

Special Prosecutor Declines to File Criminal Charges Over Destruction of CIA Torture Tapes

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Nearly three years after he was appointed to investigate the destruction of at least 92 interrogation videotapes, a dozen of which showed two high-value detainees being subjected to waterboarding and various other torture techniques by CIA interrogators, Special Prosecutor John Durham has determined that he does not have enough evidence to secure an indictment against anyone responsible for the purge.

Department of Justice (DOJ) spokesman Matthew Miller said in a statement Tuesday that Durham, a US Attorney from Connecticut, has “concluded that he will not pursue criminal charges for the destruction of interrogation videotapes.”

The statute of limitations for bringing criminal charges related to the destruction of the tapes ran out Tuesday. Truthout contacted Durham’s spokesman, Tom Carson, late Monday evening raising questions about whether Durham’s investigation was ongoing in light of the statute of limitations expiring or whether he had concluded his probe. Carson, in an email sent to Truthout hours before Miller issued a statement, said Durham’s investigation is still an “open matter.”

In response to additional queries requesting clarification of his statement, Carson said, the investigation is “still an open matter, but DOJ will not pursue criminal charges for the destruction of the tapes.”

Two people close to the probe told Truthout they were told that means there is a possibility Durham could pursue other charges, such as false statements, the targets of the probe made during the course of the investigation, but they doubted Durham would do that.

Jose Rodriguez, the head of the CIA’s clandestine division, who had been one of the primary targets of Durham’s criminal investigation, ordered the destruction of the videotapes in November 2005, shortly after The Washington Post published a front-page article exposing the CIA’s use of so-called “black site” prisons overseas to interrogate alleged “war on terror” suspects using torture techniques that were not legal on US soil. Rodriguez said he received clearance from agency attorneys.

One witness in the case who worked with Rodriguez said, “I can’t believe Rodriguez got away with it” upon learning that Durham would not prosecute his former colleague.

In a statement, Robert Bennett, Rodriguez’s Washington, DC-based attorney, said “we are pleased that the DOJ has decided not go forward against Mr. Rodriguez.”

“This is the right decision because of the facts and the law,” Bennett said. “Jose Rodriguez is

an American hero, a true patriot who only wanted to protect his people and his country.”

Rodriguez, however, according to people familiar with the investigation, was never called by Durham to testify before his grand jury.

The DOJ’s announcement was made on the same day George W. Bush published his memoir, “Decision Points,” where he defended the efficacy of torture and falsely claimed that it resulted in actionable intelligence that helped thwart pending terrorist plots. Bush also admitted that he personally authorized the CIA to waterboard self-professed 9/11 mastermind Khalid Shiekh Mohammed and signed off on ten brutal torture methods CIA interrogators used against 33 detainees.

The announcement was also made less than a week after State Department Legal Advisor Harold Koh told a delegation gathered in Geneva, Switzerland for the United Nations Human Rights Council, which scrutinized the United States’ human rights record, that inquiries into the Bush administration’s use of torture were still under investigation by Durham.

“Those investigations are ongoing,” Koh said. “The question is not whether they would consider it – those discussions are going on right now.”

Anthony Romero, executive director of the ACLU, said Durham’s decision “is stunning.”

“There is ample evidence of a cover up regarding the destruction of the tapes,” Romero said. “The Bush administration was instructed by a court of law not to destroy evidence of torture, but that’s exactly what it did. The destruction of these tapes showed complete disdain for the rule of law...We cannot say that we live under the rule of law unless we are clear that no one is above the law.”

It is widely believed that the videotapes were destroyed to cover up illegal acts. It is also believed that the tapes were destroyed because Democratic members of Congress who were briefed about the tapes began asking questions about whether the interrogations were illegal, according to Jane Mayer, author of the book, “The Dark Side” and a reporter for The New Yorker magazine.

“Further rattling the CIA was a request in May 2005 from Sen. Jay Rockefeller, ranking Democrat on the Senate Intelligence Committee, to see over a hundred documents referred to in the earlier Inspector General’s report on detention inside the black prison sites,” Mayer wrote in her book. “Among the items Rockefeller specifically sought was a legal analysis of the CIA’s interrogation videotapes.

“Rockefeller wanted to know if the intelligence agency’s top lawyer believed that the waterboarding of [alleged al-Qaeda operative Abu] Zubayda and Khalid Sheikh Mohammed, as captured on the secret videotapes, was entirely legal. The CIA refused to provide the requested documents to Rockefeller.

“But the Democratic senator’s mention of the videotapes undoubtedly sent a shiver through the Agency, as did a second request he made for these documents to [former CIA Director Porter] Goss in September 2005.”

The CIA began videotaping interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri, the alleged mastermind of the attack on the USS Cole, in April 2002, four months before Bush

administration attorneys issued a memo clearing the way for CIA interrogators to use “enhanced interrogation techniques,” the DOJ had disclosed in court documents.

As Truthout previously reported, Some of the interrogation sessions captured on the videotapes showed Zubaydah being subjected to torture methods not yet approved by an August 2002 Justice Department’s Office of Legal Counsel (OLC) memo written by attorneys John Yoo and Jay Bybee.

Specifically, these sources said, Zubaydah was subjected to repeated sessions of “water dousing,” a method that at the time interrogators used it on Zubaydah was described as spraying him with extremely cold water from a hose while he was naked and shackled by chains attached to a ceiling in the cell he was kept in at the black site prison.

The OLC did not approve the use of water dousing as an interrogation technique until August 2004. Use of the method is believed to have played a part in the November 2002 death of Gul Rahman, a detainee who was held at an Afghanistan prison known as The Salt Pit and died of hypothermia hours after being doused with water and left in a cold prison cell.

Other videotapes showed Zubaydah being subjected to extended hours of sleep deprivation before the interrogation method was approved by OLC, which one current and three former CIA officials said was part of a larger experiment to determine how long a detainee could endure the technique.

In December 2007, the timeframe when the New York Times first revealed that the videotapes were destroyed, American Civil Liberties Union filed a motion to hold the CIA in contempt for its destruction of the tapes in violation of a court order requiring the agency to produce or identify all records requested by the ACLU in September 2004 related to the CIA’s interrogation of “war on terror” detainees.

The videotapes were also withheld from attorneys and the 9/11 Commission, which requested records related to the CIA’s interrogations of detainees.

Durham was [appointed](#) special prosecutor by Attorney General Michael Mukasey in January 2008 to lead a criminal inquiry into the tapes’ destruction based on a recommendation by the DOJ’s National Security Division and the CIA Office of the Inspector General.

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Since that time, DOJ spokesman Miller said Tuesday, “a team of prosecutors and FBI agents led by Mr. Durham has conducted an exhaustive investigation into the matter.”

Mukasey did not give Durham the authority to investigate whether any of the torture techniques depicted on the videotapes violated anti-torture laws. Last year, House Judiciary Committee Chairman John Conyers proposed expanding the scope of Durham’s investigation to include a broader review of the Bush administration’s interrogation policies.

Conyers was rebuffed and he did not pursue the matter further. But last August, after the CIA Inspector General John Helgerson’s report on the CIA’s torture program was publicly released, Attorney General Eric Holder expanded Durham’s mandate and authorized him to conduct a “preliminary review” of about a dozen cases of torture involving “war on terror” detainees, including al-Nashiri. Those cases had been previously closed by DOJ attorneys for

unknown reasons.

That review is ongoing and no decision has been made about launching a full-scale criminal inquiry.

Dixon Obsurn of Human Rights First said while his organization is “disappointed that the Justice Department has chosen not to pursue charges in this case” he remains “hopeful that the still pending Durham investigation into the actions of CIA interrogators and contractors involved in abusive interrogations will ultimately provide a full, fair and objective review of allegations of illegal conduct.”

That prospect seems unlikely given the lack of accountability to date and President Obama’s pledge to “look forward.”

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