

# THE AP'S "MOST COMPLETE PUBLISHED ACCOUNT" THAT LEAVES OUT TORTURE

The AP's DOJ and intelligence writers have a story out on the Durham investigation that purports to be "the most complete published account" of the destruction of the torture tapes. Only, it ignores key details that have already been published which paint a much more damning picture of the tapes and their destruction.

First, the news. The AP story does reveal the following new details:

- The name of the guy in Thailand—then station chief Mike Winograd—involved in the destruction of the tapes
- The news that the guy who destroyed the torture tapes—former CTC and Clandestine Services head Jose Rodriguez—is still lurking around Langley as a contractor with Edge Consulting
- The observation that Rodriguez did not include the two CIA lawyers who "approved" the torture tape destruction (Steven Hermes and Robert EATINGER, who have been identified before) on his order to destroy them, which is perceived

within CIA as highly unusual

- The hint that prosecutors may use Sarbanes-Oxley to establish the requirement to keep the tapes as well as the detail that John Durham has prosecuted two of the only half a dozen cases that have used this Sarb-Ox provision
- A list of reasons why all the requests that should have covered the tapes purportedly don't:

\_In early May 2003, U.S. District Judge Leonie M. Brinkema told the CIA to reveal whether there were interrogation videos of any witnesses relevant to the case of Zacarias Moussaoui, who was charged as a Sept. 11 conspirator. But that order didn't cover Zubaydah, who Brinkema ruled was immaterial to the Moussaoui case, so the CIA didn't tell the court about his interrogation tape.

\_A judge in Washington told the agency to safeguard all evidence related to mistreatment of detainees at Guantanamo Bay. But Zubaydah and al-Nashiri were held overseas at the time, so the agency regarded the order as not applicable to the tapes of their interrogations.

\_A judge in New York told the CIA to search its investigative files for records such as the tapes as part of a Freedom of Information Act suit. But the CIA considered the tapes part of its operational files and therefore exempt from FOIA disclosure and did not reveal their existence to the court.

\_The Sept. 11 commission asked for broad

ranges of documents, but never issued a formal subpoena that would have required the agency to turn over the tapes.

As such, the story adds valuable insight into the strategies that John Durham may be using to prosecute Jose Rodriguez and others.

But the story buys into certain well-cultivated CIA myths that obscure some other important details of the story:

- The story replicates CIA's favored narrative about why the tapes were made—"to prove that interrogators followed broad new rules Washington had laid out"—and why they were destroyed—to protect the identities of officers involved in the interrogation.
- The story presents Winograd's justification for destroying the tapes—"the inspector general had completed its investigation and McPherson had verified that the cables accurately summarized the tapes"—without any discussion of the fact that McPherson acknowledged evidence of tampering with the tapes during the IG Report and couldn't say whether the techniques reflected the guidance given to the torturers.

- The story ignores all evidence of earlier destruction of evidence and cover-up of criminal acts.
- This claim—"The White House didn't learn about the tapes for a year, and even then, it was somewhat by chance"—is either further evidence of a cover-up or simply false.

Let's start with the primary fiction—that the tapes were designed solely "to prove that interrogators followed broad new rules Washington had laid out." Aside from indications they were used for research purposes about the efficacy of the methods they were using, this claim suffers from a fundamental anachronism. After all, when the taping started on April 13, 2002, Washington had not yet laid out the broad new rules ultimately used to authorize Abu Zubaydah's torture on August 1, 2002. Bruce Jessen didn't even complete his proposed interrogation plan until three days after taping started.

Although, if "Washington" had indeed given Abu Zubaydah's torturers broad rules three and a half months before the Bybee Memo was signed—reports have said that Alberto Gonzales authorized that treatment on a day to day basis—then that by itself would provide an entirely different logic for why the tapes were made and then destroyed (which is sort of the argument Barry Eisler makes in his book *Inside Out*).

That said, we know that already in April 2002, the torturers had exceeded the 24-48 limits on sleep deprivation set by DOJ and NSC. Which sort of blows the whole claim that CIA believed the torturers had remained within established guidelines...

But we also know that CIA not only knew that it had blown by the broad rules it had been given, but that the tapes provided some indication that they had. That's why AP's uncritical acceptance of Winograd's justification is so problematic—it ignores the evidence reported in the IG Report that significant portions of the torture tapes—including two waterboarding sessions—had been altered or destroyed. McPherson, of course, didn't find this earlier destruction of evidence "noteworthy." But he did say, when asked five months after his report on the tapes whether the techniques on them reflected the guidance given to the torture team, that he would have to consult that guidance before he answered.

Now, to be fair, AP is only reporting Winograd's justification for destroying the torture tapes. I'm not challenging that he did say that (indeed, it reflects the publicly available cable traffic). But the AP ought to point out to its readers the wiggle room here. The AP accepts the CIA claim that they made the tapes to make sure the torturers followed the rules set for them in Washington. But then why not point out that their justification for destroying them adopts a different standard—whether the tapes matched the log, rather than whether the tapes matched the guidelines? Why not note that McPherson himself admitted that he hadn't reviewed for the latter standard, and that the IG Report clearly concluded the torture had exceeded the standards laid out for the torturers. Had the AP laid this critical detail out, then it might not be so mystified about why McPherson needed immunity or what his testimony might be able to reveal about the reasons why Jose Rodriguez ordered the tapes destroyed.

Which gets to the earlier evidence of a cover-up. We know—and Jay Bybee has confirmed—that the torturers did not follow the rules laid out for them. Further, there are hints that the tapes might have shown far more severe sleep deprivation than approved in the rules, sleep deprivation the CIA would use to authorize using that amount of sleep deprivation. Add in

the possibility that the torturers used the mock burial that John Yoo would later refuse to approve and subsequently call torture.

There are very clear reasons why the torturers and those in CTC who authorized that torture—starting with Jose Rodriguez—might not want evidence that they exceeded limits on torture lying around in a safe in Thailand. And there are pieces of evidence that suggest the cover-up of what, since it exceeded DOJ guidelines, would be torture by anyone's measure, started in 2002. In addition to McPherson's odd report, there are also the curious details about the briefing record to Congress. Starting with the three day period in which Jose Rodriguez gave Nancy Pelosi and Porter Goss an incomplete briefing, followed the next day by the decision to destroy the tapes, followed the next day by some alteration of the only record of the Pelosi briefing. The Pelosi briefing, similar games with Bob Graham's briefing, and the odd briefing Crazy Pete Hoekstra got the day the torture tapes were destroyed suggest that CIA's briefings were all an attempt to put some legal fig leaf on the destruction of evidence of torture.

But that's not the most important oddity about Congressional briefings on torture and the torture tapes. The AP reports that the White House didn't know of the tapes until May 2004.

That's funny.

If that's true, then what happened at the meeting between CIA and the White House some time before February 22, 2003 regarding how to respond to Jane Harman's letter that—among other things—objected to the destruction of the torture tapes? And why did the CIA go to apparent lengths to share the Pat Roberts briefing with the White House differently than they did the Jane Harman one? Mind you, it is possible that none of these documents show documentary evidence that the CIA consulted with the White House when deciding what to do with Harman's written warning not to destroy the

torture tapes (though, if as it appears, the White House got Pat Roberts' MFR showing his approval to destroy the torture tapes, then the White House did know about the torture tapes). But if the CIA was working so closely with the White House on these briefings—one of three stated intents of which was to get approval to destroy the torture tapes—then the only way the White House didn't know about the tapes is if the CIA very carefully gave the White House plausible deniability.

Which would, itself, provide yet more evidence that CIA knew it was involved in a cover-up.

Here's the bottom line. There is a great deal of evidence that Jose Rodriguez knew as early as September 6, 2002 that he needed to destroy evidence of the torturers exceeding the guidelines set in DC. According to anyone's definition, that means Rodriguez knew years before he had the tapes destroyed he was destroying evidence of torture, even by Jay Bybee's and possibly John Yoo's measure.

Yet the AP—in their “most complete published account”—doesn't even mention that torture?