

By Jason Leopold

From [Truthout](#) | Original Article

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 that 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, against individuals who testified during the course of the investigation. But these people doubted Durham would do that.

In July 2009, Durham told a federal court judge in New York he was "examining whether the obstruction of justice statutes may have been violated; whether somebody engaged in a

contempt of court or contempt of Congress; whether the Federal Records Act was violated, that is, did the tapes constitute federal records and, therefore, they should not have been destroyed; and we are looking at whether people, any person or persons, filed false statements or may have otherwise perjured themselves."

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.

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. In January 2009, House Judiciary Committee Chairman John Conyers issued a [report](#), "Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush," and [recommended](#) Attorney General Eric Holder expand 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 a redacted version of CIA Inspector General John Helgerson's report on the CIA's torture program was publicly released, Holder did expand Durham's mandate and authorized him to conduct a "preliminary review" of less than 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.

Durham's review into those cases is ongoing and no decision has yet been made about whether there is enough evidence to launch a full-scale criminal inquiry.

Destruction Followed News Report

Jose Rodriguez, the head of the CIA's clandestine division, who was the primary focus of Durham's criminal investigation, ordered the destruction of the videotapes on November 9, 2005, exactly one week 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. The videotapes were made at secret CIA prisons in Thailand and destroyed there.

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. This person said Rodriguez destroyed evidence to cover-up the fact that the two detainees whose interrogations were videotaped were tortured.

Key Witness Never Testified

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

Brent Mickum, an attorney who represents Abu Zubaydah, the first high-value detainees subjected to waterboarding whose torture was captured on the videotapes, said the fact that Durham did not call Rodriguez to testify suggests that Rodriguez intended to assert his Fifth Amendment right against self-incrimination.

"There really isn't any other explanation" as to why Durham did not call Rodriguez to testify, Mickum said. Durham "can't force Rodriguez to testify if he intended to plead the Fifth. If [Durham] didn't call him and could have and was not advised that Rodriguez would plead the Fifth than that would be unacceptable. I feel very confident, however, that didn't happen."

Carson, Durham's spokesman, said he could not discuss specific details of the investigation.

Mickum said he had several conversations with Durham during the course of his investigation and he said Durham "conceded that he could see possible motive for destruction of the

evidence without ever identifying what those motives were."

Mickum added that he was "disappointed" with Durham's decision not file criminal charges.

"I'm disappointed because I am biased," Mickum said. "I obviously have an interest in the case."

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."

CIA Director Leon Panetta, who prior to being tapped to head the spy agency had published numerous columns [excoriating](#) the Bush administration's use of torture, also said he was "pleased" that criminal charges would not be filed.

"The Agency has cooperated with the investigation of this issue from the start, and we welcome the decision," Panetta said in a statement. "We will continue, of course, to cooperate with the Department of Justice on any other aspects of the former program that it reviews."

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, signed off on ten brutal torture methods CIA interrogators used against Zubaydah.

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."

"Stunning" Decision

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."

Beyond covering up torture, 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 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 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.

Torture Predated Legal Memo

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, according to intelligence sources who read CIA cables describing Zubaydah's torture.

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.

Despite the fact that Durham did not to file criminal charges related to the tape destruction, Dixon Obsurn, a spokesman for Human Rights First, still held out hope that Durham's review "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."

However, the prospect of criminal indictments seems unlikely given the lack of accountability to date, Congress's failure to hold public hearings into the Bush administration's torture policies, and President Obama's pledge to "look forward."