

DURHAM GOING AFTER THE FIRST DESTRUCTION OF TORTURE TAPES?

Bmaz had a post up this yesterday, based on this WaPo story, concluding that we're not going to have real accountability for the destruction of the torture tapes. (Thanks to bmaz for minding the shop while I feted mr. ew's birthday.)

While I agree with bmaz generally that we're not going to get real accountability out of this investigation, I'm not sure I agree with bmaz's other conclusions. Here's why.

As bmaz noted, the big piece of news in this story is that Durham just did or is about to give immunity to John McPherson, who appears to be the CIA Office of General Counsel lawyer who reviewed the torture tapes in November to December 2002, purportedly to make sure the tapes matched the descriptions of allowable torture in the Bybee Two memo.

Assistant U.S. Attorney John H. Durham, who is leading the investigation, recently bestowed immunity from prosecution on a CIA lawyer who reviewed the tapes years before they were destroyed to determine whether they diverged from written records about the interrogations, two sources familiar with the case said. That could signal that the case is reaching its final stages. Durham has been spotted at Justice Department headquarters in Washington over the past few weeks, in another signal that his work is intensifying.

The agency lawyer, John McPherson, could appear before a grand jury later this month or in April, according to the sources, who spoke on the condition of anonymity because the investigation continues. CIA lawyers have been

essential to understanding the episode because they offered advice to agency personnel about handling the tapes, and whether they should have been included when agency records were turned over in other court cases. McPherson is not thought to be under criminal jeopardy but had previously hesitated to testify, the sources said.

As you recall, the CIA IG Report gave us two critical pieces of information about this review:

The CIA OGC lawyer (presumably, McPherson) reported that the tapes did match the descriptions of allowable torture in the Bybee Two memos.

An OGC attorney reviewed the videotapes in November and December 2002 to ascertain compliance with the August 2002 DoJ opinion and compare what actually happened with what was reported to Headquarters. He reported that there was no deviation from the DoJ guidance or the written record.

But the CIA OGC's own review of the torture tapes revealed that the waterboarding shown on the tapes did not match the descriptions of allowable waterboarding.

OIG's review of the videotapes revealed that the waterboard technique employed at was different from the technique as described in the DoJ opinion and used in the SERE training.

The implication, then, is that McPherson was not entirely truthful when he claimed the torturers had not exceeded the allowable limits when he did his review.

Which explains why his lawyer worked to get him immunity before he testified, and explained why

Durham hasn't given it before now: this McPherson appears to have lied in his review of the torture tapes.

And there's one more detail of importance. As you recall, when the CIA IG reviewed the torture tapes in May 2003 (that is, five months after McPherson's review), there were 15 tapes in some state of damage or erasure.

OIG found 11 interrogation tapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to logs and cables and identified a 21-hour period of time" which included two waterboard sessions" that was not captured on the videotapes.

You see, John Durham is investigating two incidents of torture tape destruction: the first, when in 2002 or 2003 someone removed evidence of two sessions of waterboarding (and potentially, the use of mock burial that would be declared torture by John Yoo) from the videotapes. And the second one, on November 8, 2005, when someone destroyed all the tapes, which not only destroyed evidence of waterboarding that violated the terms of the Bybee Two memo, but also destroyed evidence of the first round of destruction.

And John McPherson is likely the only person who can pinpoint when the first round of destruction occurred, before or after November-December 2002.

Now, all that doesn't tell us precisely what Durham is after or whom, though I'd suggest he's at least as interested in the people in the loop of the first round of destruction as the second.

Which means it is almost certainly premature to suggest that Jose Rodriguez is in the clear here. The WaPo focuses on Rodriguez' role, as head of the Directorate of Operations in 2005, in ordering the 92 tapes to be entirely

destroyed. But my analysis here suggests his role in 2002-3, when he was head of CIA Counterterrorism Center, is just as important. And if, as WaPo suggests, someone working closely with Rodriguez lied to the grand jury, then chances are good that Rodriguez was involved in the activities involved in the subject of lying. (Remember that Rodriguez' lawyer, Robert Bennett, has consistently refused to let Rodriguez testify under oath, preferring instead to produce fictions about Rodriguez' role for the WaPo to obligingly print.)

I agree with bmaz in concluding that this inquiry is likely not to charge anything beyond obstruction or false statements. But if the target is Rodriguez, which I'd bet money to be the case, he's not directly responsible for the torture in any case.