

TORTURE TAPES AND BRIEFINGS

Isikoff has an article that basically catches everyone up on torture investigation. The big piece of news is that John Durham is flying spooks back from overseas stations to appear before the grand jury.

In recent weeks, prosecutor John Durham has summoned CIA operatives back from overseas to testify before a federal grand jury, according to three legal sources familiar with the case who asked not to be identified discussing sensitive matters. The sources said Durham is also seeking testimony from agency lawyers who gave advice relating to the November 2005 decision by Jose Rodriguez, then chief of the CIA's operations directorate, to destroy the tapes.

There are lawyers probably named Robert Bennett quoted as saying, "maybe he's just tying up loose ends," but that news, coupled with the news that Durham interviewed Dusty Foggo, who had recently been hung out to dry by Porter Goss, suggests Durham has been able to break the omerta at the CIA and make some headway on this case.

But I'm sort of interested in this claim:

Durham was appointed by former attorney general Michael Mukasey shortly after the December 2007 revelation about Rodriguez's decision. At the time, then-CIA director Michael Hayden insisted the tapes were destroyed only after "it was determined they were no longer of intelligence value and not relevant to any internal, legislative or judicial inquiries—including the trial of Zacarias Moussaoui." But since then, declassified filings in the Moussaoui

case show that around the time the tapes were destroyed, Moussaoui's lawyers were seeking CIA records about the interrogation of Abu Zubaydah—who, according to recent disclosures, was waterboarded 83 times. On Nov. 3, 2005, Judge Leonie Brinkema even ordered government lawyers "to confirm or deny that it has video- or audiotapes" of interrogations of potential witnesses.

Now, this is assuredly not news. The Moussaoui request has been on my torture tape timeline for well over a year, based on this and other reporting. And it is just one case where a party had made a legally binding request for any torture tapes—the other two being the ACLU FOIA and the 9/11 Commission request for any such materials.

(On the 9/11 Commission request, keep in mind that Philip Zelikow, Commission Executive Director, has been saying "let the prosecutor work" in his recent public critiques of torture; he may well have been interviewed in this case, so he may have reason to be confident in the quality of the investigation.)

Okay, back to Moussaoui. Not new news. But apparently news that Isikoff is focusing on at the moment. I'm interested in that not just because it says Durham would probably pin any indictments on an obstruction of justice charge. I'm interested because of the dates. There's the November 3, 2005 Brinkema order, sure, which almost perfectly coincides with the destruction of the tapes. But the trial discussion about Zubaydah testimony went back much earlier.

Moussaoui requested on September 10, 2002, to "Free Abu Zubaydah from CIA Torture Chamber and Bring Him in My Open Court," and on October 16, 2002, Moussaoui made a motion "to Force Leonie Brinkema and her Government to Stop Hiding Abu Zubaydah and Ramzi Binalshib Testimony in my Favor." Since the CIA has now admitted it had tapes through December, both these requests were

made at a time when the CIA was still **making** Abu Zubaydah tapes. Perhaps more interesting still is the timing of 2003 requests. In January 2003, Brinkema ruled that Moussaoui could get testimony from bin al-Shibh, though the government subsequently refused to make him available. And on February 3, 2003, Moussaoui attempted "to Get Inform About the Decision Relating to Ramzi and Abu Zubaydah and Al Liby."

On February 5, 2003, the CIA told Porter Goss—who was Director of Central Intelligence when the tapes were destroyed—and Jane Harman they were going to destroy the Zubaydah tapes.

In other words, the apparent focus on the November 3, 2005 order to turn over videotapes came only after three years of requests on Moussaoui's part to get testimony from Abu Zubaydah, and the decision to destroy the tapes was at least relayed to Congress (to Porter Goss, one of the key figures in the case) just after Brinkema first ruled that Moussaoui ought to get evidence from al Qaeda detainees.