

# THE DISTINCTION BETWEEN TORTURING ABU ZUBAYDAH AND AL- NASHIRI AND JUST AL- NASHIRI

The difference between whether Gina Haspel oversaw the torture of both Abu Zubaydah and Abd al Rahim al-Nashiri or just the latter is critical to claims that she only did things authorized by the OLC memo.

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## HOW ABU ZUBAYDAH'S TORTURE PUT CIA AND FBI IN NSA'S DATABASES

I said yesterday that the plan, going as far back as 2002, was to let CIA and FBI tap right into NSA's data. I base that on this explanation from Keith Alexander, which he included in his declaration accompanying the End to End Report that was submitted sometime after October 30, 2009.

By the fall of 2002, the Intelligence Community had grown increasingly concerned about the potential for further attacks on the United States. For example, during 10 to 24 September 2002, the Government raised the homeland security threat condition to "orange," indicating a high likelihood of attack. In this context, in October 2002 the Directors of NSA, CIA, and FBI established an Inter-Agency Review Group

to examine information sharing  
[redacted] The group's top  
recommendation was that NSA create a  
common target knowledge database to  
allow joint research and information  
exchanges [redacted].

Of course, we now know that the threat level was high in September 2002 because the government was chasing down a bunch of false leads from Abu Zubaydah's torture.

Abu Zubaida's revelations triggered a series of alerts and sent hundreds of CIA and FBI investigators scurrying in pursuit of phantoms. The interrogations led directly to the arrest of Jose Padilla, the man Abu Zubaida identified as heading an effort to explode a radiological "dirty bomb" in an American city. Padilla was held in a naval brig for 3 1/2 years on the allegation but was never charged in any such plot. Every other lead ultimately dissolved into smoke and shadow, according to high-ranking former U.S. officials with access to classified reports.

"We spent millions of dollars chasing false alarms," one former intelligence official said.

In other words, the justification for creating a database where CIA and FBI could directly access much of NSA's data was a mirage, one created by CIA's own torture.

All that's separate from the question of whether CIA and FBI should have access directly to NSA's data. Perhaps it makes us more responsive. Perhaps it perpetuates this process of chasing ghosts. That's a debate we should have based on actual results, not the tortured false confessions of a decade past.

But it's a testament to two things: the way in which torture created the illusion of danger,

and the degree to which torture – and threat claims based on it – have secretly served as the basis the Executive uses to demand the FISA Court permit it to extend the dragnet.

Even the current CIA Director has admitted this to be true – though without explicitly laying out the import of it. Isn't it time we start acknowledging this – and reassessing the civil liberties damage done because of it – rather than keeping it hidden under redactions?

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## **BREAKING: CIA TORTURED ABU ZUBAYDAH AT A PRISON IN POLAND**

Earlier today, the European Court of Human Rights ordered Poland to pay Abu Zubaydah and Abd al Rahim al-Nashiri a combined total of 230,000 Euros for facilitating the torture suffered at Stare Kiejkuty.

The court found Poland violated its obligations under the European Convention on Human Rights to prevent torture, ensure the right to liberty, and properly investigate allegations a crime had been committed on its territory.

It ordered Poland to pay al-Nashiri 100,000 euros in damages and 130,000 euros to Zubaydah.

“The ruling of the tribunal in Strasbourg on CIA jails is embarrassing for Poland and is a burden both in terms of our country's finances as well as its image,” said Joanna Trzaska-Wieczorek, a spokeswoman for the Polish president.

Of course, that Poland hosted one of CIA's black sites is not breaking news at all. We've known it for years.

But this is an official judgment affirming that to be true. Finally, a court has called America's torture torture.

The judgment comes as the CIA dawdles over declassifying the Senate Intelligence Committee's torture report. One reason for the delay, prior reporting has said, comes from a desire to protect our foreign partners in crimes – notably the UK and Poland.

So now that Poland's role has been confirmed, can we please get the torture report?

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## **HESHAM ABU ZUBAYDAH DATES FBI INVESTIGATION OF MOHAMMED OSMAN MOHAMUD A YEAR EARLIER**

The most recent hearing in the Mohammed Osman Mohamud case provided the following details, which the FBI claimed described the beginning of their investigation into Mohamud.

February 2009: Samir Khan and Mohamud start emailing

August 31, 2009: Mohamud's father, Osman Barre, calls the FBI to say he's worried his son is being brainwashed

Early November 2009: Mohamud investigated in—but exonerated for—a date rape allegation

December 2009: Mohamud and Amro Alali  
exchange coded emails

The entire hearing was supposed to serve as the FBI's proof that the date rape allegations didn't mark the start of their interest in Mohamud—the Khan emails and Mohamud's father's call did.

Except that Jason Leopold's mammoth investigation into Abu Zubaydah's brother Hesham suggests the investigation started perhaps as much as a year before Samir Khan's emails.

After 9/11, public claims about his brother, and a failed American marriage, Hesham found it almost impossible to get citizenship, even after marrying another American woman. Finally, the FBI came to him and suggested if he turn informant, they would help him get his citizenship.

After he agreed, they showed him a bunch of pictures of people of attendees at the Masjed As-Saber mosque in Portland. Including, in 2008, Mohamud.

Hesham said he would do "whatever it takes" to "prove to you that I am a good person and fix my situation."

Gray called him two weeks later and they met again. She brought an envelope with about ten photographs. A majority were Somalis. But there were also photographs of Iraqis and Saudis, Hesham said.

Do you recognize any of these people?" Gray asked Hesham.

"Nope," he said.

"I'd like you to go to the mosque and find out what these people are up to," Gray said. "Find out if any of those people are helping terrorists."

"I will keep my eyes open," Hehsam said.

[snip]

Hesham said one of the photographs Gray showed him was of a young Somali named Mohamed Osman Mohamud who attended the Masjed As-Saber mosque. Mohamud, who was the subject of an FBI sting operation, was arrested in November 2010 on terrorism charges for allegedly attempting to detonate what he believed was a car bomb at a Christmas tree lighting ceremony in Portland. Hesham said he recalls being shown a photograph of Mohamud in 2008, two years before that incident, when Mohamud was just 16.

Samir Kahn's success in leaving the US, when in similar circumstances other young men were stopped or prevented, has always been rather incredible. That's made worse by the fact that Khan was clearly being investigated by the FBI when he was allowed to leave the US (remember, even Mohamud wasn't allowed to go to Alaska for a summer job while he was being investigated).

But if Hesham's memory is correct, it shows several things. First, the FBI's currently operative story—which has changed several times already—would be proven incomplete again. Moreover, it might suggest that Khan (whose family got an apology when he died) had an ongoing relationship with the FBI after they allowed him to slip out of the US as they prevented so many others from doing.

And, finally, it would suggest the FBI first started targeting Mohamud well before he turned 18. It would suggest as a teenager, Mohamud withstood 2 years of that treatment before being entrapped trying to blow up the FBI's own bomb.

Again, all this rests on Hesham's memory. But his memory is utterly damning for the FBI's case against Mohamud.

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# ABU ZUBAYDAH TO DOD: CHARGE ME NOW!

Abu Zubaydah's legal team just wrote the Convening Authority for the Military Commissions demanding that it charge Zubaydah.

This letter requests that the Convening Authority immediately commence proceedings against our client, Zayn al-Abidin Muhammad Husayn (abu Zubaydah), ISN # 10016. Failure to act would raise serious questions about the integrity and legitimacy of the Convening Authority and, indeed, of the whole process established to try or release Guantanamo detainees.

[snip]

Nearly six years ago, President Bush announced that abu Zubaydah and thirteen other so-called high-value detainees were to be tried by a military commission:

So I'm announcing today that Khalid Sheikh Mohammed, abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice. (Cheers, applause)...

With these prosecutions, we will send a clear message to those who kill Americans: No matter how long it takes, we will find you and we will bring you to justice. (Emphasis

added)

It's an interesting legal tactic. If the Convening Authority doesn't charge AZ, it will surely present a Constitutional challenge on speedy trial grounds. But, as the letter makes clear, any charge would fall far short of the claims made about AZ over the last decade.

Furthermore, if the CA doesn't respond here, then the letter's predictions of a lost legitimacy may well bear out.

Abu Zubaydah has not been tried, has not been charged, and has not even had military commission counsel assigned to him. He has requested the appointment of military commission counsel repeatedly but has received no response. This overt failure to prosecute a supposed terrorist leader causes the world to wonder why. One possibility is that the claims, despite their number and decibel level, are simply untrue, so that the government cannot prove all (or any) of them. A second possibility is that the prosecution would be successful but only at the unacceptable cost of exposing the government to worldwide censure for the manner in which Zubaydah was treated and the evidence against him was obtained. The third possibility, worst of all, is both that the claims are not true and that his treatment is too shameful to be revealed to the world.

Curiously, the letter mentions the Bush Administration's efforts to destroy Phillip Zelikow's dissent on the OLC memos. It describes that as "spoilation of evidence. But it doesn't describe the spoilation of the other big piece of evidence (and likely one of the main reasons the government can't charge AZ, in addition to his mental stability): the torture tapes.

In any case, it's a very interesting approach

and one that, if successful, I'd expect more detainees (particularly Mohammed al-Qahtani) to try.

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## THE GITMO FILES: ABU ZUBAYDAH'S FILE

✖ As bmaz posted, WikiLeaks is (finally) releasing the Gitmo Files, review files on 758 of the detainees who have passed through Gitmo. For background, here's the story Carol Rosenberg (with Tom Lasseter) wrote about the files. Among other things, they write about the "mission creep" at Gitmo, as people unrelated to al Qaeda were flown there in an attempt to extract intelligence.

There's not a whiff in the documents that any of the work is leading the U.S. closer to capturing Bin Laden. In fact, the documents suggest a sort of mission creep beyond the post-9/11 goal of hunting down the al Qaida inner circle and sleeper cells.

The file of one captive, now living in Ireland, shows he was sent to Guantanamo so that U.S. military intelligence could gather information on the secret service of Uzbekistan. A man from Bahrain is shipped to Guantanamo in June 2002, in part, for interrogation on "personalities in the Bahraini court."

That same month, U.S. troops in Bagram airlifted to Guantanamo a 30-something sharecropper whom Pakistani security forces scooped up along the Afghan border as he returned home from his uncle's funeral.

The idea was that, once at Guantanamo, 8,000 miles from his home, he might be

able to tell interrogators about covert travel routes through the Afghan-Pakistan mountain region. Seven months later, the Guantanamo intelligence analysts concluded that he wasn't a risk to anyone – and had no worthwhile information. Pentagon records show they shipped him home in March 2003, after more than two years in either American or Pakistani custody.

Apparently, Dick Cheney was so afraid of Afghan sharecroppers he had to build a camp to hold them.

As a way of assessing the files, I wanted to start with Abu Zubaydah's file, since we have a good deal of information on him via other means. And it's clear that AZ's file, at least, is full of euphemism and half truths. One thing the report is clearly not: an attempt to get at the truth of the matter.

Before I get into the deceptions written into this report, note the admission the report makes on page 13 (of 14):

Detainee is assessed to be of HIGH intelligence value. Due to detainee's HVD status, detainee has yet to be interviewed.

That is, the people writing this report apparently had never even interviewed AZ, more than two years after he passed into their custody.

The distance between those writing the summary and the information described in the report may explain the seeming contradictions in it. Consider how the report treats whether AZ was or was not a member of al Qaeda. The Executive Summary reports,

Detainee is a senior member of al-Qaida with direct ties to multiple high-ranking terrorists such as Usama Bin

Laden (UBL).

Yet of course, AZ has revealed that his guards admitted this is not true. The very next line of the summary provides information that is true.

Detainee has a vast amount of information regarding al-Qaida personnel and operations and is an admitted operational planner, financier and facilitator of international terrorists and their activities.

Though note how the file doesn't say that AZ is not an "admitted operational planner" for al Qaeda?

The body of the report later admits that AZ's application to Al Qaeda was rejected.

Detainee submitted the requisite paperwork to join al-Qaida and pledge bayat (an oath of allegiance) to UBL. Detainee's application to al-Qaida was rejected.

Note that the report doesn't explain whether AZ tried to apply to al Qaeda before or after 1992, when (as the report admits) AZ suffered a head wound that caused his cognitive impairment? Even here, though, the report seems to cover up contradictory information.

In approximately 1992 or 1993, detainee sustained a head wound from shrapnel while on the front lines.<sup>8</sup> Detainee stated he had to relearn fundamentals such as walking, talking, and writing; as such, he was therefore considered worthless to al-Qaida. Detainee asked Abu Burhan al-Suri for permission to repeat the Khaldan Camp training. Detainee did not pledge bayat to UBL and did not become a full al-Qaida member. Detainee refused to make the pledge unless al-Qaida agreed to stage an

attack inside Israel or mount an operation to help free Shaykh Umar Abd al-Rahman aka (the Blind Shaykh).<sup>9</sup>

That is, the report suggests that al Qaeda rejected AZ's application because he was "worthless" to al Qaeda. But it appears that AZ also refused to join al Qaeda because it did not meet his his priority—attacking Israel (remember, he's Palestinian). AZ himself has said there were other differences in approach between him and al Qaeda (notably, on the topic of attacking innocent civilians), but the report doesn't describe them.

Also note, the report makes no other mention—none!—of AZ's cognitive impairments that remained from that injury and which were almost certainly exacerbated by the torture he underwent in 2002. Indeed, the report says AZ is in good health, though he suffers from seizures.

And the report doesn't even try to explain the discrepancy between its explanation that al Qaeda found him worthless and the other detainees who said he was a member of al Qaeda.

Detainee continues to deny being a member of al-Qaida. However, multiple sources and other al-Qaida members have identified detainee as an al-Qaida member.

Now, the report does explain this in detail, with references to the sources (I'll return to this in the future, but just as an example of the problems with their evidence, they refer to Zarqawi as an al Qaeda commander, even though he didn't become one until long after AZ was captured; also, they refer to what Ahmed Ressam said about AZ, without noting he recanted much of his testimony or describing whether Ressam had means to know the organizational structure of al Qaeda). The most important of these sources is Khalid Sheikh Mohammed (whom they refer in the body of the report as KU-10024).

Khalid Shaykh Muhammad, ISN  
US9KU-010024DP (KU-10024) identified  
detainee as a senior al-Qaida  
lieutenant.<sup>16</sup> KU-10024 and detainee each  
played key roles in facilitating travel  
for al-Qaida operatives.<sup>17</sup>

Now the first of those citations is to an  
interrogation report. But the second one is to  
(!) the 9/11 Commission Report. So this Gitmo  
report relies on analysis conducted by a bunch  
of people who suspected—but didn't know—that KSM  
was tortured, relying in part on those tortured  
interrogation reports, to confirm one key tie  
between AZ and al Qaeda.

And note how the file plays with time. Under a  
bullet point asserting AZ provided refuge for  
Osama bin Laden after 9/11 (one that, given the  
absence of further details, feels like something  
they know to be an overstatement), it includes  
this sub-bullet point that doesn't apparently  
follow logically.

In February 2007, detainee admitted that  
he expressed his support of the 11  
September 2001 attacks against the US  
during a meeting with UBL, KU-10024, and  
IZ-10026;

I'm not sure what statement that was, but the  
report makes no mention of this public statement  
AZ made in March 2007.

Yes, I write poetry against America and,  
yes, I feel good when operations by  
others are conducted against America but  
only against military targets such as  
the U.S.S Cole. But, I get angry if they  
target civilians such as those in the  
World Trade Center. This I am completely  
against [redacted].

Moreover, the reference to the actual date of a  
statement—2007, after AZ arrived at Gitmo (the  
second time), hints that statements made before

that time might be less reliable.

But the file obfuscates more than just AZ's membership in al Qaeda.

For example, the report says AZ was transferred to Gitmo on September 4, 2006, "to face prosecution for terrorist activities against the United States." It doesn't say, though, that AZ had already been held at Gitmo once before he arrived for the final time in 2006, from 2003-2004. And the report jumps almost immediately from the report of AZ's condition being "stabilized" after he was captured...

Detainee was transferred to US authorities immediately after his arrest and once his condition stabilized, he was transported out of Pakistan.

... to his arrival in Gitmo (the second time) in 2006.

In short, the report on Abu Zubaydah reads partly like an attempt to glue together a lot of contradictory information—without assessing the credibility of any one piece of that information—and an either willful or unconscious effort to tell a narrative that justifies what those in charge of Gitmo were doing.

But a close reading reveals that it doesn't succeed.

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## THE ABU ZUBAYDAH STANDARD IN OBAMA'S MIRANDA MEMO

Here are the claims the Bybee Two memo premised its authorization to torture Abu Zubaydah on:

As we understand it, Zubaydah is one of

the highest ranking members of the al Qaeda terrorist organization,

[snip]

Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply. Zubaydah is currently being held by the United States. The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas.

Compare that with the description of an “operational terrorist” whose Miranda rights may be delayed under a memo issued by DOJ last October.

For these purposes, an operational terrorist is an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation.

The two claimed preconditions for torturing AZ—that he was a high ranking member of an international terrorist group and knowledgeable about operational details of pending terrorist operations—are exactly the same as two possible premises (of three) for delaying an American

detainee's Miranda warning.

Only, with AZ, the CIA had to send John Yoo a bunch of information purportedly proving their claims before they got to torture AZ.

Here's how such claims will be checked under the Miranda exception.

There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation. [4] In these instances, agents should seek SAC approval to proceed with unwarned interrogation after the public safety questioning is concluded. Whenever feasible, the SAC will consult with FBI-HQ (including OGC) and Department of Justice attorneys before granting approval.

[snip]

As noted above, if there is time to consult with FBI-HQ (including OGC) and Department of Justice attorneys regarding the interrogation strategy to be followed prior to reading the defendant his Miranda rights, the field office should endeavor to do so. Nevertheless, the agents on the scene who are interacting with the arrestee are in the best position to assess what questions are necessary to secure their safety and the safety of the public, and how long the post-arrest interview can practically be delayed while interrogation strategy is being discussed. [my emphasis]

In other words, while FBI says it'd be nice if the folks holding the detainee consult with the lawyers in DC before delaying a suspect's Miranda warning, they provide a great big invitation—"the agents on the scene who are interacting with the arrestee are in the best position to assess what questions are necessary to secure their safety and the safety of the public"—for them not to do so. And far be it for FBI Agents to refuse such a kind invitation!

So an FBI Agent in the field can decide on his own (for reasons of urgency, you understand) not to Mirandize a guy that he has decided, with no review, is a top ranking terrorist or knows about an upcoming terrorist attack. And a plain reading of the text doesn't even require that the terrorist attack be related to international terrorism; it could be an environmental attack, for example. If an FBI Agent believes some vegan wants to free a bunch of pigs used in experimentation, he can declare it a planned terrorist attack and hold the vegan without Miranda warning. Since Main DOJ does not require that it oversee this process, it will be able to claim it has no responsibility for any abuses that result.

It will look like this in the eventual DOJ IG Report: "No one could have predicted that FBI Agents would abuse a policy written so broadly."

Now, as it happens, when the government started making claims in court about AZ, in a venue in which both an independent judge and AZ's lawyer could challenge what evidence the government actually turned over, the government chose not to claim that he was either a top-ranking al Qaeda member or aware of upcoming terrorist plots.

There's good reason they didn't make such claims. That's because he wasn't. As the government eventually admitted to AZ, after they waterboarded him 83 times. And after spending the better part of a summer chasing down the terrorist plots he invented to try to get the torture to stop.

The CIA IG Report explained how it was that the government came to have such a mistaken understanding of AZ and others.

The Agency lacked adequate knowledge of what particular Al-Qa'ida leaders—who later became detainees—knew. This lack of knowledge led analysts to speculate about what a detainee “should know,” vice information the analyst could objectively demonstrate the detainee did know.

But don't worry—I'm sure a couple of FBI Agents from, say, Iowa, working alone their first terrorism case with no required review from Main DOJ won't make the same kind of assumptions about what a detainee should know. Really.

Now, don't get me wrong. I'm not saying FBI Agents would use a Miranda delay to waterboard a detainee (waterboarding is CIA turf, after all). The CIA system clearly provided the opportunity for much more abuse.

But consider the one detainee known to be treated in such a fashion: Faisal Shahzad. The government claimed a central reason why they had to hold him without charge is that they needed unfettered access to him, 24/7, so they could immediately verify any new intelligence they picked up. Call me crazy, but interrupting a detainee repeatedly, 24/7, to ask a question sounds like a great way—even better than the Frequent Flier program used at Gitmo—to sleep deprive someone under the guise of doing something else. Since Shahzad eventually plead guilty (remember that Pakistan basically detained his family members, perhaps including his wife and kids, while he was being questioned), the judge never really challenged whether his confession was coerced.

So we only have to look at the one prior case where such a delay was used to understand what kind of abuse can be done during the time before a detainee gets a lawyer.

So perhaps I am justified to be horrified by the parallel structure used in this memo and that used in John Yoo's notoriously problematic Bybee Memo.

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## **WERE THE RAMZI BIN AL-SHIBH TAPES ALTERED LIKE THE ABU ZUBAYDAH TAPES WERE?**

Given that the AP has filled in some details about the Ramzi bin al-Shibh tapes someone had hidden under a desk at CIA, I wanted to look back at the letter DOJ wrote to Leonie Brinkema in 2007, when the government first admitted it had been sitting on those tapes.

AP says the tapes were found all at once while DOJ only learned about them over a month's time

As you recall, DOJ sent this letter on October 25, 2007, to tell Judge Leonie Brinkema (who had presided over the Zacarias Moussaoui trial) and a judge who had presided over appeals in that case that two CIA declarations DOJ had submitted—on May 9, 2003 and on November 14, 2005—“had factual errors.”

Here's how the AP describes the tapes and their discovery:

The CIA has tapes of 9/11 plotter Ramzi Binalshibh being interrogated in a secret overseas prison. Discovered under a desk, the recordings could provide an unparalleled look at how foreign governments aided the U.S. in holding and questioning suspected terrorists. The two videotapes and one audiotape are

believed to be the only remaining recordings made within the clandestine prison system.

[snip]

When the CIA destroyed its cache of 92 videos of two other al-Qaida operatives, Abu Zubaydah and Abd al-Nashiri, being waterboarded in 2005, officials believed they had wiped away all of the agency's interrogation footage. But in 2007, a staffer discovered a box tucked under a desk in the CIA's Counterterrorism Center and pulled out the Binalshibh tapes.

[snip]

The CIA first publicly hinted at the existence of the Binalshibh tapes in 2007 in a letter to U.S. District Judge Leonie M. Brinkema in Virginia. The government twice denied having such tapes, and recanted once they were discovered. But the government blacked out Binalshibh's name from a public copy of the letter. [my emphasis]

The DOJ letter describes a slightly different (though not necessarily inconsistent) chronology. It claims the CIA informed DOJ first of one videotape, and then roughly a month later, of the second videotape and audiotape.

On September 13, 2007, an attorney for the CIA notified us of the discovery of a video tape of the interrogation of [1.5 lines redacted] On September 19, 2007, we viewed the video tape and a transcript [redacted] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution. The evidence of the video tape, however, is at odds with the statements in two

CIA declarations submitted in this case, as discussed in detail below.

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case. CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape, both of which pertained to interrogations [redacted]. On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts [redacted] Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution—they neither mention Moussaoui nor discuss the September 11 plot. We attach for the Courts' review ex parte a copy of the transcripts for the three recordings.

At our request, CIA also provided us with intelligence cables pertaining to the interviews recorded on the two video tapes. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the [redacted] videotapes, and keeping in mind that the cables were prepared for the purposes of disseminating intelligence, we found that the intelligence cables accurately summarized the substance of the interrogations in question. [my emphasis]

So the AP's sources suggested that a staffer simply pulled out a box [Christmas in September!] and found all three tapes—presumably

at the same time—whereas DOJ only found out about one tape at first, then sent CIA back to see if there were more. If, as the AP suggests, the CIA found the tapes all at once, then it suggests that the CIA withheld two of the tapes from DOJ until DOJ asked for them specifically. Given that DOJ reviewed the first tape on September 19 and the second and third on October 18, there seems to have been a delay in getting those second two tapes, which might either suggest the tapes weren't found at the same time, or CIA was very slow in turning over tapes they already knew existed.

The DOJ's explanation of why CIA didn't mention the tapes assumes CIA didn't check with CTC before writing the Declarations

Now, the AP reports that John Durham has expanded his investigation to cover the Ramzi bin al-Shibh tapes as well.

A Justice Department prosecutor who is already investigating whether destroying the Zubaydah and al-Nashiri tapes was illegal is now also probing why the Binalshibh tapes were never disclosed.

The Brinkema letter provides this explanation why the people who wrote the Declarations in 2003 and 2005 didn't mention the tapes.

Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. We asked the CIA to ascertain the reason for such an error. [1.5 lines redacted] As best as can be determined, it appears that the authors of the Declarations relied on assurances of the component of the CIA that [one line redacted] unknowing that a different component of the CIA had contact with [one line redacted]

While this passage is heavily redacted, it seems to suggest DOJ claims the authors of the

Declarations didn't know which components of the CIA had had contact with Ramzi bin al-Shibh (and, potentially, Abu Zubaydah). But the AP reports the tapes were found lying around the Counterterrorism office. That seems to suggest (though we can't be sure with all the redactions) that the people who wrote the Declarations had no clue that CTC was running the torture program.

Which is really only plausible if you ensure the people who wrote the Declarations were completely compartmented out of the most basic information about the interrogation program.

But I guess ensuring unbelievable levels of ignorance on the part of the CIA Declarants would be a good way to ensure none of the tapes were released pursuant to discovery in the Moussaoui trial.

The reviews DOJ did of the tapes recall the earlier CIA whitewash of the tape content

What I'm particularly interested in—particularly given the news that John Durham has expanded his investigation to cover the obstruction involved with these tapes—is the description of the review that DOJ conducted of the tapes.

On September 13, 2007, DOJ learned of the first tape. On September 19, they viewed the videotape and a transcript—the provenance of which they redact (so we don't know if it was contemporaneous or whether it were done for the benefit of DOJ, and we don't know who did it or whether it also involves translation). Then on October 18, CIA admitted it had another “video tape” and an “audio tape.” Once again, DOJ reviewed the tapes and read the transcript. Then, DOJ reviewed the intelligence cables based on just the “video tapes,” but not, apparently, the “audio tape,” “to ensure that the cables accurately captured the substance of the interrogations.” After assuring themselves that the version of the tapes they had reviewed the first time—the cables—was close enough “keeping in mind that the cables were prepared for the

purposes of disseminating intelligence,” they then gave Brinkema the transcripts for all three tapes, but not the tapes themselves, to review.

I’ve got a couple of questions about DOJ’s actions here:

- Why would they review the cables at all?
- Why would they review the cables for the “video tapes” but not the “audio tape”?
- Why would they give Brinkema the transcripts but not the videos?

I’d love to have the lawyer folks—or anyone else—weigh in in comments. But here is one possible explanation. It’s possible that when DOJ reviewed the tapes they saw something on the tapes that they thought might be pertinent, even if it did not constitute a mention of Moussaoui or 9/11. You know—like the physical condition of al-Shibh, or some physical coercion? If so, that might explain why they didn’t review the cables from the “audio tape”—because they “saw” nothing on those tapes. (Alternately, it’s possible that CIA withheld the cables based on the audio taped interrogation when DOJ did its discovery review, which would be damning all by itself.)

They say they wanted to review the cables “[b]ecause we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations.” This sounds, partly, like CYA: they wanted to make sure the representations DOJ had made—as distinct from the CIA Declarations—were accurate and fair. But the fact they even did the review of the cables suggests they had their doubts. Add in the heavily caveated judgment that the cables did reflect the content of the interrogation (they seem to conclude the cables reflect the intelligence gained during the interrogation, but not some other aspects of it), and it sure

seems like there's a discrepancy between the "video tapes" and the cables. Just not one DOJ felt they were responsible for, given the terms of Brinkema's order on discovery, at least not after Moussaoui had already plead guilty.

Now onto the description of the three tapes: 2 "video" tapes and 1 "audio" tape. Which, in plain language, would seem to suggest that the CIA had means to both record video (as they did with Abu Zubaydah and Rahim al-Nashiri in the same time period) as well as means to record audio. There are no indications the torturers in Thailand made audio tapes. There is, however, proof that by late 2002, the CIA had already altered the Zubaydah tapes such that the video in some of them had been destroyed; they showed nothing but snow.

In other words, I think it distinctly possible—particularly given that the tapes showed up in a box under a desk in the same CTC department that had knowingly tried to cover up the earlier tampering with the Zubaydah tapes—that the one "audio" tape didn't start out that way, that it got altered in similar fashion to the Zubaydah tape.

That's all wildarsed speculation, mind you.

But there is some evidence that Durham is not only investigating the 2005 destruction of the torture tapes but also the earlier, 2002, tampering with them. (And his investigation seems to have taken on new energy when he gave John McPherson—who was involved in CIA's first attempt at covering up this tampering—immunity.) If Durham is collecting evidence that the CIA engaged in a cover-up of torture in its treatment of the Zubaydah tapes, then both the condition of the al-Shibh tapes (if they still exist) and CIA's earlier treatment of them (including such things as making sure those who wrote Declarations for Brinkema were ignorant of who was running the torture program) would serve to round out his case (and potentially provide the forensic evidence now lacking for the Zubaydah tapes).

All of which probably answers my third question, why DOJ didn't give Brinkema the tapes themselves. Mind you, I'm sure they accounted for that in the name of protecting sources and methods (you know? methods? fly them to Morocco for the scalpel-on-penis treatment!). But by withholding the tapes themselves, they prevented Brinkema from seeing whatever it is they saw when they decided they needed to review the cables to see if they were accurate.

Note how carefully the AP's sources claim that the tapes show no "harsh interrogation methods" like waterboarding.

But current and former U.S. officials say no harsh interrogation methods, like the simulated drowning tactic called waterboarding, were used in Morocco. In the CIA's secret network of undisclosed "black prisons," Morocco was just way station of sorts, a place to hold detainees for a few months at a time.

"The tapes record a guy sitting in a room just answering questions," according to a U.S. official familiar with the program.

But if Binyam Mohamed is telling the truth about the scalpel-on-the-penis treatment in Morocco (and thus far, his claims have held up against the documentary evidence), we know the claim that "Morocco was just a way station of sorts" is an out and out lie. But it still may be true that the tapes don't show—or didn't, before one of them became an audio tape, if that's what happened—the approved methods of the CIA program itself. That doesn't rule out the tapes showing other things—like the outright beatings that Mohamed describes having happened in Morocco.

Which appears to be one way the DOJ review of these tapes exactly matches McPherson's review of the Zubaydah tapes in 2002. Both reviewed the tapes and the cables to see whether the cables were a reasonably accurate version of what

appeared on the tapes. But both apparently stopped short of comparing the tapes to the limits on interrogation DOJ laid out in 2002. Because if you're DOJ, it would sure suck to be looking at evidence of torture, huh?

Update: papau's comment about the implausibility that CIA found the tapes under a desk reminded me I wanted to note one more difference between the DOJ version and the AP one. DOJ says the "CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution." AP almost suggests the discovery was accidental.

But in 2007, a staffer discovered a box tucked under a desk in the CIA's Counterterrorism Center and pulled out the Binalshibh tapes.

There seems to be a related story here about why they were looking and discovering boxes full of torture evidence in 2007.

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## **ABU ZUBAYDAH'S AMERICAN-TAXPAYER PAID TOUR OF THE WORLD**

You should read two pieces in conjunction this morning. First, this Andy Worthington piece from last week, that lays out new details on the black site CIA used in Poland in 2002-2003.

On Friday, the Polish Border Guard Office released a number of documents to the Warsaw-based Helsinki Foundation for Human Rights, which, for the first time, provide details of the number of

prisoners transferred by the CIA to a secret prison in Poland between December 5, 2002, and September 22, 2003, and, in one case, the number of prisoners who were subsequently transferred to a secret CIA prison in Romania. The documents (available [here](#) and [here](#)) provide important information about the secret prison at Szymany, in northeastern Poland, and also add to what is known about the program in Romania, which has received far less scrutiny.

[snip]

Friday's revelations by the Polish Border Guard Office are, however, even more significant, firstly because they include, for the first time, confirmation that N63MU flew into Poland on December 5, 2002, and secondly, because they provide details of the number of passengers on seven of the flights, as follows:

December 5, 2002: 8 passengers delivered

February 8, 2003: 7 passengers delivered; 4 others flown to an unknown destination

March 7, 2003: 2 passengers delivered

March 25, 2003: 1 passenger delivered

May 6, 2003: 1 passenger delivered

July 30, 2003: 1 passenger delivered

September 22, 2003: 0 passengers delivered; 5 flown to Romania

Then, read this AP piece, which fleshes out details about the first time that Abu Zubaydah and three other detainees went to Gitmo.

Four of the nation's most highly valued terrorist prisoners were secretly moved to Guantanamo Bay, Cuba, in 2003, years earlier than has been disclosed, then whisked back into overseas prisons before the Supreme Court could give them access to lawyers, The Associated Press has learned.

[snip]

Before dawn on Sept. 24, 2003, a white, unmarked Boeing 737 landed at Guantanamo Bay. At least four al-Qaida operatives, some of the CIA's biggest captures to date, were aboard: Abu Zubaydah, Abd al-Nashiri, Ramzi Binalshibh and Mustafa al-Hawsawi.

Together, the articles provide key new details of the global voyages that Abu Zubaydah and other key detainees took between CIA black sites. And the AP piece confirms something earlier revealed in the ICRC report completed in 2007 and released last year: that at least four of the High Value Detainees were in Gitmo in 2003-2004, until they were moved again precisely to hide them from the ICRC.

ICRC notes that four detainees believed that they had previously been held in Guantanamo, for periods ranging from one week to one year during 2003/4. They reported recognising this location upon return there in September 2006, as each had been allowed outdoors on a daily basis during their earlier time there. The ICRC has been assured by DoD that it was given full notification of and access to all persons held in Guantanamo during its regular detention visits. The ICRC is concerned, if the allegations are confirmed, it had in fact been

denied access to these persons during the period in which they were detained there.

Now, the two pieces in conjunction answer key questions. As Worthington points out, we know from this that Abu Zubaydah and Rahim al-Nashiri (and, he adds, Ramzi bin al-Shibh) got moved from Thailand to Poland in December 5, 2002, as CIA was making their first efforts to close the Thai black site and destroy the torture tapes. And then the three of them, plus Mustafa al-Hawsawi, got moved to Gitmo the following September 24, 2003. Then, on March 27, 2004, they were taken away from Gitmo.

One implication of this, of course, is that the death threats used against al-Nashiri—reportedly investigated by John Durham (and, I have speculated, possibly one reason Philip Mudd retired in March) happened on Polish soil.

It also times interestingly with Jack Goldsmith's tenure at OLC (October to July) and even more interestingly with the CIA IG Report (they got Zubaydah and Nashiri—against both of whom the IG Report described torture—out of Gitmo before Congress got a hold of the report).

But the two reports also lay out further area for inquiry. At least according to what detainees told the ICRC, at least one of the detainees who were in Gitmo in this early period were only there for a week. But that also suggests some of the four might not have known they were at Gitmo when they returned in 2006, perhaps because they didn't have the same exercise privilege (and remember that detainees, at least as of a few months ago, still exercised only with those who they had been in black sites before, so they couldn't compare notes). Does this mean others were moved to Gitmo's "Strawberry Fields" after this first bunch?

Finally, note how CIA's spokesperson, in his comment to the AP, wants this story to be about events that happened six years ago.

CIA spokesman George Little said: “The so-called black sites and enhanced interrogation methods, which were administered on the basis of guidance from the Department of Justice, are a thing of the past.”

Aside from the fact that Little said this while John Durham’s inquiry into the torture that exceeded the guidance of DOJ is ongoing, it also distracts attention from other inconvenient little facts: like the presumably ongoing existence of Camp No, and the weird qualification in Obama’s Gitmo closure orders limiting them only to those at Gitmo considered to be enemy combatants.

Still, kudos to Worthington and the AP for their work to tease out the global trajectories of these detainees.

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## **DID JAY BYBEE ACCIDENTALLY ADMIT THAT CIA EXPERIMENTED ON ABU ZUBAYDAH WITH SLEEP DEPRIVATION?**

Pages 100-102 of the Jay Bybee Transcript are worth reading closely, not least for the way Jay Bybee tries to shift the focus of discussion on torture from “severe physical or mental pain or suffering” to “prolonged mental harm” to avoid the obvious fact that CIA and DOJ approved extended sleep deprivation without having any clue whether it amounted to torture.

But I’m more interested in the retroactive edit

on page 102, which seems to admit that CIA had already subjected Abu Zubaydah to 11 days of sleep deprivation by the time Jay Bybee signed the OLC memos on August 1, 2002. Here's what Bybee originally said:

The CIA did not indicate that they intended to keep Abu Zubaydah awake for 11 days. They said this is what we have done. Here is the best literature on this.

In notes reflecting Bybee's requested changes, he asked that "They said this is what we have done" be changed to "They said this is what we know."

Bybee goes onto make a similar comment (though this one he didn't try to correct). He repeatedly refers to the CIA's studies.

Nadler: And if you deprive someone of sleep for a lengthy period of time, could you not be causing severe physical pain, too, without prolonged mental harm?

Bybee: We didn't have any evidence of that from what the CIA told us, and that was based on their studies.

Nadler: What the CIA told us?

Bybee: Not just based on their studies. I'm sorry, based on the literature that they had surveyed.

But both Jason Leopold and I have pointed to reasons to believe they already had subjected Abu Zubaydah to 11 days of sleep deprivation. In other words, there is evidence to suggest that the CIA did, in fact, say, "this is what we have done," and that they had done their own studies ... with the guy whose sleep deprivation they were trying to get approved.

Oops! Jay Bybee may have accidentally told the truth!