

# THE CONTEXT OF THE TORTURE INDEX

I wanted to return to the torture index released to ACLU the other day to comment on what the CIA claims to have in terms of records.

First, remember what this index is. The April 21 order required CIA to turn over two things.

- Records "relating to the content" of the torture tapes "from the entire period of the tapes that were destroyed"
- "Documents relating to the destruction of the tapes, which describe the persons and reasons behind their destruction"

The second bullet (referred to as Paragraph 4 material) is the stuff discussed in the recent John Durham squabble. The first bullet (referred to as Paragraph 3 material) is the stuff we got the other day and which I'll discuss in this post.

The May 7 order summarizes how CIA and ACLU agreed CIA would treat those records that described the content of the torture tapes.

In response to earlier orders, the CIA originally identified approximately 3,000 documents potentially responsive to paragraph 3 of the Court's April 20, 2009 Order. Those 3,000 records included "contemporaneous records," which were created at the time of the interrogations or at the time the videotapes were viewed, "intelligence records," which do not describe the interrogations but contain raw intelligence collected from the

interrogations, "derivative records," which summarize information contained within the contemporaneous records, and documents related to the location of the interrogations that, upon further review by the CIA, were determined not to relate to the interrogations or to the destroyed videotapes.

With respect to paragraph 3 of the April 20, 2009 Order, the parties jointly propose that the Government address the contemporaneous and derivative records, but not the intelligence records or the other records that ultimately proved to be unrelated to the interrogations or the videotapes. With respect to the contemporaneous and derivative records, the parties jointly propose the following:

- *May 18, 2009: The Government will produce a list of all contemporaneous records and all derivative records. The list will, to the greatest extent permissible on the public record (i.e., the list will not include classified information or information otherwise protected by statute), identify the date, sender, recipient, type, and subject matter for each record;*

So the stuff we got the other day is one of three things:

- Documentation made contemporaneously with interrogations that were videotaped
- Documentation made contemporaneously to the viewing of the videotapes
- Derivative records that summarize the contents of the contemporaneous record

The dates on the list, then, tell us certain things: the dates during which interrogations were videotaped, the dates when the videotapes were viewed, and the dates when people at the CIA were summarizing what went on in those interrogations.

#### **The contemporaneous interrogation materials**

This appears to explain the timing of the multiple times a day cables which start on April 13, 2002, and continue to December 4, 2002. Those are the dates, presumably, when the CIA was videotaping either Abu Zubaydah's and/or al-Nashiri's interrogation. As MadDog pointed out the other day, almost all of the communication during this period consists of cables from the Field to HQ, with the exception of two handwritten log books; cables from the Field to the Field on April 23, May 12, May 21, May 31 to June 3, October 25, and November 21; a photograph dated October 11, 2002; a cable from HQ to the Field on May 28; and a memo from HQ to the Field on November 30. This memo is notably classified only Secret, while everything else is classified Top Secret. Given the timing, I wonder whether the memo is the order from HQ to stop videotaping interrogations, given that the tapings apparently stopped five days later. Also, I wonder whether the photo recorded al-Nashiri, whom the CIA got sometime in that month, after he was tortured in Dubai for a time.

The rest of the dated material appears to fall into two timeframes: the first half of 2003, which almost certainly relates to the CIA IG investigation, and late 2007 to early 2008, which may relate to the exposure of the torture tape destruction.

### **The IG Report materials**

These materials consist of:

January 9, 2003: Memo for the record  
February 3, 2003: Interview report  
February 10, 2003: Interview report  
May 9, 2003: Notes  
May 22, 2003: Memo for the record  
June 17, 2003: Handwritten notes  
June 18, 2003: Email  
June 18, 2003: Interview report

By putting these dates together with the details in the IG declaration submitted in this case, we can flesh them out a little.

The declaration explains that the IG review was initiated in January 2003.

In January 2003, OIG initiated a special review of the CIA terrorist detention and interrogation program.

So that memo for the record dated January 9 might be the initiation of the review. If so, the initiation itself must summarize the contents of the contemporaneous record (or else the document wouldn't be responsive to this FOIA).

The IG review team reviewed the videotapes themselves in May, 2003.

OIG reviewed the videotapes at an overseas covert NCS facility in May 2003.

So those notes from May 9, 2003, are almost certainly notes taken while viewing the videotapes. Note the memo for the record written

a few weeks later.

Other than that, the materials tied to the IG report appear to be tied to three interviews, reports of which were written on February 3, February 10, and June 18. Curiously, the CIA did not list the IG report itself (though I wonder whether some of the undated timelines and outlines are related to the IG report). I think that's because the CIA already turned over the report itself, though I'm going to try to double check that.

### **The torture tape scandal materials**

While I'm less sure about the most recent materials, they appear to be connected with events surrounding the revelation that the torture tapes were destroyed. These materials—along with some relevant notes—are:

December 3, 2007: 5-page email  
December 5, 2007: NYT informs CIA they're going to publish story on tapes  
December 6, 2007: Michael Hayden writes letter to CIA personnel explaining matter; NYT **breaks** story of torture tape destruction  
December 8, 2007: DOJ **opens** preliminary investigation into torture tape destruction  
December 10, 2007: 5-page email w/memo  
December 10, 2007: 2-page email  
December 11, 2007: Hayden **briefs** SSCI on the torture tape destruction, discussed the techniques used on Abu Zubaydah, including waterboarding  
December 12, 2008: ACLU moves to hold CIA in contempt for destroying torture tapes  
December 28, 2007: 7-page interview report  
January 2, 2008: Mukasey **announces** appointment of John Durham to conduct investigation into torture tape destruction  
January 7, 2008: 13-page email; first hearing on ACLU's contempt motion

January 10, 2008: CIA submits motion  
opposing contempt

Given the other events that occurred around this time, most of these documents make sense. There was correspondence leading up to Hayden's SSCI briefing, in which he told the Committee what techniques had been used with Abu Zubaydah. There was an interview, which may well relate to the preliminary investigation (and Mukasey's decision, days later, to start a formal investigation). There's the 13-page email that might either relate to the investigation or ACLU's contempt motion.

But then there's the 5-page email from December 3, before the NYT article. Was this related to the article? Did CIA know it might be coming? I have no idea—but it is interesting that that email precedes all the other events related to this scandal.

#### **The unknown timelines and notes**

Which leaves a bunch of undated timelines and notes, of which only one is even described as to its author (HQ).

Someone, at some point, was trying to put together a timeline of what was done to Abu Zubaydah and/or al-Nashiri. The timeline 10 pages long, and the longest version of the notes/outline is 29 pages long.

You'd think the CIA would at least know generally who wrote these materials, and when. But it claims not to. My guess is it's work product on the IG report done sometime after viewing the tapes and before the actual report—which included descriptions of the torture used—was published. But that's just a wildarsed guess.