

“REMEMBER, AN FBI AGENT [LIKE ALI SOUFAN] ALWAYS KEEPS HIS NOTES.” WHY WON’T OBAMA ADMIN RELEASE THEM?

As Ali Soufan has been making the rounds rebutting Jose Rodriguez’ self-serving lies, he has said something, repeatedly, that hasn’t gotten a lot of attention.

Soufan has notes that prove Rodriguez is lying.

He actually first mentioned them publicly (AFAIK) in his book, Black Banners.

In early 2008, in a conference room that is referred to as a sensitive compartmented information facility (SCIF), I gave a classified briefing on Abu Zubaydah to staffers of the Senate Select Committee on Intelligence. The staffers present were shocked. What I told them contradicted everything they had been told by Bush administration and CIA officials.

When the discussion turned to whether I could prove everything I was saying, I told them, “Remember, an FBI agent always keep his notes.” **Locked in a secure safe in the FBI New York office are my hand-written notes of everything that happened with Abu Zubaydah** [redacted] (434-435; my emphasis)

He mentions them again later in the book, almost begging someone to go get them.

It was apparent from the [torture] memos that the introduction of EITs was based on lies. The proof resides in my

notes—locked, as noted earlier, in FBI vaults. (526)

Soufan repeated this emphasis on his notes in a piece explaining why Jose Rodriguez' lies might help Abd al Rahim al-Nashiri in his military commission.

Nonetheless, the government has my **investigative notes, as well as daily reports**, and the inspector general also found instances where Rodriguez's team went far beyond what they had approval for and the legal guidelines set forth by the George W. Bush administration, including holding a drill to Nashiri's head. [my emphasis]

And in the Q&A with Amy Davidson, Soufan again mentions that documentary proof that Rodriguez is lying.

The claim about waterboarding leading to unmasking of K.S.M. as the mastermind of the September 11, 2001, attacks is similarly false. We got that information in April, 2002, before the contractors hired by the C.I.A. Counterterrorism Center even arrived at the site. One by one, the successes claimed by E.I.T. proponents have been shown to be false.

I went before the Senate Judiciary Committee and under oath recounted what happened. And, as I note in "The Black Banners," **I sent daily reports from the secret interrogation location, to Washington**, recording what happened, which the U.S. Government has in its possession.

[snip]

The tapes also contained our interrogations, done with traditional techniques. The tapes would have shown under which circumstances Abu Zubaydah

coöperated and when he stopped
coöperating. But while the tapes were
destroyed, **our daily reports from the
location are luckily safe and still in
the government's possession.** [my
empahsis]

Notes, notes, notes and daily reports, daily
reports, daily reports.

You think maybe this guy wants us to know that
there is documentary proof, as yet unreleased,
that Rodriguez' book is based on a pack of lies?
You think maybe he'd like these notes released
before Rodriguez makes a mint off these lies?

The thing is, Soufan's repeated mention of his
notes have not entirely escaped all attention.
Back in January, Jason Leopold actually FOIAed
the notes. DOJ responded that because the notes
pertain to a third party—Abu Zubaydah—Leopold
would have to get that third party's permission
to win their release. But AZ is stuck behind a
wall of legal obstruction, in which Gitmo
censors say such a waiver does not constitute
proper legal mail pertaining to AZ's habeas
petition (which is the only kind of legal
representation he's supposed to get), and
therefore AZ's lawyers can't get him the waiver
so he can sign it. Leopold is left appealing the
decision on public interest grounds.

So journalists keep reporting that Soufan has
these notes that prove Rodriguez' lies (and,
probably, that Rodriguez' torturers did far more
than legally approved in the Bybee memo,
including, at a minimum, use a coffin to
simulate live burial, the only thing John Yoo
said was illegal). While the repeated reporting
on these notes has not yet reached a clamor,
clearly they are newsworthy (and for some
legally suspect reason, subjected to a higher
degree of privacy than Rodriguez' lies are).

Ali Soufan says there is documentary evidence
that proves Rodriguez' entire PR campaign is
based on lies. So why won't the Administration

release that evidence?

Why is the Administration obstructing release of evidence that Rodriguez is lying?

THE PROBLEM WITH EQUATING TRAVEL ROUTES AND TERRORISM: 34 DEAD CIVILIANS

A few weeks back, Seton Hall published a report showing that since the DC Circuit reversed the habeas petition of Mohammed al-Adahi, “the practice of careful judicial fact-finding was replaced by judicial deference to the government’s allegations. Now the government wins every petition.” The report traced a number of factors that, before al-Adahi, judges examined with some skepticism, but after, fairly regularly accepted as evidence that a detainee was a member of al Qaeda.

Among those factors were staying in certain guest houses and traveling a particular route that—the government effectively claimed—meant you were a terrorist. Thus, it no longer mattered whether you had fought for al Qaeda. In the absence of more direct evidence, the government argued that where you traveled was one piece of evidence that you should be detained as a terrorist.

Tellingly, while the government has a declaration they routinely submit in Gitmo cases on the significance of guest houses to al Qaeda, they have not (as far as I know) ever submitted a similar declaration providing evidence for a tie between travel routes and al Qaeda membership (the closest they have is a report on

Tora Bora which seems to argue “if you were in this vicinity you must have been in Tora Bora and, Osama bin Laden!”). In fact, that’s part of what infuriated David Tatel in the Latif case—the way the majority opinion simply accepted the government’s evidence about Latif’s travel back to Pakistan—where hundreds of innocent of Arabs were picked up at the time—as corroboration for the error-ridden report the government submitted as its main proof that Latif could be detained.

Latif left Kabul in November 2001 and then traveled through Jalalabad before eventually arriving at the Pakistani border where Pakistani authorities detained him. According to the government, this path mirrors that of Taliban soldiers retreating from Kabul. Although not contending that this evidence is dispositive, the government argues that because Latif’s admitted route is consistent with that of Taliban soldiers and with information in the Report, it is a helpful piece in the puzzle, bolstering its claim that the Report’s inculpatory statements are accurate.

Fair enough, but how helpful? If this route is commonly used by innocent civilians, then the evidence is not that helpful at all. To understand why, consider a simple hypothetical. Suppose the government were to argue in a drug case that the defendant drove north from Miami along I-95, “a known drug route.” Familiar with I-95, we would surely respond that many thousands of non-drug traffickers take that route as well. Given what we know about our own society, the I-95 inference would be too weak even to mention. Cf *Almerfedi*, 2011 WL 2277607, at *4 n.7 (noting that some conduct such as possessing an AK-47 is so “commonplace in Afghanistan [that it] does not meaningfully distinguish an al

Qaeda associate from an innocent civilian"). On the other hand, if the alleged drug trafficker had driven along an infrequently traveled country road, then a contention that that road was "a known drug route" would carry more weight. The burden of proof is on the government to demonstrate whether travel on a particular route to the Pakistani border, when considered in context, is more like the lonely country road and thus worthy of consideration when it comes to distinguishing between enemy combatants and innocent civilians.

I raise all this not just to point you to the Seton Hall report, which is well worth your time. But because today, SCOTUS will decide whether or not to accept two cases—Latif and Uthman—in which these issues are central (we won't find out whether they'll take the cases until Monday).

And because of this WSJ report, showing the tragic result of assuming that travel patterns must be indicative of terror ties: 34 dead civilians, targeted by Turkish warplanes after a US drone spotted a caravan of Kurdish smugglers using a route frequented by PKK guerrillas.

Above and out of sight, a U.S. Predator drone loitered. It was on a routine patrol when U.S. personnel monitoring its video feeds spotted the caravan just inside Iraq and moving toward the Turkish border, according to U.S. officials and the Pentagon's assessment of the fatal strike.

U.S. military officers at the Fusion Cell in Ankara couldn't tell whether the men, bundled in heavy jackets, were civilians or guerrilla fighters. But their location in an area frequented by guerrilla fighters raised suspicions. The Americans alerted their Turkish counterparts.

[snip]

Then Turkish warplanes appeared. "It was like a lightning bolt," Mr. Encu said. "I saw a bright light and the force of the explosion threw me to the ground...When I turned my head I could see bodies on fire and some were missing their heads."

The strikes lasted for about 40 minutes, survivors said. Of the 34 men killed, 11 were members of Mr. Encu's extended family. It was the largest number of Kurdish civilians killed in a single attack in Turkey's long conflict with the region's militants.

[snip]

The killings sparked clashes between hundreds of stone-throwing protesters and the police in Kurdish parts of Turkey. In the town of Uludere, Mayor Fehmi Yaman charged that the attack marked the latest in a series of government efforts to intimidate the local population, much of which supports Kurdish militancy.

"The military knew these people were civilians. It was a deliberate attack," he said. "The government has tried all means of suppression, which have failed, and now they tried this."

The Turkish military initially said it ordered the strike because the convoy moved along a pathway frequently used as a staging point for attacks by the PKK.

[snip]

The killings threaten to spoil efforts to forge a Turkish-Kurdish consensus for a planned new constitution expected to partly address the issue of rights for the Kurdish minority.

Now, the US is hedging whether it told Turkey these Kurdish smugglers were PKK members because of their travel route. The Predator drones moved on, the government says; had they stuck around, maybe they could have confirmed these Kurds weren't terrorists.

However convincing—or not—that hedge, the public *Turkish* explanation amounts to no more than travel route. They blasted a caravan of smugglers, killing almost all of them, because they were traveling on a route also used by PKK guerrillas. And with it, they blasted any credibility they had on wanting to engage their Kurdish minority, with potentially long-lasting consequences.

Obviously, the use of this travel-route-terrorism is different in the two cases. One delivers drone-assisted executions for “terrorism,” the other ratifies HUMINT-justified life imprisonment. But that's why the Turkish example is so useful: because it provides a very graphic (and tragic) example of the costs of relying on such shoddy intelligence to target terrorists. With Gitmo detainees, we hide those costs down in Cuba or back in Yemen where detainee family members grow increasingly desperate for any justice from America. But the human and political costs are there, nevertheless.

THE GOVERNMENT CONTINUES TO PLAY REDACTION GAMES WITH LATIF

I've now read all the documents the government issued and reissued on April 30 in some detail (District Court Opinion; Circuit Opinion; Cert

Petition; Government Response; Latif Reply). As I've noted, in addition to releasing their own response to Adnan Farhan Abd al Latif's cert petition, the government also released less-redacted versions of the previous filings in the case.

As it turns out, the government primarily released a lot of stuff that would make Janice Rogers Brown's opinion look less batshit crazy, if you ignore that they had been hiding her Wizard of Oz analogy in the name of national security. For example, it released information making it clear that all the government's data on whether Latif is married or not is inconsistent, which of course is all blamed on Latif.

The ploy seems to have worked; Ben Wittes, who seems unconcerned that three reports on Latif (his DOD intake form and two conflicting reports from the same interview at Gitmo) prove that such intelligence reports cannot practically be afforded the presumption of regularity without the government's own case files—and frankly, their case here—falling apart, now thinks “Judge Brown's reading of [the evidence against Latif] strikes me as very likely preferable to the one the district court adopted.”

That said, with the newly released information, I'm increasingly convinced they're using the redaction process not to protect national security, but to cheat.

The redactions get worse to make it harder to find problems with the government's recruiter story

There are a few examples where in this round, the government has actually redacted more information on the second round—mostly information on Ibrahm al-Alawi starting on page 10 in the District Court opinion (compare the “less redacted version” with the original release). Since this stuff is all already available in other documents, this mostly amounts to pettiness, but it does serve to hide

a central part of the government's argument. They claim the similarities between Latif's story about the charity worker Ibrahim al-Alawi and the known al Qaeda recruiter Ibrahim Balawi (who is usually called Abu Khalud) provides corroboration for the government's story. Yet none of the eight or so detainees recruited by Abu Khalud IDed Latif. And—as I hope to show—the records on these other detainees suggest they should have been able to, if Abu Khalud and al-Alawi were really the same guy. In other words, while this redaction doesn't limit the amount of information out there, it does make it harder for people to quickly see how flimsy one crucial part of the government's argument is.

Adding half a line in the redaction process

More curious appears on page 1 (PDF 68) of the Tatel's opinion. There appear to be about half a line—which is redacted—that **has been added** to the third and fourth line of the opinion. As a result, Tatel's reference to "(the Report)" is shifted onto the next line and the alignment of the entire rest of the paragraph changes.

Here's the original release:

TATEL, *Circuit Judge*, dissenting: The government's "primary" piece of evidence, Appellants' Br. 10, is a single report: [REDACTED] (the Report)
[REDACTED]
[REDACTED] After carefully laying

And here's the latest release:

TATEL, *Circuit Judge*, dissenting: The government's "primary" piece of evidence, Appellants' Br. 10, is a single report: [REDACTED] (the Report)
[REDACTED]
[REDACTED] After carefully laying out the parties' arguments about

Now, the space is about what a reference to the document name—TD-314/00684-02—would take up on the line. Maybe they've simply added that. But still, what's the protocol for just adding something into the record just before SCOTUS reviews it? Did Tatel approve this addition?

Hiding Latif's explanations for how TD-314/00684-02 implicated him

There's another apparent redaction that—if I'm right about its content—serves to prevent us from seeing a thoroughly unclassified but nevertheless critical part of Latif's (or perhaps just David Tatel's) argument. There are repeated discussions of Latif's theory for how TD-314/00684-02 got so screwed up as to implicate him in fighting for the Taliban. Kennedy discusses it at 14—though almost all the explanations remain redacted. Rogers Brown summarizes these at 4, though one clause remains redacted.

But Latif says his statements were misunderstood or, alternatively, [redacted] were misattributed to him.

There's a long discussion on 26 in Rogers Brown and on 24-25 (PDF 92-93) in Tatel. All of these have been newly released in significant part. Except for a key part of Tatel's argument.

About halfway down Rogers Brown's 26, she argues that Tatel's explanation doesn't fully explain the presence of exculpatory information along with the inculpatory information in the report.

The dissent also fails to account for Latif's incriminating statements about being escorted to the Taliban and receiving weapons training, and does not explain why, **if these inculpatory statements were produced by government agents filling gaps in their comprehension "with what [they] expected to hear,"** id. at 25, those agents would invent the counterintuitive claim that Latif "never fired a shot" during his time on the front lines with the Taliban .

She makes it clear that Tatel has argued that the multiple step process of translation, note-taking, and transcription created some gaps in

the comprehension of the personnel doing the report, and that they may have filled in those gaps by including "what [they] expected to hear."

The thing is, if you refer to Tatel's page 25 (PDF 93), this very logical explanation—particularly given that all this occurred after the Pakistanis had presumably told the Americans Latif was a fighter—is redacted. Now, I have no idea whether this is Latif's explanation—that interrogators interrogated Latif, having been told by Pakistanis he had fought in Kabul, and the interrogators or translator then interpreted what Latif said as all referring to combat rather than his own explanation about medical care.

Now it may be that the government redacted this passage from Tatel because it includes too much speculation, and redacted the other references to Latif's explanation because it suggests the Pakistanis may have had a role in the confusion. The latter, at least, would be a typical redaction hiding the role of our partners, though the government reply is more explicit that all this took place in Pakistan. But it all shows that the government is hiding one of the central arguments in this case—one that would implicate the chaotic process at the Pakistani border in late 2001 that resulted in so many detainees who didn't need to be in Gitmo, including, apparently, Latif.

And the thing is, we know this happens, even in the comparative calm of Gitmo. In this post, I compared the actual language from TD-314/00684-02 which what is sourced to it in Latif's Gitmo file. Look what happened in that translation process.

Subject met Ibrahim Al-((‘Alawi)) from Ibb during 2000. ‘Alawai talked about jihad and Afghanistan and convinced subject that he should travel to Afghanistan. Subject did not know if ‘Alawi had actually participated in any

jihad activity himself. Subject departed home in early August 2001, travelled by car to San'a, then by airplane to Karachi. He took a taxi to Quetta, then crossed into Qandahar where he went to the grand mosque, where he met 'Alawi. He went to '**Alawi's** house, where he remained for three days.

Detainee admitted Ibrahim Aliwee convinced detainee to travel to Afghanistan for jihad and admitted staying at **Abu Khulud's** residence for a short period in Kandahar. [my emphasis]

The passage from the Gitmo file should only include information that appears in the reports it's sourced to. But this Abu Khulud claim is sourced to TD-314/00684-02 and a DOD interrogation report from March 2002; we know that neither records Latif "admitting he stayed with Abu Khulud." But the analyst writing the report, having "assessed" that Ibrahim al-Alawi is Ibrahim Balawi, simply asserted that Latif had admitted, effectively, that they are the same person, something Latif has always denied.

Do the judges and Latif's team even know what TD-314/00684-02 says about Latif's friend?

Finally, there's a hint of another redaction that may be still more troubling. There's an odd reference that was newly revealed on page 21 of Rogers Brown's opinion.

Some of the information gleaned from Latif's interview is redacted, including information about [few words redacted] the name of a friend who accompanied him to Jordan for medical treatment.

Let's take a step back. We know from the Petition Cert table of contents that TD-314/00684-02 is about 19-20 pages long, and most of it is redacted (though there is an error

noticeable on the first page). The government has ostensibly redacted it to hide information about the at least 3 Saudis and one Syrian detained based partly (in the case of one of the Saudis, entirely) on the report who have since been freed, not to mention the fact that most if not all of detainees still held based on the report are four Yemenis, unable to be released because of instability in Yemen, not the evidence against them. That is, most of the redactions serve to hide information on other detainees.

But this passage from Rogers Brown **seems** to suggest that when she reviewed the report while writing her October 14, 2011 opinion, there were portions **about Latif**—in addition to all the information on other detainees—that remained redacted.

The Rogers Brown sentence noting these redactions was itself redacted in the first release of the Circuit Opinion. So was the following passage in the Kennedy opinion (click to enlarge).

[REDACTED]

After those lines, a paragraph reads:

Subject is a high school graduate. He had 4000 Pakistani rupees in his pocket. He had no U.S. contacts. His only previous travel was to Jordan, accompanying [REDACTED] a friend injured during the Yemeni Civil War. For medical treatment of an injury to his hand.

Id. [REDACTED] paragraph reads in its entirety: "Subject claimed no knowledge of any imminent or future terrorist threats to U.S. or any other interests." *Id.*

That block quote must be the passage Rogers Brown refers to (in places where she and others refer to it—as on page 24—she uses ellipses in place of the redacted passage). The name of the friend—as well as perhaps a description of him—is redacted in our copy, but it's not clear whether it was redacted in what Kennedy was looking at or not. That is, it's not clear whether that redaction we see here is a redaction in the report as well as Kennedy's opinion or just the latter. But Rogers Brown's language appears to suggest that parts of TD that pertain to Latif remain redacted for the

judges (and while he couldn't address anything about content, when I asked, Latif counsel David Remes did say they got only what the judges got).

In any case, it's hard to understand what justification the government has for redacting this passage now. In an attempt to prove Latif changed his story, Latif's factual (PDF 16) return appears to have shown two names for the friend he said traveled with him to Jordan so he could receive medical care, and includes an unredacted reference to Hady, which seems to be the same as the name the Gitmo files uses, Hassan Hadi (though note that that Hadi reference is cited to the same March 6, 2002 interrogation, so there's a spelling discrepancy that may derive from another appearance of this same name).

...and that a friend in Yemen named
'[redacted] was either driving the truck
that was in the accident and arranged
for his (Ala'dini's) treatment in
Jordan, see ISN 156 FD-302 (May 29,
2002); or that "Hady" was otherwise a
medical person, see ISN 156 SIR (March
6, 2002); or instead that a man named
[redacted]—ostensibly the same recruiter
described above—arranged for Petitioner
Ala'dini's treatment in Jordan, see ISN
FD-302 (May 18, 2003).

But the actual reference in TD-314/00684-02 and therefore its redaction may well be more interesting.

His only previous travel was to Jordan,
accompanying [redacted] a friend injured
during the Yemeni Civil War. For medical
treatment of his hand.

Even with the redaction, the passage makes Rogers Brown's claim—"it lacks a clear antecedent"—grammatically suspect. But I find it particularly interesting that

TD-314/00684-02 claims Latif's friend had been injured in the Yemeni Civil War, whereas Latif maintains he was injured in a truck his friend used for transporting grapes.

The Yemeni Civil War (which lasted from May to July 1994) would time to Latif's injury; he had been unconscious for a month after the injury in 1994, and was admitted to the Jordanian hospital on July 9, 1994, meaning he was probably injured in May or June, 1994. So it could in fact be plausible the head wound—Latif's, not his friend's—was a result of fighting. That might actually provide a closer tie to al Qaeda (whether real or introduced by the expectations of the interrogator), but it would also give Latif a closer tie to the Ali Abdullah Saleh government (though we know a Yemeni delegation to Gitmo met with Latif in July 2005 but there's no reference to the Civil War in this Gitmo file).

All of which might be interesting, but the government has chosen to treat the information as totally irrelevant to Latif's detention. Maybe they're hiding a name and description that could not plausibly have ties to Latif. Maybe they're hiding Hadi's name for some bizarre reason. But the fact that they're simply taking it out of the discussion by redacting it (for us, if not for the judges and Latif's team), seems pretty suspect.

Scott Horton did a piece the other day, tracing how our embrace of secret justice more and more resembles that of the Soviet Union. He points to Latif's case—to redaction games like the ones the government is playing here—as a prime example.

The type of secrecy that lies at the heart of *Latif* cannot be reconciled with justice—it is political by nature, and it is motivated by a sense of political vulnerability. Courts embrace such secrecy at the risk of forfeiting their claims to impartiality and fairness, and of harming America's institutions and

reputation.

This is, no matter what the government claims, a terribly weak case; even if the government believes Latif had ties to the Taliban, they have no real evidence of it. But to hide that fact, they continue to play games with their unilateral redactions—purportedly in the name of national security but demonstrably to hide that the wizard behind the curtain is just a powerless feeble old man.

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.

DOD: CONSIDER WHETHER WE'VE MADE DETAINEES CRAZY IN PERIODICAL REVIEW

Section 1023 of the Defense Authorization mandated that the Administration tell Congress how it was implementing Obama's Executive Order providing periodic review of Gitmo detainees' continued need to be detained.

SEC. 1023. PROCEDURES FOR PERIODIC
DETENTION REVIEW OF INDIVIDUALS DETAINED
AT UNITED STATES NAVAL STATION,
GUANTANAMO BAY, CUBA.

(a) PROCEDURES REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting

forth procedures for implementing the periodic review process required by Executive Order No. 13567 for individuals detained at United States Naval Station, Guantanamo Bay, Cuba, pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note).

Here's the directive complying with that requirement.

I'll have plenty to say about it. But for the moment, I got hung up on this:

3. STANDARD. Continued law of war detention is warranted for a detainee subject to periodic review if such detention is necessary to protect against a continuing significant threat to the security of the United States. In making that assessment, the PRB may review all relevant materials including information from the final Task Force assessments produced pursuant to Reference (k); the work product of a prior PRB; or any relevant intelligence produced subsequent to either. Application of this standard is specifically not intended to require a re-examination of the underlying materials that supported the work products of either Reference (k) or a prior PRB and is not intended to create a requirement that each PRB conduct a zero-based review of all original source materials concerning a detainee. In assessing whether a detainee continues to meet this standard, the PRB may consider:

[snip]

(6) The detainee's physical and psychological condition.

We know, of course, that there are a number of

people at Gitmo—starting with Abu Zubaydah and Mohammed al-Qahtani—we’ve driven completely insane with our torture and abuse, who we can’t try but also can’t release (not that we’d release either of these two anyway).

But this seems to be a tacit admission that we won’t release people we’ve driven crazy. Because, Freedom!, I guess. So are we now saying that because our treatment has made them insane we will now use that as reason to keep them in custody?

Though maybe once these guys get to be so old they’re having health problems, maybe then we’ll finally release them.

WHAT IF THE BIGGEST RISK ISN’T KHALID SHEIKH MOHAMMED GIVING SPEECHES?

The guy who covered up CIA’s torture, Jose Rodriguez, worries that Khalid Sheikh Mohammed might give a speech during the course of his military commission.

Although he acted defiantly in court, Rodriguez said KSM would like nothing more than a forum to preach radical Islam.

“This is a process that will continue for a long time,” Rodriguez said. “I have heard he may plead not guilty, and if he does, he’ll use the [legal] process as his platform . . . to talk about his jihadist beliefs.”

[snip]

“It seemed to us that he was looking for

a platform from which he could spout his hatred for all things American, and a trial would certainly present that opportunity,” Rodriguez writes. “It strikes me as more than a little ironic that several years later, Attorney General Eric Holder almost granted KSM his wish.”

Ironically, Rupert’s rag decided to plug these Rodriguez fears the day after KSM and his co-defendants tied up the military commission in knots not by speaking, but by remaining silent.

Judge [James] Pohl turns to Mohammed’s attorneys and his right to counsel. Mr. Mohammed, he says, pursuant to the Manual for Military Commissions, you are today represented by two military lawyers, Derek Poteet and Jason Wright, your detailed counsel. Do you understand this?

There’s a pause – the first of many, as we’ll soon see – as the court and counsel wait for the defendant’s responds. KSM doesn’t give one, and Judge Pohl notes as much. Very well, he continues, detailed counsel will be provided to you.

No response.

Pohl adds that Mohammed also has the option to request different military counsel; Mohammed has the right to ask the Office of the Chief Defense Counsel to provide any lawyer from its staff, to the extent they are available.

Crickets again from Mohammed.

If, Judge Pohl goes on, your request for different military attorneys is approved, then Poteet and Wright no longer will be available to represent you. Do you understand this?

Silence.

Pohl next asks if Mohammed wants a different military lawyer than that detailed.

No answer.

The sole comment from the defendants, apparently, came from Ramzi bin al-Shibh.

In this court appearance, the only verbal outburst came from Bin al Shibh, who blurted at one point that the prison camp leadership was just like Moammar Gadhafi, the slain Libyan dictator.

When the judge tried to hush Bin al Shibh, explaining the accused would be given a chance to speak later, the Yemeni replied: "Maybe they are going to kill us and say that we are committing suicide."

Bin al-Shibh's comments may reflect a remarkable access to and analysis of damning news coverage. But they don't amount to the kind of propagandistic diatribe that was one reason cowards like Chuck Schumer fought having this trial in a civilian court in Manhattan.

I have no idea how the silent treatment on the part of the defendants will affect the legitimacy of the 9/11 military commission. I would think victims' families might grow impatient with our justice system, with potentially troublesome consequences, while the many international observers might view the whole thing as a bigger clusterfuck than the Slobodan Milošević trial. Repeated efforts to censor the defendants' lawyers from mentioning the torture we know Jose Rodriguez' torturers inflicted may focus more attention on that torture.

There was a time when pundits were talking about what a great display of American institutions and rule of law a trial would be for KSM and the other 9/11 plotters. That may still happen. Or,

it may be that the silent treatment will serve to focus attention on America's shame and fear instead of our well-established and laudable civilian judicial system—what was once our pride.

Compare all that to the UndieBomber, who may have none of KSM's evil guile, but even still had his 15 minutes of fame—the soapbox for radical jihad that Jose Rodriguez cowers in fear of—pass almost unnoticed.

The government could have meted justice to KSM by now, had it shown minimal courage of conviction and belief in our institutions. Instead, the world may well see America's embarrassing embrace of ad hoc justice instead of the institutions that once made us great. And that may be far more damning than anything KSM might have to say.

GOING TO JIHAD WITH THE MEDICAL RECORDS YOU HAVE, NOT THE JIHAD FIGHTERS YOU MIGHT WANT

I want to apologize to Janice Rogers Brown. In this post, I suggested she agreed with the argument the government used to dismiss evidence that corroborated Adnan Farhan Abd al Latif's explanation for why he traveled to Afghanistan.

As I explained, Latif's US intake form recorded that he had medical records with him when he was taken into US custody. Both David Tatel and Henry Kennedy found those records to corroborate the story Latif has told for a decade about why he traveled to Afghanistan: he was seeking affordable medical care to treat a head injury

he had sustained in 1994. The government, however, dismissed the indication that Latif had medical records with him, suggesting that the notation provided “evidence only that Latif said he had medical records with him at the time he was seized rather than that he in fact had them.”

The government, at the same time as arguing that a report of an interrogation conducted in Pakistani custody should be afforded a presumption of regularity, was arguing that the soldier that filled out Latif’s US intake form was not following the procedure laid out in the Army Field Manual. It was, in short, arguing that a Pakistani intake report should be presumed regular, but not a US military intake report.

I mistakenly assumed Rogers Brown must have accepted the government’s argument that Pakistani intake reports should be afforded the presumption of regularity but not US intake reports.

But as a newly declassified passage makes clear, that’s not what Rogers Brown did. Instead, she accepted Judge Kennedy’s treatment of the intake report as regular, but argued that the detail that Latif had medical records with him when captured reinforced her own argument that the Pakistani intake report should be presumed to be regular.

“[T]he reliability of evidence can be determined not only by looking at the evidence alone but, alternatively, by considering sufficient additional information permitting the factfinder to assess its reliability.” *Bensayah v. Obama*, 610 F.3d 718, 725-26 (D.C. Cir. 2010). The only piece of extrinsic evidence the district court relied on does nothing to weaken the presumption of regularity. The district court found Latif was captured with medical records in his possession. based on a government document’s statement to that effect. .

The record contains a medical benefits referral from Yemen's Ministry of Defense, a "medical report" from a Jordanian Hospital confirming that Latif was admitted in 1994 for a "head injury," and a report from Yemen's Ministry of Public Health recommending in 1999 that Latif pursue further treatment at his own expense. This evidence corroborates Latif's assertions about his medical condition and incidentally corroborates the Report's description of his medical trip to Jordan-but it does nothing to undermine the reliability of the Report. The Government is tasked with proving Latif was part of the Taliban or otherwise detainable-not disproving Latif's asserted medical condition. There is no inconsistency between Latif's claim that Ibrahim promised him medical treatment and the Report's statement that Ibrahim recruited him for jihad. Both may be true. For example, Ibrahim could have promised Latif the medical treatment he needed to induce him join the Taliban.

That was awfully nice of Judge Rogers Brown, to fix the fundamental flaw in the government's argument about presumption of regularity (that is, that they weren't even affording their own documents the presumption of regularity).

But that makes Rogers Brown's Wizard of Oz tale even more fantastic. She argues that because some witch-posing as a good witch, no doubt-told Latif he could find a new head from a wizard in Afghanistan, and because Latif went there with medical records in tow to meet that wizard, and according to a report she finds credible never once fired a shot, that constitutes proof that our poor Tin Yemeni Man in search of an uninjured brain was a member of the Taliban.

Beware, America. Because not only did Rogers Brown's decision permit the government to detain anyone based on any intelligence report they can

conjure up, regardless of how obviously unreliable. But she has also equated searching for medical care with terrorism.

CONFIRMED: THE GOVERNMENT IS BLOWING UP HABEAS WITH AN INTERROGATION REPORT INVOLVING PAKISTAN

In addition to declassifying the analogies to the Wizard of Oz Janice Rogers Brown made in her opinion on Adnan Farhan Abd Al Latif's habeas petition, the government also declassified passages from the Latif cert petition.

Newly declassified passages make it clear the report in question is TD-314/00684-02

Among the passages newly declassified is this paragraph from the document at the heart of the Latif case.

History: Subject met Ibrahim Al-(('Alawi)) from Ibb during 2000. 'Alawai talked about jihad and Afghanistan and convinced subject that he should travel to Afghanistan. Subject did not know if 'Alawi had actually participated in any jihad activity himself. Subject departed home in early August 2001, travelled by car to San'a, then by airplane to Karachi. He took a taxi to Quetta, then crossed into Qandahar where he went to the grand mosque, where he met 'Alawi. He went to 'Alawi's house, where he

remained for three days. 'Alawi owned a taxi in Qandahar, and had his family with him. 'Alawi took him to the Taliban, who gave him weapons training and put him on the front line facing the Northern Alliance north of Kabul. He remained there, under the command of Afghan leader ((Abu Fazl)), until Taliban troops retreated and Kabul fell. Subject claimed he saw a lot of people killed during the bombings, but never fired a shot. He went to Jalalabad, then crossed into Pakistan with fleeing Arabs, guided by an Afghan named Taqi ((AIlah)). While he was with the Taliban, he encountered ((Abu Hudayfa)) the Kuwaiti, ((Abu Hafs)) the Saudi, and ((Abu Bakr)) from the United Arab Emirates (UAE) or Bahrain.

By comparing that paragraph with the parts of Latif's Gitmo file sourced to TD-314/00684-02, we can be virtually certain that the document at issue is, in fact, TD-314/00684-02. (Each sentence below is followed by the page on which it appears in Latif's Gitmo file.)

Detainee admitted Ibrahim Aliwee convinced detainee to travel to Afghanistan for jihad and admitted staying at Abu Khulud's residence for a short period in Kandahar. (5) Detainee admitted receiving weapons training from the Taliban and then fighting in support of the Taliban on the front lines. Detainee remained there until the Taliban retreated and Kabul fell to the Northern Alliance. (6)

Detainee admitted after training he was sent to the front lines north of Kabul. Detainee remained there until the Taliban retreated and Kabul fell to the Northern Alliance. (6-7) Detainee claimed he saw a lot of people killed during the bombings, but never fired a shot. (3) Detainee then traveled to

Jalalabad, AF, and crossed into Pakistan with fleeing Arabs, guided by Taqi Allah. (3) While detainee was with the Taliban, he encountered Abu Hudayfa the Kuwaiti; Abu Hafs the Saudi, and Abu Bakr from the United Arab Emirates or Bahrain. (3)

The last two sentences, in particular, make the match particularly clear, given that those details were newly added to Latif's Gitmo file from TD-314/00684-02 in 2008. Also note, the only major claim in the paragraph above not clearly sourced to TD-314/00684-02 in Latif's file—"He remained there, under the command of Afghan leader ((Abu Fazl)), until Taliban troops retreated and Kabul fell"—appears this way in Latif's Gitmo file without clear attribution but in a paragraph otherwise sourced to TD-314/00684-02:

He remained in Kabul under the command of Afghan leader Abu Fazl, until Taliban troops retreated and Kabul fell.

All of this makes it virtually certain that the report in question is TD-314/00684-02.

Newly declassified passages also show that the interrogation in question happened while Latif was in Pakistani custody

We can also show with a high degree of certainty that the interrogation in question happened while Latif was still in Pakistani custody.

This sentence, from page 10 of the cert petition, makes it fairly clear that the interrogation, if not the document itself, dates to December 2001 (the CIA file has a 2002 date, so it probably wasn't drafted until the following month).

The government's case was "primarily based" on a single document, created [~1 word redacted] in late December 2001 [3-4 words redacted].

But there's an even more interesting reference to the timing of the interrogation in the new version of Henry Kennedy's opinion. After a long still-redacted paragraph on page 6 introducing TD-314/00684-02, there's a brief reference to "in late December 2001," further redaction, the footnote 5, and then a new sentence introducing further, more detailed description of TD-314/00684-02.

Here's what we see in the footnote:

⁵ The document indicates that [redacted] its contents are from [redacted] "late December 2001." [redacted]

That is, not much. But enough to see that the contents are derived from something that appears to use "late December 2001" as a date rather than a specific date itself. (That is, Kennedy uses quotation marks for the date, to indicate that the document he looked at included not a specific date, but this more general one.)

According to Latif's Gitmo file and TD-314/00845-02 (a document that appears to have primarily served to record the transfer of custody from Pakistani to US custody), Latif was transferred on December 30, 2001. According to his intake form (see PDF 32-34), he was transferred on December 31, 2001.

Unless the interrogation happened on December 30, as the Pakistanis were transferring Latif to US custody, then it happened while he was still formally in Pakistani custody.

Only Yemenis are known to remain at Gitmo based on this document

As I've explained before, TD-314/00684-02 was not a report detailing just Latif's intake in Pakistan. The Gitmo Files of at least 7 other men cite TD-314/00684-02. As this table shows—and I describe in more detail below—the Saudis and the Syrian held, at least in part, based on the interrogation reported in TD-314/00684-02 have all been transferred out

of US custody. Just the Yemenis remain.

ISN	Name	Nationality	Resolution
154	Mazin Salih al-Awfi	Saudi	To SA, 7/07
156	Adnan Farhan Abd al Latif	Yemeni	
158	Majid al Harbi	Saudi	To SA, 2/20/2007
170	Sharaf Masud	Yemeni	
171	Abu Bkar Alahdal	Yemeni	
179	Al Jusaid	Saudi	To SA, 7/15/07
317	Moammar Badawi Dokhan	Syrian	To Portugal, 8/28/09
324	Al Sabri	Yemeni	

That's important because it corroborates something Latif has argued in his case: that the government itself didn't rely on this document when it cleared Latif for release on multiple occasions in the past. While the newly released documents continue to redact one suspected source of inaccuracy (see PDF 91 for David Tatel's consideration of the question), it is certainly possible the Pakistanis played a role in any inaccuracies, not least because they stood to get a bounty for each Arab "fighter" they turned over to the US.

I've provided the summaries of the claims against these men based on TD-314/00684-02 (the number in parentheses indicate how many other sources are cited for the claim). But particularly given that the government redacted all the rest of these reports, it seems likely the government has otherwise found the entire report unreliable.

We know that the chaos, the sheer numbers, as well as the bounty system used in our processsing of "fighters" captured at the Paksitani border in late 2001 resulted in large numbers of innocent or insignificant men to be transferred to Gitmo in 2002. Given the entirety of the record against Latif, that seems to be the case for him, too.

But, nevertheless, the government is fighting not just to keep him in custody, but to defend a dangerous precedent permitting the government to hold alleged fighters on whatever unreliable intelligence report they present.

Summaries of the other Gitmo detainees known to have been detained based on TD-314/00684-02

Mazin Salih Musaid al-Awfi (ISN 154)

Saudi citizen, released into Saudi custody July 2007, joined AQAP then returned.

Gitmo file; NYT Docket

Some details of detainee's account have been corroborated by other detainees, such as his stay in the al-Nebras Guesthouse in Kandahar; however, detainee is assessed to have minimized his own role as a mujahid. Detainee admitted only to being present on the rear lines north of Kabul and the rear line at Tora Bora.[0]

Majid al Harbi (ISN 158)

Saudi citizen, released into Saudi custody December 13, 2006

Gitmo File; NYT Docket

After high.school,, detainee attended college for two years in Jeddah, SA studying computer sciences.[5]

On one occasion, al-Harbi [no relation] approached detainee and convinced him to go to Pakistan to conduct missionary work with JT. Detainee agreed and traveled from Jeddah to Riyadh, S.A. He then traveled to Karachi, Pakistan (PK), via Dubai, United Arab Emirates (UAE). In Karachi, detainee did as he had instructed by Al-Harbi, and took a taxi to the Hotel Dubai. After approximately three days, JT member Mohammed Akbar met detainee at the hotel and took him to a mosque in Lahore, PK, named Sheik Bura (NFI).[6]

Shortly after detainee arrived at the mosque, Abu Ghanim (a Kuwaiti) and Abu

Abdullah (a Saudi) arrived. [5]

The Imam of the mosque, Mohammed Elias, issued a call for JT members to go to Afghanistan and fight. [2]

Abu Ghanim and Abu Abdullah traveled to a training camp for three days of training and detainee stayed in the house for five days. [7]

[a description of all the Arabs being kicked out of Kandahar, and making their way to Khost]

While at this house, detainee realized he had lost his passport. [3]

Transferred with \$400 Dollars [1]

Al Juaid, (ISN 179)

Saudi citizen, released to Saudi custody July 15, 2007

Gitmo file; NYT docket

From 2000 to 2001, detainee attended the College of Technology in Mecca, SA, studying computer science, but did not complete the degree. [1]

Around July 2001, detainee traveled from Saudi Arabia to Afghanistan via Bahrain and Karachi, Pakistan (PK).[1]

From Karachi, detainee traveled to Quetta, PK and Kandahar, AF.[1]

Detainee then continued to Kabul. In approximately August 2001, detainee was assigned to the rear lines of the Northern front opposite the Northern Alliance (NA). Detainee remained in this position until the Taliban withdrew under heavy coalition bombardment on approximately 20 November 2001.[0]

[Unsources comment placing him at Tora Bora]

Two weeks later, detainee and a group of ten Arabs headed for Pakistan. [0]

[Description of the attack on Pakistani guards sourced to IIR 7 739 3396 02, a document used to trace 84 detainees to Kohat and, allegedly, to escaping from Tora Bora with Ibn Sheikh al-Libi]

Detainee admitted to occupying a position on the rear lines in Kabul for three months. [0]

[Unsources assertion detainee part of 55th Arab Brigade]

Detainee stated that on approximately 20 November 2001, during flight from heavy bombardment, detainee and a small group of Arabs traveled from Kabul to Tora Bora where they stayed for two weeks under the command of Ali Mahmud. [0]

Detainee claimed that there were several hundred fighters. Most of them dispersed and broke into small groups heading for the border of Pakistan. Detainee reported that he arrived at the border on or about 20 December with a group of ten Arabs. [0]

Detainee admitted traveling to Afghanistan to participate in jihad after answering a fatwa issued by radical Shaykh Abdallah Bin Jibreen. [0]

Moammar Dokhan (ISN 317)

Gitmo file; NYT docket

Syrian. Transferred to Portugal August 28, 2009 (Miami Herald account); as of January 2010, he lived in his own apartment.

Reporting lists Abu Abdallah al-Shami

from Syria as one of those who escaped from the trucks during the struggle with the soldiers and his whereabouts were unknown. (Analyst Note: This is a reference to the riot on the bus transporting prisoners noted in detainee's capture data. Detainee is likely the al-Shami noted, though he was probably recaptured within a day of his escape.)

Mashur al Sabri (324)

Gitmo file; NYT docket

Yemeni, lost habeas petition this year

He sometimes has claimed he was born in Taiz, YM and other times in Mecca, SA, demonstrating his willingness to mislead US intelligence officials on even the most basic detail. [1]

Sharaf Masud (170)

Gitmo file; NYT docket

Yemeni, remains in custody, although there are no allegations he fought; government preparing to release public return in his habeas case, filed under Sharaf al Sanani

In September 2001, detainee decided to visit Kabul, AF, in order "to see what the city was like." After two weeks at an unidentified location in Kabul, detainee heard on the radio that the local Afghans were killing Arabs for being the cause of the US bombing campaign in Afghanistan. Detainee decided to flee to Jalalabad, AF, and stayed at the Mujama al-Arab guesthouse for approximately six weeks. In mid-December 2001, an Afghan guide led

detainee and fifty other Arabs east toward the Afghanistan-Pakistan border. They reached a small village where they resided for approximately four days at a local mosque. Detainee discarded his suitcase, which contained his passport and money, while fleeing Jalalabad. [3]

Detainee fled Afghanistan with a group of al-Qaida and Taliban fighters led by LY-212, UBL's military commander in the Tora Bora Mountain Complex. The group crossed the Afghanistan-Pakistan border in the Nangarhar, AF region in mid-December 2001 and arrived at a Pakistani village where their local contact convinced them to surrender their weapons. The contact then gathered the group in a mosque where Pakistani forces arrested them. [2/3]

Detainee stated he traveled to Kandahar and stayed in an Arab guesthouse for sixty days prior to going to Kabul in September 2001. [0]

Detainee admitted using the alias Gharib.[0]

[Confiscation at a guest house] is probably the true disposition of detainee's passport and supports his possible attendance at an al-Qaida affiliated training camp despite detainee's claim that he had abandoned his suitcase and passport during his exodus from Jalalabad. [0]

Detainee admitted being part of a three vehicle convoy of prisoners transported from where they surrendered to the prison in Kohat.[0]

Gitmo file; NYT docket; Habeas public return

Yemeni who allegedly fought with the Taliban and who remains in custody

Detainee then continued to the Daftar Taliban (Taliban Office) in Quetta, PK where the office manager, Muhammad Dauod, facilitated his jihad application in Afghanistan. [1]

After four days, detainee traveled to Kabul, AF where detainee stayed at the al-Khat Guesthouse for one week.[0]

In Kabul, detainee presented himself to Taliban commander Mullah Abd al-Ahad. [0]

Detainee requested to return to the front lines after fully recovering from his illness and was assigned as a guard in a twelve-man unit, composed of nine Arabs and three Afghans. Mullah Abdul al-Ahad commanded the unit, which provided security for the Taliban rear headquarters. [2]

Detainee claimed he withdrew to a village on the outskirts of Jalalabad and hiked into the mountains where he remained for the duration of Ramadan. After six days of walking in the mountains, his group broke into two-man units to reduce suspicion. The group was aided by a Yemeni who approached a concentration of other Arabs making their way to Pakistan. Upon arrival, the villagers turned them all over to Pakistani authorities. They were taken to a police station in pickup trucks at night and later sent in a convoy of three buses toward another prison when a riot broke out in one of the other buses. [0]

Detainee stated he was proud to have been a mujahid fighting for the Islamic cause under the Taliban banner. Detainee

stated he will bide his time until the next "Islamic nation" arises and he will join the fight against the enemies of Islam. Detainee remarked he was a willing terrorist against the US because of his opinion that the US holds a hostile position against Palestinian Muslims and other Arab populations. [0]

Detainee occupied Taliban and al-Qaida positions on the front lines during Operation Enduring Freedom. Detainee reported he returned to Kabul in July 2001 and spent two months recovering there before he returned to the front lines. Detainee was on the front lines until withdrawing to Jalalabad and the nearby mountain where he spent Ramadan (mid-November to mid-December) 2001 before escaping to Pakistan. [5]

Detainee was assigned to an artillery unit and is assessed to have received basic and advanced training requisite of this assignment. Detainee occupied a Taliban position north of Kabul under the command of Mullah Abdul Ahad. [0]

Al-Qadasi (163)

Gitmo file; NYT docket

Yemeni, still in custody.

An individual in Hudaydah, YM known as Juhana gave detainee \$400 US, procured detainee's Pakistani visa, and gave detainee a one-year round trip "open" ticket from Yemen to Pakistan (PK) to seek medical treatment for joint pain. Detainee's June or July 2001 flight originated in Hudaydah, YM and continued to Sanaa, YM and then Karachi, PK. [3]

[At Tora Bora] Detainee hid in trenches until he was able to escape into Pakistan. [0]

Detainee claimed he traveled to Afghanistan in June or July 2001, but probably traveled in late 2000.[2]

JANICE ROGERS BROWN SINGS “FOLLOW THE YELLOW BRICK ROAD” AS SHE GUTS HABEAS

The government has released a new version of the DC Circuit opinion in the Latif case. (Via DC Circuit Review h/t scribe)



I suppose it should comfort us that the government no longer considers this passage from Janice Rogers Brown’s opinion to be classified. [I’ve underlined the bits the government previously claimed were classified; see PDF 39-40 to compare.]

What makes Latif’s current story so hard to swallow is not its intrinsic implausibility but its correspondence in

so many respects with the Report he now repudiates. Like Dorothy Gale upon awakening at home in Kansas after her fantastic journey to the Land of Oz, Latif's current account of what transpired bears a striking resemblance to the familiar faces of his former narrative. See THE WIZARD OF Oz (MGM 1939). Just as the Gales' farmhands were transformed by Dorothy's imagination into the Scarecrow, Tin Man, and Cowardly Lion, it is at least plausible that Latif, when his liberty was at stake, transformed his jihadi recruiter into a charity worker, his Taliban commander into an imam, his comrades-in-arms into roommates, and his military training camp into a center for religious study.

Though it raises real questions why it was classified in the first place. Really? Our government classified a Wizard of Oz analogy! And it wonders why we doubt the men behind the curtain.

And a good thing they released it, too. It makes Rogers Brown's comment earlier in the opinion analogizing Dorothy's Uncle Henry to Judge Henry Kennedy look every bit as disrespectful as it did in the first draft...

Even doting Uncle Henry managed to evaluate Dorothy's credibility when she professed that the family and friends gathered around her bed had been with her in Oz. See THE WIZARD OF Oz (MGM 1939) ("Of course we believe you, Dorothy."). The district court, by contrast, mustered only a guarded finding of plausibility.

But at least we know that Rogers Brown—and not Kennedy—is the one who has gotten lost in Oz.

But a look at numbered page 21 shows all you

need to know about the government's good faith in this reconsidered redaction. The government admits details that all-but prove it is what I speculated it was—TD-314/00684-02, an interrogation report based on a Pakistani intake interview and therefore subject to Pakistani's desire for bounty. On page 14, for example, it admits this report came from Latif's first interrogation (and therefore before he was in US custody). On page 19, it admits the report is a screening interview (an admission left unredacted in at least one other document in this case). On page 4 of Henderson's concurrence (PDF 54), she reveals the report was "written" in late December 2001—which therefore dates it to the period when Latif was still in Pakistan. But page 21, where it presumably describes the circumstances of the report—in which Pakistanis presumably had every incentive to spin tall tales as Arab prisoners did—remains largely redacted.

Nowhere in the newly revealed passages does the government explain the circumstances of the interrogation and, if relevant, the involvement of the Pakistanis, and therefore not just additional opportunities for miscommunication, but also the profit motive driven by our bounty system. And also the fact that a slew of reports—including some of the interrogations purportedly also reported in TD-314/00684-02—seem to build a generic narrative around certain details. Admit you were in Kabul? Then the Pakistanis will supply a story about being at the rear lines for the Taliban.

Just like Frank Baum did.

Ultimately, though, this is the most important newly released passage.

True, the court cited problems with the Report itself, including its substantial redactions, [redacted] its reference to Latif's "hand" instead of his head injury, [two lines redacted] and the perceived lack of corroboration. But the

Report was not so inherently unreliable that it could be discarded in the absence of countervailing evidence offering a more likely explanation for Latif's travels. See *supra* pp. 20-31. And Latif offers no evidence to rebut the Government's presumptively reliable record aside from his own statements and the Report itself. A merely "plausible" explanation cannot rebut the presumption of regularity. See *Riggs Nat'J*, 295 F.3d at 21. The other two grounds for the court's decision—minor transcription errors in the Report and a lack of corroboration for its incriminating statements—do not satisfy that standard. As we have already discussed, see *supra* pp. 21-27, the mistakes in the Report provide no support for the much more extensive fabrication Latif alleges. And to the extent the district court relied on a lack of corroborative evidence to discredit the Report, it highlighted its failure to afford the document a presumption of regularity. By definition, a presumptively reliable record needs no additional corroboration unless the presumption is rebutted.

It reveals that whoever wrote the report in question didn't know his ass—or rather, a hand—from the hole in Latif's head. And it reveals that Janice Rogers Brown is prepared to let the government present any document, no matter how obviously flawed, and based on whatever fiction that document presents, build an entire new world.

If this Report were true someone—one of the eight people who admitted to being recruited by Latif's alleged recruiter, any of the many people who did fight out of Kabul, or the people alleged to have trained with him—would have been able to ID Latif. The government has had 10 years to find someone to do that. And no one—not a single one—corroborates the fantasy that

Janice Rogers Brown is so sure deserves treatment as presumptively reliable.

If only we had ruby slippers to click together to get out of Rogers Brown's fantasy world.

"THE GLOVES COME OFF" MEMORANDUM OF NOTIFICATION

Operational flexibility: This is a highly classified area. All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves come off.

-Cofer Black, 9/11 Congressional Inquiry, September 26, 2002

When Cofer Black, the main author of the plan laid out in the September 17, 2001 Memorandum of Notification that appears to be at issue in the FOIA dispute between the CIA and White House and the ACLU (post 1, post 2, post 3, post 4, post 5), testified before the 9/11 Congressional Inquiry, he described the expanded operational flexibility CIA's counterterrorism efforts gained after 9/11 by saying "the gloves come off."

As this post shows, the legal means by which "the gloves come off" was the MON in question. Thus, rather than referring to the MON by its date, perhaps the best way for us to think of it is as the "Gloves Come Off MON."

Before we get into what the MON did, here's what the National Security Act, as amended, says such MONs are supposed to do. The NSA requires the President to notify congressional intelligence and appropriations committees (or, in rare cases, the Gang of Eight) of any covert

operations he has authorized the CIA to conduct.
Some important excerpts:

SEC. 503. [50 U.S.C. 413b] (a) The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government **unless the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security** of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:

(1) **Each finding shall be in writing**, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than 48 hours after the decision is made.

[snip]

(5) **A finding may not authorize any action that would violate the Constitution or any statute of the United States.**

[snip]

(d) The President shall ensure that the congressional intelligence committees, or, if applicable, the Members of Congress specified in subsection (c)(2) [the Gang of Eight], are **notified of any significant change in a previously approved covert action**, or any significant undertaking pursuant to a previously approved finding, in the same manner as findings are reported pursuant to subsection (c).

As used in this title, the term “covert action” means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include—

(1) **activities the primary purpose of which is to acquire intelligence,** traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

Basically, the MONs are supposed to provide an up-to-date written notice of all the potentially very embarrassing things the CIA is doing. And given that MONs cannot authorize unconstitutional or illegal (within the US) actions, it should impose some legal limits to covert operations.

Dick Cheney, in a 1989 speech complaining about Congressional overreach in foreign policy (Charlie Savage just posted this), described how this requirement to inform Congress of covert ops provided a way for Congress to oppose such actions by defunding any ongoing ones.

The 1980 law [requiring notice] did not challenge the President’s inherent constitutional authority to initiate covert actions. In fact, that law specifically denied any intention to require advance congressional approval for such actions.

[snip]

Any time Congress feels that an operation is unwise, it may step in to prohibit funds in the coming budget cycle from being used for that purpose. As a result, all operations of extended

duration have the committees' tacit support.

That's the understanding of the limitations MONs might impose on Presidents that Cheney brought to discussions of the Gloves Come Off MON.

Bob Woodward provides an extensive discussion of what George Tenet and Cofer Black requested in this MON in *Bush at War*.

At the heart of the proposal was a recommendation that the president give what Tenet labeled "exceptional authorities" to the CIA to destroy al Qaeda in Afghanistan and the rest of the world. **He wanted a broad intelligence order permitting the CIA to conduct covert operations without having to come back for formal approval for each specific operation.** The current process involved too much time, lawyering, reviews and debate. The CIA needed new, robust authority to operate without restraint. Tenet also wanted encouragement from the president to take risks.

Another key component, he said, was to "use exceptional authorities to detain al Qaeda operatives worldwide." That meant the CIA could use foreign intelligence services or other paid assets. Tenet and his senior deputies would be authorized to approve "snatch" operations abroad, truly exceptional power.

Tenet had brought a draft of a presidential intelligence order, called a finding, that would give the CIA power to use the full range of covert instruments, **including deadly force.** For more than two decades, the CIA had simply modified previous presidential findings to obtain its formal authority for counterterrorism. His new proposal,

technically called a Memorandum of Notification, was presented as a modification to the worldwide counterterrorism intelligence finding signed by Ronald Reagan in 1986. As if symbolically erasing the recent past, it superseded five such memoranda signed by President Clinton.

Woodward describes other things included in Tenet's request:

- Providing hundreds of millions to "heavily subsidize Arab liaison services," effectively "buying" key services in Egypt, Jordan, and Algeria
- Equipping Predator drones with Hellfire missiles for lethal missions to take out top al Qaeda figures
- Working with the Northern Alliance in Afghanistan (in the earlier discussions, Woodward made clear that Rashid Dostum, whose massacre at Dasht-i-Leili we subsequently covered up] was the key figure Black had in mind)
- Conducting covert ops in 80 countries, including the use of breaking and entering, and lethal force (what Jane Mayer, in *The Dark Side*, refers to as paramilitary death squads)
- Working with Libya and Syria

(and also, in the context of
Afghanistan, Uzbekistan)

Mayer adds to Woodward's list that it,

authorized the CIA's officers to break
and enter into private property, and to
monitor the communications and financial
transactions of suspected terrorists,
even inside the United States when
necessary, as well.

As Woodward describes Bush signing the MON on
September 17,

He was approving every one of Tenet's
request for expanding the role of the
agency, rejecting most of Rumsfeld's
efforts to scale back.

So even with respect to what the MON explicitly
approved, it included the use of lethal force,
the outsourcing of torture to partner liaison
services like Egypt, the use of drones,
paramilitary attacks on targets in 80 countries,
and broad surveillance, potentially in the US.

But more importantly, as Woodward describes it,
the MON authorized the CIA to engage in these
general activities **without having to come back
for a new finding**. Jane Mayer elaborates what
this meant:

To give the President deniability, and
to keep him from getting his hands
dirty, the finding called for the
President to delegate blanket authority
to Tenet to decide on a case-by-case
basis whom to kill, whom to kidnap, whom
to detain and interrogate, and how.

The legal fight between the Administration and
the ACLU is fundamentally about whether—given
the way Tenet constructed his Interrogation
Guidelines—Bush (and now Obama) could sustain
that claim of plausible deniability.

There is another issue with the Gloves Come Off MON as well: the way it was used did not comply with the NSA. For example, the notifications of significant changes (such as that CIA had started torturing detainees itself) were not in written form. Cheney kept notifications at the Gang of Four level that prevented anyone in charge of appropriations from knowing what they were paying for—though in the case of the illegal wiretap program, they kept doing the activity after Congress had defunded it (Congress at least believes the briefing got better under Obama subsequent to Leon Panetta revealing the assassination program, though obviously the Awlaki killing belies that). And in the case of torture—which, they’ve always said, was intended to collect information rather than create false confessions—should not have been a covert op in the first place.

But those are the specifics. The more general lesson about the Gloves Come Off MON is that it turned the CIA and those it partnered with into an entity with almost boundless authority to operate outside normal rule of law and oversight. And this is the legal authorization—not the AUMF or the OLC memos—behind most of the ugliest things our country has done since 9/11.