

HAPPY “DIRTY YOUR HANDS” BY PARTNERING WITH BASHAR AL-ASSAD DAY

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As I noted last week, 12 years ago today, President Bush signed the Memorandum of Notification that governed – and as of last year, at least, still governs – our war on terror.

Part of that MON, according to Bob Woodward’s *Bush at War*, includes partnering with “rogue regimes” like Syria on intelligence collection.

[Tenet] called for initiating intelligence contact with some rogue states such as Libya and Syria that he said might be helpful in trying to destroy al Qaeda. For the CIA to obtain helpful information against the terrorists, they might have to get their hands dirty.

After signing that MON, Bush’s own regime sent people like Maher Arar off to be tortured by Bashar al-Assad’s government.

The same guy we almost went to war against last week because he’s so barbaric, we partnered with, in a policy set by the President, outsourcing our torture.

As of May 25, 2012, the government was still relying on this MON (probably, at a minimum, to cover the drone and other method assassinations that aren’t covered by any AUMF).

I already noted all this; I wasn’t going to

otherwise call out the anniversary of the day the “Gloves Came Off.”

But then I saw this clip of Philip Mudd on Colbert. About halfway through, Mudd says we have to fight Syria because Assad is,

a tyrant who has a reckless abandon when he murders innocents. At what point do you draw a line and say we are not just US citizens, we’re global citizens?

Mudd then goes on to answer a question about whether he tortured prisoners by saying he was Deputy Director of the Counterterrorism Center, which held and tortured prisoners.

He doesn’t regret that, he says.

He then goes on to admit he signed papers to render prisoners.

Mudd: If you’re asking if I’m responsible for some of that, the answer’s yes.

Colbert: Alright, you think that was the right thing to do.

Mudd: Yes.

Colbert: And we renditioned some of those people to Syria.

Mudd: Uh, I think the answer’s yes, I don’t [shakes head]

Colbert: OK

Mudd: We rendered a lot of people.

At what point do you draw a line, says this man, who can’t even remember that Syria was indeed one of the countries we outsourced our torture to, even the torture of an innocent man. We must be global citizens, not just American citizens, he says, and doing anything else is a sign of cowardice.

And yet, this intelligence expert can’t even

figure out why Assad thinks he can get away with murdering his own people.

ERIC HOLDER: WELL, MAYBE JUST A LITTLE FORCED NUDITY AND SOLITARY CONFINEMENT...

Eric Holder has written a letter to Russian Minister of Justice Alexander Valdimirovich Konovalov. In it, he claims to address the issues Edward Snowden raised in his application for asylum to Russia (I'm not sure he accurately represents the claim – in other asylum applications Snowden made a clear case he was charged with a political crime, which Holder doesn't mention at all).

The letter assures Konovalov that the charges currently charged don't carry the death penalty and the government wouldn't seek the death penalty if he were charged with such crimes.

But it also offers this guarantee that Snowden won't be tortured:

Second, Mr. Snowden will not be tortured. Torture is unlawful in the United States.

That's it! The guy whose DOJ reviewed but chose not to charge a bunch of CIA torturers (and those who obstructed investigations into that torture) says torture is illegal here and therefore Snowden wouldn't be tortured.

Assuming, of course, you believe the forced nudity and solitary confinement Bradley Manning was illegally (per the judge in his case)

subjected to doesn't amount to torture. I'm sure Vladimir Putin would agree, but much of the civilized world does not.

In other curious assurances, Holder promises that Snowden would have the right to counsel.

Any questioning of Mr. Snowden could be conducted only with his consent: his participation would be entirely voluntary, and his legal counsel would be present should he wish it.

I guess Holder ought to tell Dzhokhar Tsarnaev about this return to the good old days, because he asked for a lawyer several times under questioning before he got one.

These assurances are all very nice. But more and more, such assurances are easily disproven by our recent history. Again, I don't think Vlad Putin gives a great shit about all that. But ultimately this increasingly shoddy recent history will hurt such claims in the international realm.

DIANNE FEINSTEIN SUGGESTS PRESIDENT OBAMA PERSONALLY VIOLATING OUR TREATY OBLIGATIONS

As I noted the other day, in her ruling that she could not halt the force-feeding at Gitmo, Gladys Kessler described the treatment as "degrading," potentially invoking our obligations under Article 16 of the Convention against Torture to prevent degrading treatment. Kessler actually explicitly

invoked International Covenant on Civil and Political Rights, which includes a similar prohibition on degrading treatment.

Dianne Feinstein and Dick Durbin sent Obama a letter yesterday, using Kessler's ruling to connect the two explicitly.

U.S. District Court for the District of Columbia Judge Gladys Kessler also expressed concern about the force-feeding of Guantanamo Bay detainees. The Court denied detainee Jihad Dhiab's motion for a preliminary injunction to stop force-feeding due to lack of jurisdiction, but in her order, Judge Kessler noted that Dhiab has set out in great detail in his court filings "what appears to be a consensus that force-feeding of prisoners violates Article 7 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits torture or cruel, inhumane, and degrading treatment." The United States has ratified the ICCPR and is obligated to comply with its provisions. Judge Kessler also wrote, "it is perfectly clear from the statements of detainees, as well as the statements from the [medical] organizations just cited, that *force-feeding is a painful, humiliating, and degrading process.*" (emphasis added).

The judge concluded by correctly pointing out that you, as Commander in Chief, have the authority to intercede on behalf of Dhiab, and other similarly-situated detainees at Guantanamo. The court wrote: "Article II, Section 2 of the Constitution provides that '[t]he President shall be the Commander in Chief of the Army and Navy of the United States. ...' It would seem to follow, therefore, that the President of the United States, as Commander-in-Chief, has the authority—and power—to directly

address the issue of force-feeding of the detainees at Guantanamo Bay.”

Feinstein only by association makes the next part of her argument. We comply with these treaties by complying with our Eighth Amendment prohibition on cruel or unusual punishment. And the government has long said that if we can do something elsewhere in a our gulag system, we can do it in Gitmo.

In a letter to Chuck Hagel last month – which Feinstein noted in yesterday’s letter but did not quote from – she laid out how our force-feeding at Gitmo differs from that used in the Bureau of Prisons.

In addition to the allegation that the Department of Defense’s force-feeding practices are out of sync with international norms, they also appear to deviate significantly from U.S. Bureau of Prison practices. Based on a review by Intelligence Committee staff, the significant differences between force-feedings at Guantanamo Bay and within the U.S. Bureau of Prisons relate to the manner in which the detainees are force-fed, how often detainees are force-fed, and the safeguards and oversight in place during force-feedings.

Within the Bureau of Prisons, force-feeding is exceedingly rare. The Intelligence Committee staff has been told that no inmate within the Bureau of Prisons has been force-fed in more than six months. When force-feedings do occur within the Bureau of Prisons, we have been told that nearly 95% of the time they are conducted with a fully compliant inmate requiring no restraints. At Guantanamo Bay, on the other hand, all detainees being force-fed—regardless of their level of cooperation—are placed in chairs where they are forcibly restrained. The visual

impression is one of restraint: of arms, legs, and body. Further, at Guantanamo Bay, detainees are fed twice a day in this manner, potentially over a substantial period of time. This also is inconsistent with the practice of the U.S. Bureau of Prisons.

Additionally, the U.S. federal prison guidelines for force-feedings include several safeguards and oversight mechanisms that are not in place at Guantanamo Bay. These guidelines require the warden to notify a sentencing judge of the involuntary feeding, with background and an explanation of the reasons for involuntary feeding. Further, the Bureau of Prisons requires an individualized assessment of an inmate's situation to guide how force-feedings are administered, a practice that I found largely absent at Guantanamo Bay. Finally, all force-feedings must be videotaped within the Bureau of Prisons.

It's almost as if DiFi knows or suspects there's an OLC memo that – parallel to the ones that found torture to be legal because it vaguely resembled practices elsewhere (as when they noted that members of the military undergo SERE training, so reverse-engineered SERE techniques used in different situations were legal) – finds our force-feeding at Gitmo to be legal because judges have approved the way we force-feed people in federal prisons. In any case, Gitmo officials have said their treatment is similar with BOP treatment.

Between these two letters, she has laid out why that is not the case. Indeed, that's the import of Kessler's language, a federal judge finding the treatment we use in Gitmo to violate our obligations under ICCPR.

Say what you will about DiFi (lord knows I've often said the same, where I thought it

appropriate), but she has just told a President from her own party that he's breaking the law.

JUDGE KESSLER TO PRESIDENT OBAMA: WILL YOU SAVE GITMO DETAINEES FROM “PAINFUL, HUMILIATING, AND DEGRADING” TREATMENT?

In my post describing the emergency suit to stop force-feeding at Gitmo before Ramadan, I suggested it might be unlikely for the DC District Court judges to accept a challenge about prison conditions. That is exactly what happened: Judge Gladys Kessler rejected the request on jurisdictional grounds.

But along the way, she made it clear she doesn't buy government claims that force-feeding people is really the best medical care.

Despite the statements contained in the Declaration submitted by the Government in support of its Opposition to the Application claiming that “[t]he health care provided to the detainees being held at JTF-GTMO rivals that provided in any community in the United States and is comparable to that afforded to our active duty service members. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians,” it is perfectly clear from the statements of detainees, as well as the statements from the organizations just

cited, that force-feeding is a painful, humiliating, and degrading process. [my emphasis]

At which point she made clear who really bears responsibility for this continued treatment.

Even though this Court is obligated to dismiss the Application for lack of jurisdiction, and therefore lacks any authority to rule on Petitioner's request, there is an individual who does have the authority to address the issue. In a speech on May 23, 2013, President Barack Obama stated "Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. . . Is that who we are? Is that something that our founders foresaw? Is that the America we want to leave to our children? Our sense of justice is stronger than that." Text of President Obama's May 23 Speech on National Security (Full Transcript), Wash. Post, May 23, 2013, available at 2013 WLNR 12700673.

Article II, Section 2 of the Constitution provides that "[t]he President shall be the Commander in Chief of the Army and Navy of the United States ... " It would seem to follow, therefore, that the President of the United States, as Commander-in-Chief, has the authority—and power—to directly address the issue of force-feeding of the detainees at Guantanamo Bay. [my emphasis]

Kessler's use of the term "degrading" is particularly notable. Article 16 of the Convention Against Torture reads, in part,

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel,

inhuman or degrading treatment or punishment which do not amount to torture

A federal judge has just determined that force-feeding Gitmo detainees amounts to degrading treatment.

Will the President act to end this degrading treatment, or will he publicly fail to meet our obligations under the Convention Against Torture?

FBI RETIREES WARN AGAINST JIM COMEY, TORTURE, AND INDEFINITE DETENTION

When one of the unions that represent FBI Agents floated a trial balloon supporting Mike Rogers to be FBI Director, it got a lot more press attention than the unlikelihood of their request merited.

Let's see whether this letter – from 5 retired FBI Agents – gets similar press attention. It raises concerns about two parts of Jim Comey's past: his concurrence with a May 10, 2005 memo authorizing (among other things) torture – which I wrote about here – and his support for the indefinite detention of Jose Padilla.

However, the public record also shows that Mr. Comey concurred with a May 10, 2005 Office of Legal Counsel opinion that justified those same enhanced interrogation techniques for use individually. These techniques include cramped confinement, wallstanding, water dousing, extended sleep deprivation, and

waterboarding, all of which constitute torture or cruel, inhuman, or degrading treatment in contravention of domestic and international law. Further, Mr. Comey vigorously defended the Bush administration's decision to hold Jose Padilla, a United States citizen apprehended on U.S. soil, indefinitely without charge or trial for years in a military brig in Charleston, South Carolina.

Among the signatories is Jack Cloonan, a former member of the Osama bin Laden team who watched as CIA started interrupting successful interrogations to subject the detainee to torture instead. I'd be surprised, too, if he didn't know Comey from the Southern District of NY days.

The letter suggests that Comey might not guard the FBI's legacy as nobly as Robert Mueller (!) did.

The FBI, while not a perfect institution, has a proud history of dealing with terrorism suspects in accordance with the law. When other agencies and departments resorted to "enhanced interrogation" techniques, FBI Director Mueller directed FBI agents not to participate and in many cases FBI agents were pulled from the field where there were concerns about complicity with unlawful interrogation approaches. To date, the FBI has played a role in prosecuting within the civilian criminal justice system nearly 500 international terrorism cases—often leading to substantial periods of incarceration—without having to resort to indefinite detention. Even Jose Padilla was ultimately given a trial in a civilian court, despite claims by Mr. Comey that prosecuting Padilla or otherwise affording him traditional due process

protections would compromise national security.

They also tied Comey's confirmation process to the declassification of the Senate Intelligence Committee's torture report.

The Agents ask only that Comey "reject" the May 10, 2005 OLC memo. Me, I'd like the Senate to demand a full explanation for the circumstances of it. The memo was retroactive to cover someone who had already been tortured (though of course probably served to authorize Abu Faraj al-Libi's torture, among others). At the very least the Senate Judiciary Committee could demand that Comey explain the circumstances of that retroactive approval.

GITMO DETAINEES TRY TO FORCE END TO FORCE-FEEDING IN TIME FOR RAMADAN

According to Carol Rosenberg's count, 44 of the 106 Gitmo detainees currently on hunger strike are being tube-fed. Which suggests there are too many men to carry out the tube feeding after sunset and sunset, which is what the camp has done in past years when there were fewer detainees hunger striking during Ramadan.

That is just one of the issues cited in the emergency motion filed by the lawyer for Shaker Amer and three other detainees, Cori Crider, plus John Eisenberg (of al-Haramain fame) to end the practice.

Petitioners have been detained at Guantánamo Bay for up to 11 years. At this point, their detention without

trial or military commission proceedings has become indefinite. To force-feed a noncriminal detainee in order to prolong his indefinite detention violates the law of human rights and thus serves no legitimate penological interest.

Petitioners' force-feeding also violates medical ethics and is inhumane. For that reason, too, it serves no legitimate penological interest. The only theory advanced to justify petitioners' detention is that, more than a decade ago, they were enemy belligerents. Their detention, it is said, is necessary to ward off some putative "return" to the battlefield. They dispute that claim, but even if one accepts it, a noncriminal enemy belligerent is still entitled, under the Geneva Conventions and basic standards of human decency, to be treated honorably and humanely. Being strapped to a chair and having a tube forcibly inserted through one's nostrils and into one's stomach is dishonorable and degrading. It falls within the ambit of torture or other forms of inhumane treatment. In the long history of American detention of the enemy, bodily invasions of this character have never been the routine business of the prisoner of war camp.

The motion has individual descriptions from each of the four detainees explaining why they are striking.

[Nabil] Hadjarab is an Algerian citizen and former French resident. His living relatives are French citizens and have requested that the French government accept him in honor of his family's history of French military service. He was also cleared by the Bush administration ARB in 2007 and by the Obama-era GRTF in 2009.

[snip]

Mr. Hadjarab was among the first prisoners to be force-fed, on March 22, 2013. Crider Decl. Ex. A, at 11. He also finds the process degrading and painful, stating that the feeding chair “ ‘reminds [him] of an execution chair.’ ” Id. at 11. He, too, has sought to raise concerns with medical staff and has been rebuffed.

The big question will be whether the courts accept a challenge on prison conditions.

The judges in these detainees’ habeas cases, Rosemary Collyer and Gladys Kessler, have given the government until Wednesday to respond.

Ramadan starts Monday.

OBAMA’S HEADLONG RUSH TO COUNTERTERRORISM TRANSPARENCY

By my count, Thursday will be the 100th day since Obama promised, in his State of the Union Address delivered February 12, “to engage Congress to ensure not only that our targeting, detention and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world.”

Back then there were, officially at least, just a handful of Gitmo detainees on hunger strike. And it’s possible – if DOJ used the two 45-day gags on subpoenas they permit themselves – a subpoena seizing the phone records for 21 AP

phone lines had already been issued.

After Obama promised more transparency on drones and other counterterrorism programs, Members of Congress continued to have to demand minimal transparency. On February 20, Rand Paul sent his third request for that information. On February 27, House Judiciary Chairman Bob Goodlatte repeated that Committee's request to see OLC's drone targeting memos; he also expressed anger that the Administration had refused to send a witness to the hearing.

On March 7, Eric Holder hinted that we would "will hear from the President in a relatively short period of time" on drones and transparency and counterterrorism. On March 8, guards at Gitmo shot non-lethal bullets at detainees. The following day US conducted a drone strike in Pakistan, one of two strikes that month.

On March 11, Progressive Members of Congress sent a letter asking for information on drone targeting.

On April 9, McClatchy reported that most drone strikes had hit low level militants, contrary to public claims; it also revealed the intelligence reports themselves were false.

On April 10, the House Judiciary Committee finally threatened to subpoena the OLC memos authorizing the killing of an American citizen; that was at least the 23rd request for such information from Congress. A week later the Committee would finally get a promise to see just those memos, memos squarely within the Committee's oversight jurisdiction.

On April 13, the military locked down Gitmo, effectively depriving most detainees of the human company they had enjoyed for years. On that day, 43 men were hunger striking.

On April 14, Samir Haji al Hasan Moqbel described, in a NYT op-ed, "I've been on a hunger strike since Feb. 10 and have lost well over 30 pounds. I will not eat until they restore my dignity." That same day, the

US launched one of two drone strikes in Pakistan that month.

On April 15, the Tsarnaev brothers attacked the Boston Marathon, reportedly in retaliation for treatment of Muslims in Afghanistan and Iraq.

April 17, a US drone struck the Yemeni village of a Yemeni, Farea al-Muslimi, already scheduled to testify before the Senate Judiciary Committee about how drones turn Yemenis against the US.

On April 21, the number of hunger strikes at Gitmo reached 84 – over half the men there. Six days later, on April 27, that number reached 100. Three more men have since joined the hunger strike.

As those numbers were growing, on April 25, Dianne Feinstein called on Obama to transfer those detainees who have been cleared. On April 30, Obama renewed his promise to close Gitmo. The next day, the White House made clear that the moratorium preventing almost half the detainees, men who have been cleared for transfer, to return home to Yemen, remained in place.

On May 10, the AP learned that DOJ had seized phone records from 21 phone lines with no notice, potentially exposing the sources of up to 100 journalists.

On May 16, in a hearing querying whether Congress should eliminate or expand the September 18, 2001 Authorization to Use Military Force, Assistant Defense Secretary Michael Sheehan testified the war on terror would last at least 10-20 more years. He also said DOD won't be taking over CIA's side of the drone war anytime soon.

Saturday, a drone strike killed at least 4 thus far unidentified men in Yemen.

Which brings us to Thursday when, the WaPo details, Obama will give a speech telling us once again the drone strikes are legal, his desire to close Gitmo is real, and leaks his new

CIA Director exacerbated are serious. He will, apparently, also tell us how he plans to make his counterterrorism plan look more like what he promised it would look like 4 years ago.

President Obama will deliver a speech Thursday at the National Defense University in which he will address how he intends to bring his counterterrorism policies, including the drone program and the military prison at Guantanamo Bay, Cuba, in line with the legal framework he promised after taking office.

In the interim between when he promised this transparency and when he'll start to sort of deliver it (but not, apparently, any actions to close Gitmo), about 7% of his second term will have passed.

Some of the delay, apparently, comes from the need to address the issues that have been festering during the delay.

Obama was prepared to deliver the speech earlier this month, but it was put off amid mounting concerns over a prisoner hunger strike at Guantanamo Bay and more recently the Justice Department leaks investigation – both of which the revised speech may address.

But otherwise, it appears it has taken 100 days to be able to craft a speech good enough to make his paranoia about secrecy and lip service to human rights in counterterrorism look like something else.

Ah well, at least they've sharply curtailed drone strikes while they've been writing a speech.

HILLARY SAID APPOINT A GITMO CHAMPION; THE OPPOSITE HAPPENED

There's a weird detail in this Daniel Klaidman piece on Obama's claimed newfound commitment to closing Gitmo.

One of the new details in it describes a memo Hillary Clinton wrote just before she left the State Department.

One recent plea, two sources told Newsweek, came from Hillary Clinton, who, just before she left office in January 2013, sent a two-page confidential memo to Obama about Guantánamo.

[snip]

Now, in one of her last moves as secretary of State, she was making a final effort to prod her boss to do more. Her memo was replete with practical suggestions for moving ahead on Gitmo. Chief among them: Obama needed to appoint a high-level official to be in charge of the effort, someone who had clout and proximity to the Oval Office. Further, Clinton argued that Obama could start transferring the 86 detainees who'd already been cleared for release. (Congress has imposed onerous restrictions on the administration's ability to transfer Gitmo detainees—including a stipulation that the secretary of Defense certify that detainees sent to other countries would not engage in acts of terrorism. In her memo, Clinton pointed out that the administration could use "national-security waivers" to circumvent the restriction.)

The Clinton missive perturbed White House aides, who viewed it as an attempt to put them on the spot, according to a senior administration official. It's unclear how Obama himself reacted to the memo; there's no evidence that it spurred him to action.

I thought to myself as I read this, "but Clinton's departure is precisely when the Administration moved backwards on this front, by reassigning Daniel Fried, who had been in charge of resettling detainees." Fried's reassignment was reported January 29. That was technically while Hillary was still at State – Kerry took over on February 1.

Still, whoever transferred Fried, she must have written that memo (which pissed off Obama's minders) at almost precisely the moment State eliminated the person most focused on working towards Gitmo closure.

Klaidman doesn't entirely ignore this detail. Six paragraphs later he mentions the transfer.

For much of the past few years, without any signal that Obama was going to fight on Gitmo, the policy drifted. Daniel Fried, the veteran State Department official in charge of resettling detainees, was transferred to a different position.

Still, there must be a story explaining why Fried got transferred at precisely the moment Hillary, technically still his boss, was calling to redouble the effort to close Gitmo.

WHAT ARE THE SECRETS

THAT WILL REMAIN HIDDEN IN BENGHAZI?

Things are becoming clearer day by day in Libya. groups and brigades are polarizing along Islamist-jihadist-secular lines

US drones are not only hovering all the time over eastern Libya, they also bombed a training camp run by Abdulbasit Azuz, a commander from Derna.

Yes, you heard that right, US drones are bombing Libya already

The above June 8, 2012 quote, apparently from a extremist discussion board, is among the materials (see PDF 119) the State Department used to investigate the Benghazi attack (Darrell Issa released them after last year's Benghazi hearing). While the screen cap of the discussion entry comes with no explanation, it appears to show someone at State was tracking the rise of extremists in real time, particularly the day after an earlier IED attack on the US mission in Benghazi claimed by the Imprisoned Sheikh Omar Abdul-Rahman Brigades (see PDF 110 for State's description of that).

But it wouldn't take reading Jihadist sites to understand what they were saying the summer before the September 11 attack on Benghazi. CNN's June 7 coverage of the attack on the mission included many of the same details.

A senior Libyan official told CNN that the U.S. is flying surveillance missions with drones over suspected jihadist training camps in eastern Libya because of concerns over rising activity by al Qaeda and like-minded groups in the region but said that to the best of his knowledge, they had not been used to fire missiles at militant training camps in the area.

The revelation follows a failed attack on the U.S. Mission in Benghazi on Tuesday night, which a shadowy jihadist group claimed was to avenge the death of al Qaeda No. 2 Abu Yahya al-Libi.

The official said that one militant commander operating in Derna, Abdulbasit Azuz, had complained that a drone strike had targeted his training camp in the east of Libya. Last month, there were reports of explosions outside the Derna area in the vicinity of the camps, according to a different source.

[snip]

The senior Libyan official said it would be bad if such a strike had occurred. He added that the Americans' use of drones in a surveillance capacity had been discussed at the top level of the transitional Libyan government.

As CNN has reported, Azuz is a senior al Qaeda operative and longtime close associate of the group's leader, Ayman al-Zawahiri, who was dispatched to Libya from the tribal areas of Pakistan in spring 2011, according to several sources. There, he subsequently recruited fighters.

[snip]

The jihadist group that claimed responsibility for the failed attack on the U.S. Mission in leaflets left at the scene called itself the Imprisoned Omar Abdul Rahman Brigades. It promised more attacks against American interests.

It was first heard from late last month, when it claimed responsibility for an attack on a Red Cross office in Benghazi. A purported video of the attack was apparently posted on jihadist websites that regularly feature statements by al Qaeda. The video showed

several rockets being fired into a building at night.

While CNN doesn't make an explicit connection between the bombing of the Benghazi mission and US surveillance (and claimed drone attack) in Derna, the implication is they're related, particularly as they track Libyans with ties to core al Qaeda (CNN also discusses former Gitmo detainee Sufian bin Qumu's presence in Derna) responding to the drone killing in Pakistan of Abu Yahya al-Libi on June 5.

So on June 5 we killed Abu Yahya in Pakistan, on June 6 an unknown militia attacks the compound in Benghazi in retaliation and promises more attacks, on June 7 discussions of the attack tie back to claims we launched a drone strike in Derna.

On September 10, 2012, the day before the Benghazi attack, Ayman al Zawahiri, who had sent Azuz to Derna to set up an al Qaeda presence the year before, confirmed the death of Abu Yahya.

I lay all this out because, even as State and CIA continue to bicker over who is responsible for the bureaucratic failures that led to Ambassador Stevens' death in Benghazi, there seems to be larger underlying issues that remain unspoken.

That's a claim made explicitly in the ebook by two former Special Operations fighters that purports to present the "Definitive Report" on Benghazi (and described here). The book has its limitations: it presents a very CIA-friendly view (in part because it's written to champion the two CIA contractors who were killed in the attack), and as such obscures many of the actions and inactions from militia and contractors leading up to the attack.

It suggests the attack on Benghazi was largely blowback from JSOC operations run out of the White House.

Meanwhile, JSOC counterterrorism

operations began sometime in mid-summer 2012, when the organization started putting “boots on the ground” inside Libya.

[snip]

The nature of these operations remains highly classified. They were never intended to be known to anyone outside a very small circle in the Special Operations community and within Obama’s National Security Council. Ambassador Stevens, the CIA Chief of Station in Tripoli, and then-Director, General Petraeus, had little if any knowledge of these JSOC missions.

The book goes onto blame John Brennan, by name, for not alerting CIA and State within Libya to what JSOC was doing (the ebook was released the week Brennan’s confirmation process started, though was not mentioned explicitly in open hearing).

Kept in the dark about these compartmentalized JSOC operations the CIA was caught off-guard by the Ansar al-Sharia retaliation. They had no idea that Special Operations missions would be kicking the hornets’ nest in Libya and therefore could not prepare for the fallout that would result.

[snip]

Because John Brennan is running his own private war, he is not going through the normal chain of command, and operations are not deconflicted. Ambassador Stevens, for example, was not read into the JSOC operations in Libya. Likewise, the CIA never knew what hit them.

[snip]

Ambitious bureaucrats like John Brennan need to be reined in or fired if these operations are to be successful, or we

will see plenty more Benghaziis happen.

It also speculates in suggestive fashion about Bin Qumu.

Given that Bin Qumu was released from Gitmo before taking control of Ansar al-Sharia, one must ask whether or not American intelligence services had “flipped” him while he was held in duress while at the Guantanamo Bay prison facility. Is the Libyan terrorist a double, or even triple agent?

There are a number of reasons that I won’t go into why I think the suggestion that Bin Qumu had been flipped is not at all far-fetched (here’s an earlier post I did on Bin Qumu).

But as to whether it’s credible to claim CIA was not read into operations that were pissing off militias in eastern Libya, remember the claim David Petraeus’ mistress, Paula Broadwell, made in a speech attempting to defend his role in Benghazi, two weeks before he resigned in disgrace.

Now, I don’t know if a lot of you heard this, but the CIA annex had actually, um, had taken a couple of Libyan militia members prisoner and they think that the attack on the consulate was an effort to try to get these prisoners back. So that’s still being vetted.

The challenging thing for General Petraeus is that in his new position, he’s not allowed to communicate with the press. So he’s known all of this – they had correspondence with the CIA station chief in, in Libya. Within 24 hours they kind of knew what was happening.

[snip]

As a former intel officer it’s frustrating to me because it reveals our sources and methods. I don’t think the

public necessarily needs to know all of that.

See also this post, which maps how Fox's reporting on the same subject changed over time, but also considers how the reported presence of prisoners at the CIA mission affected militias' willingness to help defend the State and CIA compounds. Fox suggests that CIA's hand-picked militia, February 17 brigade, used the attack to free captives, rather than defend Americans. (Remember, too, that Ambassador Stevens was taken to a hospital guarded by Ansar al-Sharia; how he was located and his body reclaimed is one of the vaguest parts of any of the accounts of the attack.)

As to Broadwell's blabbing about detainees at the CIA annex in Benghazi, as recently as April 10, Petraeus was being interviewed by the FBI about whether he shared classified information with Broadwell.

Now, as a threshold matter, note the language Broadwell used. She didn't say CIA was holding two militia figures. She said the CIA annex had taken them prisoner.

CIA's response to Broadwell's blabbing was to issue the same kind of non-denial denial they issued after Jeremy Scahill revealed CIA surrogates were operating a prison for the Agency in Somalia.

The CIA has not had detention authority since January 2009, when Executive Order 13491 was issued. Any suggestion that the Agency is still in the detention business is uninformed and baseless.

See also this tweet, repeating CIA's denial that the Agency itself was holding prisoners.

Now, in her comments, Broadwell seems to suggest Petraeus learned about detainees in Benghazi within 24 hours of the attack.

But just days after she would blab about the

trip and just days before he resigned in disgrace, Petraeus took his own fact-finding trip to Libya, even as Deputy CIA Director Mike Morrell was in Langley spinning out CIA's defense. Yet, in spite of the fact that Petraeus took the trip ostensibly to prepare for Congressional testimony, the intelligence committees had trouble getting a copy of his trip report, and Petraeus tried to back out of testifying about the trip personally. Not only does this feel like a concerted effort to withhold what he learned from Congress, but if the CIA Station Chief told Petraeus something significantly different in person in October from what he told him via cable on September 12, I can see why Petraeus might use his resignation as an excuse not to tell Congress.

I'm wondering, too, whether this relates to Mac Thornberry's attempt to assure everyone there's sufficient oversight over JSOC kill-or-capture missions; if Brennan kept JSOC ops in Libya that blew up on us too closely held, Thornberry would likely have been one of the few to have been read into them. Remember that the government keeps refusing to tell Ron Wyden all the countries where we've been running targeted killing missions.

And remember, too, that Petraeus' first reaction to Benghazi was to ask for more drones, a request that John Brennan approved.

Now, I don't know whether Petraeus' behavior makes the claim that he and the Station Chief weren't read into what was going on in eastern Libya more or less likely.

But Petraeus' role in this has always been creepy, from when he refused to attend the memorial services for the CIA contractors killed in the attack to when he ostentatiously attended the Argo premiere the night of Darrell Issa's first hearing on Benghazi. And it is clear that Petraeus' efforts to spin his own role, and that of CIA, in this really pissed off the rest of the National Security establishment.

Given that Petraeus appears to be willing to reopen this issue, we might one day find out the underlying explanation for Benghazi.

HAROLD KOH RELITIGATES THE ARGUMENT HE ALREADY LOST

The NYT thinks the takeaway “news” of Harold Koh’s speech on Forever War is his call for more transparency on drone killing. Yet that Koh supports more transparency on drones is not news. Daniel Klaidman has been reporting that since January 2012.

What’s newsworthy about this call for transparency, though, is how shrill it is.

But since then, to be candid, this Administration has not done enough to be transparent about legal standards and the decisionmaking process that it has been applying. It had not been sufficiently transparent to the media, to Congress, and to our allies. Because the Administration has been so opaque, a left-right coalition running from Code Pink to Rand Paul has now spoken out against the drone program, fostering a growing perception that the program is not lawful and necessary, but illegal, unnecessary and out of control. The Administration must take responsibility for this failure, because its persistent and counterproductive lack of transparency has led to the release of necessary pieces of its public legal defense too little and too late.

As a result, the public has increasingly

lost track of the real issue, which is not drone *technology per se*, but the need for transparent, agreed upon domestic and international legal process and standards.

Perhaps this shrillness is why Koh ends the speech with a grandiose invocation of our “better angels.”

Because I am an American who loves his country, I have served it for ten years of my professional career. My former professor and former Legal Adviser Abram Chayes once said, after he had sued the United States government from the academy, “I have always thought there is nothing wrong with an American lawyer holding the United States to its own best standards.” It is in that spirit that tonight, from this important podium, I call my country to its own best values and principles. As President Lincoln famously said, there is still time—indeed, it is high time— for Americans once again to answer to the “better angels” of our national nature.

Though it should be noted that Attorney Abe Lincoln appealed for us to answer to our better angels at the beginning of his service in the Executive Branch, not after he had left that position of influence (something John Wilkes Booth prevented in any case). Why is Harold Koh saying this now?

After all, this battle, the battles for transparency, for “discipline” in the drone program, and for closing Gitmo, are all battles he fought and lost while he was still in government.

It’s how Koh relitigates the last of those battles, closing Gitmo, I find most interesting. He calls for the appointment of a Greg Craig type to implement the plan Craig tried to

implement himself in the first year of the Obama Administration.

First, and foremost, he must appoint a senior White House official with the clout and commitment to actually make Guantanamo closure happen. There has not been such a person at the White House since Greg Craig left as White House Counsel in early 2010. There must be someone close to the President, with a broad enough mandate and directly answerable to him, who wakes up each morning thinking about how to shrink the Guantanamo population and close the camp.

Second, this White House Envoy need not develop a new paradigm for closing Guantanamo. He or she merely needs to implement the National Archives framework that the President announced three years ago. The White House Envoy should lead the Administration's efforts to implement the three-part framework for closure of the Guantanamo detention facility specified in the President's 2010 speech at the National Archives. That speech described a framework for how this closure could happen: through diplomatic transfers of those individuals who could be safely transferred, prosecution of those who can be tried before civilian courts when possible and military commissions where that is the only option, and third, by commencing the long-overdue legally mandated periodic review of so-called Law of War Detainees to see if any can be released, because of changes either in their attitude or in the conditions of the country to which they could be transferred.

Now, I'm all in favor of closing Gitmo and this might be one way to do it. Koh actually improves on the prior plan by admitting the indefinite

detainees will have to be released as the war is over, which is legally correct but misapprehends why they're not being released and why we have to have a Forever War to justify keeping them silent and imprisoned forever.

But Koh's map for closing Gitmo also misrepresents why appointing Greg Craig himself to carry out the Gitmo task didn't work. As I traced in real time (see, here, here, and here), to get Obama's ear, Craig had to fight through Rahm Emanuel. And Rahm preferred to sell out Obama's human rights promises in exchange for an eventually failed attempt to appease Lindsey Graham. Rahm won that fight. After Rahm won that battle, he scapegoated Craig. Ultimately, when asked why he left, Craig pointed to Rahm.

It wasn't enough to appoint Greg Craig. Closing Gitmo either required appointing someone with the bureaucratic chops to beat Rahm or someone like him in battle, or someone whom Obama actually entrusts such a battle with. And Holder's fate – where Obama continues to have trust in him even while he ultimately reversed his decision to try Khalid Sheikh Mohammed in NYC – shows that's not enough. Heck, Koh stayed on for almost four years, but even battles he presumably thought he had won, like drone rules, he now appears to have lost. Ultimately, then, it's going to take a really shrewd fighter or ... it's going to take the President wanting to invest political capital in these things more than he did three years ago.

Sure, things may be different now, as 100 detainees continue their months-long hunger strike, as Obama starts thinking more and more about his legacy. Maybe Koh's shrill words will resonate (though I suspect he used equally shrill language in arguments in the Situation Room, and that seems not to have worked).

So it's all a nice sentiment, and it's useful to remind people there was once a plan, and I'm sure delivering this speech makes Koh feel

better about having apparently sacrificed his values in sanctioning drone killing that – he all but admits here – lacks the discipline to make it legal or at least defensible.

But ultimately, we would do well to remember that these are all battles Koh already lost. And unless we can change the underlying reasons Koh lost them, invoking our better angels will not be enough to accomplish these goals.