

The Torture Tape Cover-up: How High Does It Go?

By [Prof. Marjorie Cohn](#)

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26 December 2007

Theme: [Crimes against Humanity](#),
[Intelligence](#), [Law and Justice](#)

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When the hideous photographs of torture and abuse emerged from Abu Ghraib in the fall of 2004, they created a public relations disaster for the Bush administration. The White House had painstakingly worked to capitalize on the 9/11 attacks by creating a “war on terror.” Never mind the absurdity of declaring war on a tactic. Central to Bush’s new “war” was the portrayal of us as the good guys and al Qaeda, the Taliban, and Saddam Hussein as the bad guys.

But the Abu Ghraib photos of naked Iraqis piled on top of one another, forced to masturbate, led around on leashes like dogs shined the light on U.S. hypocrisy.

After the Abu Ghraib revelations, the Bush administration could not tolerate more bad publicity. So in 2005, the CIA destroyed several hundred hours of videotapes depicting torturous interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri, probably including water boarding. The former U.S. official involved in discussions about the tapes reported widespread concern that “something as explosive as this would probably get out,” according to the *Los Angeles Times*. This destruction of evidence may violate several laws. And it remains to be seen how high up the chain of command the criminality goes.

Now that the videotape scandal has come to light, Bush and his men are back in damage control mode. CIA Director Michael Hayden minimized the significance of the destruction, claiming 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.” These claims are disingenuous.

The tapes likely portray U.S. officials engaged in torture, which violates three U.S.-ratified treaties as well as the U.S. Torture Statute and the War Crimes Act.

Bush justifies his administration’s “harsh interrogation techniques” by maintaining that Zubaydah, under interrogation, fingered Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attacks. But according to investigative journalist Ron Suskind in his 2006 book *One Percent Doctrine*, it was a “walk-in” who led the CIA to Mohammed in return for a \$25 million reward.

Zubaydah evidently wasn’t a top al Qaeda leader. Dan Coleman, one of the FBI’s leading experts on al Qaeda, said Zubaydah “knew very little about real operations, or strategy.” Moreover, Zubaydah was schizophrenic, according to Coleman. “This guy is insane, certifiable split personality.” Coleman’s views were echoed at the top levels of the CIA and were communicated to Bush and Cheney. But Bush scolded CIA director George Tenet, saying, “I said [Zubaydah] was important. You’re not going to let me lose face on this, are you?” Zubaydah’s minor role in al Qaeda and his apparent insanity were kept secret.

In response to the torture, Zubaydah told his interrogators about myriad terrorist targets al Qaeda had in its sights: the Brooklyn Bridge, the Statue of Liberty, shopping malls, banks, supermarkets, water systems, nuclear plants, and apartment buildings. Al Qaeda was close to building a crude nuclear bomb, Zubaydah reported. None of this was corroborated but the Bush gang reacted to each report zealously.

The Supreme Court has repeatedly affirmed the government’s duty to provide criminal defendants with any evidence in the government’s possession that might tend to exonerate the defendant or impeach the prosecutor’s case. Zacarias Moussaoui tried to subpoena Zubaydah to testify at his trial. On May 9, 2003, Assistant U.S. Attorneys David Novak and

David Raskin lied to U.S. District Court Judge Leonie Brinkema, who presided over Moussaoui's trial. When the judge asked "whether the interrogations are being recorded in any format"?, the U.S. Attorneys, evidently relying on information from the CIA, said "No." This is obstruction of justice.

When Zubaydah and al-Nashiri go before the military commissions, they will undoubtedly raise their torture as a defense to whatever crimes they face. Yet the evidence of that torture has been destroyed by the government.

There was no way of knowing whether these tapes could have intelligence value in the future. Indeed, the government defied the 2003 and 2004 demands of the 9/11 Commission by failing to turn over the videotaped interrogations. Now the CIA is parsing words by claiming the commission never directly asked for videotapes. "We asked for every single thing they had," commission co-chairman Thomas Kean said. "And then my vice chairman, Lee Hamilton, looked the director of the CIA in the face, and said, 'Look, even if we haven't asked for something, if it's pertinent to our investigation, make it available to us.'" Hamilton said the CIA "clearly obstructed" the commission's investigation.

At the same time the 9/11 Commission was denied the tapes, the ACLU filed Freedom of Information Act requests seeking records of the treatment of all detainees held in U.S. custody abroad since 9/11. When the government refused to comply with the FOIA requests, the ACLU sued in federal court in New York. On September 15, 2004, U.S. District Court Judge Alvin Hellerstein ordered the CIA and other government agencies to "produce or identify" all requested documents within one month. They are still not forthcoming. The ACLU has filed a motion to hold the CIA in contempt of court for refusing to comply with Judge Hellerstein's order.

When the destruction of the tapes became public, both the House and Senate intelligence committees opened investigations, and subpoenaed witnesses and documents to shed light on the matter. Attorney General Michael Mukasey refused to cooperate and tried to put the kabosh on the congressional probes, asking them to wait until he had finished his own internal investigation. But after criticism in the media, the CIA relented and agreed to produce documents and the testimony of acting CIA general counsel John Rizzo.

The decision to destroy the tapes was allegedly made by Jose A. Rodriguez Jr., who was chief of the Directorate of Operations, the CIA's clandestine service. Although the House intelligence committee has subpoenaed Rodriguez, there is no indication his bosses will allow him to testify.

The *Sunday Times* (London) reported that Rodriguez may seek immunity from prosecution in exchange for testifying before the House intelligence committee. Rodriguez's testimony could be explosive.

At least four top White House lawyers participated in discussions with the CIA between 2003 and 2005 about whether to destroy the videotapes. They included Alberto Gonzales, David Addington (Cheney's former counsel, now his chief of staff), Harriet Miers, and John Bellinger (former senior attorney at the National Security Council). The *New York Times* quoted a former senior intelligence official as saying there was "vigorous sentiment" among some high White House officials to destroy the tapes.

Two former CIA officials, Vincent Cannistrano and Larry Johnson, think it highly unlikely

Rodriguez made the decision to destroy the tapes on his own. George W. Bush “has no recollection” of hearing about the existence or destruction of the tapes before Hayden briefed him on December 13. Yet given Bush’s keen interest in Zubaydah’s interrogation, it seems more likely the President was involved with the decision to destroy the tapes.

During his Senate confirmation hearing, Michael Mukasey refused to opine about whether water boarding constitutes torture. Mukasey knew the Bush administration had admitted water boarding prisoners, and that torture is a war crime under the U.S. War Crimes Act. Mukasey was shielding his future bosses from criminal liability as war criminals. Now the Department of Justice, under Mukasey, is investigating the destruction of the tapes.

Justice Department regulations call for the appointment of an outside special counsel when (1) a criminal investigation of a person or matter is warranted, (2) the investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating division of the Department of Justice would present a conflict of interest for the Department, and (3) under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter. When these three conditions are satisfied, the attorney general must select a special counsel from outside the government. (28 C.F.R. 600.1, 600.3 (2007).)

When he was a federal judge, Michael Mukasey issued the material witness warrant for Jose Padilla. The warrant was based partly on information from Abu Zubaydah. It is not clear whether Mukasey knew Zubaydah’s statements were obtained by torture. But since he issued the warrant, Mukasey has a real or apparent conflict of interest. He has said it is premature to appoint an outside special counsel. But like the Nixon administration, the Department of Justice cannot be trusted to investigate itself. Congress should be pressured to pass a new independent counsel statute.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and the president of the National Lawyers Guild. She is the author of *Cowboy Republic: Six Ways the Bush Gang Has Defied the Law*. Her articles are archived at www.marjoriecohn.com.

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}
}
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