

# **EXHIBIT 49**

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## Justice Dept. Sets Criminal Inquiry on C.I.A. Tapes

By [MARK MAZZETTI](#) and [DAVID JOHNSTON](#)

WASHINGTON — Attorney General [Michael B. Mukasey](#) said Wednesday that the Justice Department had elevated its inquiry into the destruction of [Central Intelligence Agency](#) interrogation videotapes to a formal criminal investigation headed by a career federal prosecutor.

The announcement is the first indication that investigators have concluded on a preliminary basis that C.I.A. officers, possibly along with other government officials, may have committed criminal acts in their handling of the tapes, which recorded the interrogations in 2002 of two operatives with [Al Qaeda](#) and were destroyed in 2005.

C.I.A. officials have for years feared becoming entangled in a criminal investigation involving alleged improprieties in secret counterterrorism programs. Now, the investigation and a probable grand jury inquiry will scrutinize the actions of some of the highest-ranking current and former officials at the agency.

The tapes were never provided to the courts or to the Sept. 11 commission, which had requested all C.I.A. documents related to Qaeda prisoners. The question of whether to destroy the tapes was for nearly three years the subject of deliberations among lawyers at the highest levels of the Bush administration.

Justice Department officials declined to specify what crimes might be under investigation, but government lawyers have said the inquiry will probably focus on whether the destruction of the tapes involved criminal obstruction of justice and related false-statement offenses.

Mr. Mukasey assigned John H. Durham, a veteran federal prosecutor from Connecticut, to lead the criminal inquiry in tandem with the [Federal Bureau of Investigation](#). The appointment of a prosecutor from outside Washington was an unusual move, and it suggested that Mr. Mukasey wanted to give the investigation the appearance of an extra measure of independence, after complaints from lawmakers in both parties that Mr. Mukasey's predecessor, [Alberto R. Gonzales](#), had allowed politics to influence the Justice Department's judgment.

Mr. Durham was not appointed as a special counsel in this case, a step sought by some Congressional Democrats. He will have less expansive authority than a special counsel and will report to the deputy attorney general rather than assume the powers of the attorney general, which he would have had as a special counsel.

Mr. Durham has spent years bringing cases against organized crime figures in Hartford and Boston. In legal circles he has the reputation of a tough, tight-lipped litigator who compiled a stellar track record against the mob.

A C.I.A. spokesman said that the agency would cooperate fully with the Justice Department investigation. Current and former officials have said that the C.I.A. official who ordered the destruction of the tapes in November 2005 was Jose A. Rodriguez Jr., who at the time was the head of the agency's clandestine branch.

The decision to start a full-scale criminal investigation into the matter came four weeks after the disclosure on Dec. 6 that the tapes had been created and then destroyed. The Justice Department and the C.I.A. opened a preliminary inquiry on Dec. 8, and Mr. Mukasey said Wednesday that he had concluded from that review "that there is a basis for initiating a criminal investigation of this matter."

The chairmen of the House Intelligence Committee, Representative Silvestre Reyes, Democrat of Texas, and the Senate Intelligence Committee, Senator [John D. Rockefeller IV](#), Democrat of West Virginia, welcomed Mr. Mukasey's announcement. But neither gave any indication he would defer to the criminal inquiry, and in separate statements they pledged to proceed with their committees' investigations into the destruction of the tapes.

John L. Helgerson, the C.I.A. inspector general who took part in the preliminary inquiry, said Wednesday that he would step aside from the criminal investigation to avoid any appearance of a conflict of interest.

Mr. Helgerson's office had reviewed the videotapes, documenting the interrogation of [Abu Zubaydah](#) and Abd al-Rahim al-Nashiri, as part of an investigation into the C.I.A.'s secret detention and interrogation program. Mr. Helgerson completed his investigation into the program in early 2004.

Among White House lawyers who took part in discussions between 2003 and 2005 about whether to destroy the tapes were Mr. Gonzales, when he was White House counsel; [Harriet E. Miers](#), Mr. Gonzales's successor as counsel; [David S. Addington](#), who was then counsel to Vice President [Dick Cheney](#); and John B. Bellinger III, then the legal adviser to the [National Security Council](#). It is unclear whether anyone outside the C.I.A. endorsed destroying the tapes.

The new Justice Department investigation is likely to last for months, possibly beyond the end of the Bush administration.

Mr. Durham is currently the top-ranking deputy in the United States attorney's office in Connecticut, supervising all major felony cases brought in the state.

In the late 1990s he was assigned as a special attorney in Boston leading an inquiry into allegations that F.B.I. agents and police officers had been compromised by mobsters.

In taking over the inquiry, Mr. Durham is expected to be able to move ahead without a long delay because his team will include Justice Department prosecutors who have already been working on the case. But at least in the beginning, it is likely to proceed more slowly than parallel investigations on Capitol Hill that are already well under way. Investigators from the House Intelligence Committee last month reviewed C.I.A. documents related to the destruction of the tapes, and the committee has called government witnesses to testify at a hearing scheduled for Jan. 16.

Mr. Mukasey pointedly did not designate Mr. Durham as a special counsel, in effect refusing to bow to pressure from Congressional Democrats to appoint an independent prosecutor with the same broad legal

powers that were given to [Patrick J. Fitzgerald](#), the special counsel who was appointed in 2003 to lead the investigation into the disclosure of a C.I.A. officer's identity. That inquiry resulted in the perjury and obstruction prosecution of [I. Lewis Libby Jr.](#), formerly Mr. Cheney's chief of staff. After Mr. Libby's conviction, President Bush commuted his sentence.

Mr. Fitzgerald was appointed after the attorney general at the time, [John Ashcroft](#), determined that his own relationship with officials under possible scrutiny in the leak case forced him to recuse himself from the investigation. As special counsel, Mr. Fitzgerald had the authority of the attorney general for the matters under investigation.

Mr. Durham will report to the deputy attorney general, an office being held temporarily by Craig S. Morford. Mr. Durham will have the powers of the United States attorney for the Eastern District of Virginia, a jurisdiction that includes C.I.A. headquarters. If a grand jury is convened as expected, it will meet in Alexandria, Va., where the prosecutor's office is located.

Mr. Mukasey said "in an abundance of caution" the office of United States attorney for the district, Chuck Rosenberg, had been recused from the case and would not take part in the inquiry. Mr. Rosenberg's office has investigated cases of detainee abuse by C.I.A. employees and contractors and has worked closely with the C.I.A. on counterterrorism and espionage cases.

Mr. Mukasey said the decision was made "to avoid any possible appearance of a conflict with other matters handled by that office." Appointments like Mr. Durham's are sometimes made in cases in which prosecutors like Mr. Rosenberg have recused themselves.

In an Op-Ed article in The New York Times on Wednesday, [Thomas H. Kean](#) and [Lee H. Hamilton](#), the chairman and vice chairman of the Sept. 11 commission, said they believed that C.I.A. officials had deliberately withheld the tapes from the commission. They suggested that since the commission received its authority from both Congress and President Bush, any deliberate withholding of evidence might have violated federal law.

"Those who knew about those videotapes — and did not tell us about them — obstructed our investigation," they wrote.

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