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# No Criminal Charges Sought Over C.I.A. Tapes

By **MARK MAZZETTI** and **CHARLIE SAVAGE**

WASHINGTON — Central Intelligence Agency officials will not face criminal charges for the destruction of dozens of videotapes depicting the brutal [interrogation](#) of terrorism suspects, the Justice Department said Tuesday.

After a closely watched investigation of nearly three years, the decision by a special federal prosecutor is the latest example of Justice Department officials' declining to seek criminal penalties for some of the controversial episodes in the C.I.A.'s now defunct detention and interrogation program. The destruction of the tapes, in particular, was seen as so striking that the Bush administration itself launched the special investigation after the action was publicly disclosed.

Government officials said Tuesday that the special prosecutor, [John H. Durham](#), could still decide to charge current and former C.I.A. officers and lawyers with making false statements to a grand jury over the course of the investigation, which began in January 2008.

In addition, the prosecutor has yet to close another aspect of his investigation, focused on the death or abuse of detainees in the hands of C.I.A. officers who used tactics that had not been approved by the Justice Department.

"The investigation is ongoing," said Tom Carson, a spokesman for Mr. Durham.

Justice Department officials provided no details of Mr. Durham's decision. However, one impediment to the case was that the officials who destroyed the tapes claimed to have gotten approvals from C.I.A. lawyers. Similar claims have also posed obstacles to investigating the Bush administration's use of brutal interrogations and secret prisons in the years immediately following the Sept. 11 attacks.

The key figure in the tape destruction incident was Jose A. Rodriguez Jr., the former head of the

agency's clandestine service. In November 2005, he ordered his staff to destroy tapes of the interrogations of [Abu Zubaydah](#) and [Abd al-Rahim al-Nashiri](#), the first two detainees held in secret overseas prisons. The tapes had been kept in a safe in the agency's station in Thailand, the country in which the interrogations were conducted in 2002.

According to current and former government officials, Mr. Rodriguez told his superiors that two lawyers inside the C.I.A.'s clandestine service, Robert EATINGER and Steven HERMES, had signed off on his order to destroy the tapes.

Internal C.I.A. e-mails, released earlier this year in response to a Freedom of Information Act lawsuit by the [American Civil Liberties Union](#), showed that Mr. Rodriguez had argued that "the heat" agency officials would take over destroying the tapes "is nothing compared to what it would be if the tapes ever got into the public domain."

Mr. Rodriguez told another top C.I.A. official that if the images were disclosed "out of context, they would make us look terrible; it would be 'devastating' to us," an e-mail said. The tapes showed hours of interrogation of the two detainees, including the infliction of a technique called [waterboarding](#) that simulates drowning.

The e-mails showed that the tapes were destroyed on the morning of Nov. 9, 2005. Officials announced the decision on Tuesday because the five-year statute of limitations for filing criminal charges relating to the tapes' destruction had expired.

The agency had withheld the fact that the tapes existed from both the federal courts and the Sept. 11 Commission, which had asked the agency for records of the interrogations. The existence and subsequent destruction of the tapes was first revealed by The New York Times in December 2007.

[Robert S. Bennett](#), Mr. Rodriguez's attorney, said in an interview that he was pleased that the Justice Department "did the right thing."

Mr. Rodriguez is "a hero and a patriot, who simply wanted to protect his people and his country," Mr. Bennett said.

[Leon E. Panetta](#), the C.I.A. director, said in a statement that the C.I.A. was "pleased with the decision" not to bring charges against agency officers involved in destroying the tapes, and that the agency would continue to cooperate with other aspects of the Justice Department's investigation. But [Anthony Romero](#), the executive director of the American Civil Liberties Union, condemned Mr. Durham's failure to file charges for obstruction of justice. He noted that the tapes were pertinent to litigation

pending at the time that the agency destroyed them, including an A.C.L.U. Freedom of Information Act lawsuit seeking documents and images related to interrogations.

Mr. Durham, a career federal prosecutor based in Connecticut, was appointed in January 2008 by Attorney General [Michael Mukasey](#) to investigate whether destroying the tapes was a crime. In August 2009, the new attorney general, [Eric H. Holder Jr.](#), expanded Mr. Durham's mandate to include looking into whether crimes had been committed in the interrogation program, an investigation that remains open.

At the time, Mr. Holder cited a 2004 report by the C.I.A. inspector general that discussed several instances in which detainees died during interrogations by agency officials in Iraq and Afghanistan. It also documented the use of unauthorized techniques — like mock executions, threats to family members and inflicting waterboarding — more often than the department had approved.

When he expanded Mr. Durham's mandate, Mr. Holder also stressed that the Justice Department would “not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”

Mr. Holder was referring to once secret Justice Department memorandums asserting that certain interrogation techniques, like stripping prisoners naked, keeping them awake for long periods, slamming them into walls and subjecting them to waterboarding, would not violate antitorture laws.

Many legal scholars have contended that the memorandums gave a false reading of the law, and other officials in the Bush-era Justice Department later rescinded the legal guidance. But because the Justice Department had initially signed off on the techniques, it is considered essentially impossible for the department to prosecute officials who relied on the memorandums.

In his newly released memoir, former President [George W. Bush](#) writes that he personally authorized the C.I.A. to use the techniques in 2002, after obtaining assurances from government lawyers that the interrogation program would be lawful.

“I have been troubled by the blowback against the intelligence community and Justice Department for their role in the surveillance and interrogation programs,” Mr. Bush wrote.

“Our intelligence officers carried out their orders with skill and courage, and they deserve our gratitude for protecting our nation. Legal officials in my administration did their best to resolve complex issues in a time of extraordinary danger to our country. Their successors are entitled to disagree with their conclusions. But criminalizing differences of legal opinion would set a terrible

precedent for our democracy.”

*This article has been revised to reflect the following correction:*

**Correction: November 9, 2010**

*An earlier version of this article misstated the timing of Attorney General Eric Holder's statement that the Justice Department would not prosecute C.I.A. employees who had acted in good faith; it was in August 2009, not August 2008.*