudi Arabia by such means as "suspension from bars by handcuffs, ad threats against family members ... [being] forced constantly to lie on hard floors [and] deprived of sleep" Other reports have criticized hooding and stripping prisoners naked.

In other words, the report uses our country's own principled statements against torture techniques—precisely some of the ones we have used on detainees since 2001—to show that the US considers these practices to be objectionable.

Now, in spite of the fact that they've shown how the OIG arrived at its conclusion that these interrogation methods violated the Convention, they've still invoked some kind of secrecy rule in order to redact that bit.

I guess that's the "we don't want to admit we broke the law" FOIA exception.