

JOSE RODRIGUEZ BRIEFED PELOSI AND GOSS IN DECEPTIVE ABU ZUBAYDAH BRIEFING

As MadDog noted, Judicial Watch just got some new documents detailing briefings Congress received. Or rather, they got new documents providing further proof that CIA has no fucking clue what it said to Congress during some key briefings (this batch shows, for example, that the fall 2003 briefings were never finalized into a Memo for the Record, just as earlier ones weren't, and PDF 48 shows that many key briefings weren't recorded).

But in what I've reviewed so far, the new documents reveal one important new detail. Page 44 of this PDF provides a mostly redacted record of the briefing CIA gave Porter Goss and Nancy Pelosi on Abu Zubaydah's torture on September 4, 2002. We know—because both Goss and Pelosi have described this detail the same way—that CIA did not tell the House Intelligence leadership that it had already tortured Abu Zubaydah. CIA told Goss and Pelosi about waterboarding, but spoke of it as a technique that might hypothetically be used in the future, not something that had been used 83 times on one detainee the prior month.

But we haven't known **who** gave that badly deceptive briefing. Mind you, I had my suspicions. I thought it likely that Jose Rodriguez, then head of Counterterrorism Center, and the guy who ordered the torture tapes destroyed three years later, was a likely candidate to have done that briefing. But there was no proof.

Until today.

Assuming CIA's own documentation is accurate (always a big assumption, given the CIA), then Jose Rodriguez—listed as D/CTC—is the one who

gave Goss and Pelosi that deceptive briefing.

Jose Rodriguez went on to participate in destroying evidence of torture that should have been briefed to Congress. And these documents prove (again, presuming CIA's documents are accurate) that Jose Rodriguez was deceiving Congress about torture right from the start.

ABU ZUBAYDAH'S HABEAS DOODLE

I want to make one more point about the interview Jason Leopold did with Jon Kiriakou last week. Jason asks Kiriakou about Dan Coleman's judgment that Abu Zubaydah's diaries reveal him to be mentally ill. Kiriakou agrees with Coleman that the diaries were written in multiple voices, but dismisses that by saying they were a creative outlet. (my transcription, starting around 24:00)

Those weren't diaries. ... They were journals and doodle books. He would write these letters to himself. They weren't **really** letters to himself. It was like a work of fiction. It was just something to relieve some stress and to be creative. Now if you read this as a diary, sure you're gonna say the guy's schizophrenic, he has split personalities, he's writing letters to himself. But they weren't diaries.

[Jason asks whether Suskind's description of the diary having three different voices is correct]

No, completely true. They were written, like I say, to himself, each personality to the other. But it was a creative outlet. It wasn't, they weren't the ramblings of a lunatic. It wasn't some

insane guy that couldn't control insane voices in his head and had to get it all down on paper. It was a creative outlet, nothing more.

For someone critical of the CIA's waterboarding but still needing to rationalize his treatment, the claim the diaries are fictional offers a nice explanation for what—Kiriakou confirms—are multiple voices in the diary.

But that introduces a problem. As the government stated repeatedly in a filing last year, they base most of their case for holding Abu Zubaydah on his diaries.

The Government filed a factual return and supporting material in this case on April 3, 2009. The Government's factual return included six volumes of diaries written by [Zubaydah] before his capture, in which [Zubaydah] recounts detailed information about his activities and plans. It also included a propaganda video recorded by Petitioner before his capture in which Petitioner appears on camera expressing his solidarity with Usama Bin Ladin and al-Qaida. The factual return does not rely on any statements made by Petitioner after his capture.

[snip]

Additional searches also would not be likely to produce significant additional information that would demonstrate that Petitioner's detention is unlawful, especially given that a large part of the Government's case for detaining Petitioner is drawn from diaries and a propaganda video that [redacted].

[snip]

The Government has satisfied the terms of CMO § I.E. 1(2) by providing Petitioner's counsel with copies of all

statements by the Petitioner that the Government relies on to justify detention: specifically, a propaganda video and certified English translations of six volumes of diaries recorded by [Zubaydah] before his capture.

[snip]

Respondent acknowledged in the factual return that [Zubaydah] diaries indicate that he suffered cognitive impairment from a shrapnel injury for a number of years. Factual Return ~ 23. Respondent has also searched for information materially undermining the reliability of the diary as required by CMO § LD.1, including any information that suggests that the passages relied upon by the Government did not recount true events, were not written by Petitioner before his capture as described in the factual return, or had a meaning other than the meaning accorded to them in the factual return.

If the diaries are meant to be transparently truthful, then then multiple voices suggest some mental instability on Abu Zubaydah's part. But if they're meant to be fiction, then the details the government has now cited as factual themselves must be treated as fiction.

And one of the few Americans to spend significant amounts of time with Abu Zubaydah before he was tortured has now stated, on the record, that he believes the diaries—or rather, doodles—are fictional.

A pity for Kiriakou. Elsewhere in the video he complains about being called to testify in the Scooter Libby case. I'm guessing, after this exchange, he's going to be asked to testify in Abu Zubaydah's habeas hearings in the very near future.

THE ABU ZUBAYDAH DOCUMENT

One of the most curious documents turned over in last week's FOIA dump is the last one, titled "The CIA Interrogation of Abu Zubaydah" (PDF 110-122). While these are just wildarsed guesses, I suspect it may either have been a summary developed for the CIA Inspector General's office for use in its review of the torture program or a summary to prepare Stan Moskowitz, then head of CIA's Office of Congressional Affairs, to brief the Gang of Four in early February 2003.

The Timing

This document must have been written between January 9 and January 28, 2003. On PDF 117, the document describes CIA's Office of General Counsel completing its review of the torture tapes; that report was finalized on January 9. The same page describes the "Guidelines on Interrogation Standards," which was ultimately signed by George Tenet on January 28, as not yet having been approved. The document makes no mention of the Inspector General's plan to review the torture tapes impacting the decision on destroying the torture tapes, that decision was initiated in early February. It also refers to the need to brief Congress on the torture tapes in the future.

The Structure

The document includes a long Top Secret section, followed by a short summary of the document classified Secret. That suggests that the audience of this document might in turn have its own audience with which it could use the Secret summary. So, for example, if the IG were the audience, it might be permitted to use the summary description in its final report. If Gang of Four members were the audience, they might be

permitted to keep the Secret summary but not to see the Top Secret report.

The Top Secret section of the document has the following sections (each section has its own classification mark, which shows in the margin, which is how we know where redacted titles appear):

- Abu Zubaydah: Terrorist Activities
- Injuries at Time of Capture
- Highlights from Reporting by Abu Zubaydah
- [Completely redacted section]
- Interrogation Techniques Used on Abu Zubaydah
- [Redacted title and page and a half, though this section includes discussion of videotapes and training, which suggests the section describes the management controls on the torture]
- [Completely redacted section]

The Hand-Written Notes

Curiously, this document showed up in the January 8, 2010 Vaughn Index but not—as best as I can tell—in the November 20, 2009 Vaughn Index (or, if it showed up in the earlier Index, John Durham had not yet protected it under a law enforcement privilege). That means that the document existed as an electronic document. Yet, as the Vaughn Index tells us, this document has “handwritten marginalia” on it. These are presumably what the redactions are to the right of the main text on PDF 111 and 112. The redactions on PDF 113 are also wider than other sections, suggesting there is marginalia there,

too.

In other words, the reader of this document made notes in response to the following claims (in addition to whatever appears in the long redacted section on PDF 113):

- [AZ] was heavily involved in al Qa'ida's operational planning, and had previously been an external liaison and logistics coordinator.
- Abu Zubaydah was provided adequate and appropriate medical care.
- Abu Zubaydah identified Jose Padilla and Binyam Muhammad as al-Qa'ida operatives who had plans to detonate a uranium-topped "dirty bomb" in either Washington DC, or New York City.

The first and third of these claims, of course, are somewhat dubious (though the first is more restrained than the CIA was publicly making at the time). So the reader may have been questioning these claims. And the notation next to the claim about AZ's "adequate" medical care reminds me of the Ron Suskind report that George Bush got enraged when he learned AZ had been given pain killers. In any case, these notations suggest the reader of this document may have had a very high level of information on AZ.

The Contents

Here are notable contents, by section:

Abu Zubaydah: Terrorist Activities

As I said above, the claims made in this section are more restrained than the CIA was making publicly in January 2003. Rather than call AZ the number 3 guy in al Qaeda, it calls him a

lieutenant of Osama bin Laden (a claim that is still incorrect, however). The description of AZ as "an external liaison and logistics coordinator," however, is a much more accurate description of AZ's true role than CIA has traditionally given.

Injuries at Time of Capture

The report describes two bullet wounds: one, in his leg. The description of the second is redacted (but I believe this was a gut wound, though it might refer to him losing a testicle, which AZ described in his CSRT). There is a separate bullet point describing another physical issue; I wonder whether this is a description of the lingering effects of his 1992 head wound?

Highlights from Reporting by Abu Zubaydah

There are seven bullet points of information here. Perhaps most telling is the admission that "Over time, he had become more willing to cooperate on many issues." You'd think someone might have questioned whether AZ's cooperation increased as he got further from his torture?

First redacted section

This section would be the logical sequitur between AZ's past interrogation and the techniques used to interrogate him. I wonder whether they discussed either inaccuracies in his information, or described the things he had not yet revealed (such as the location of Osama bin Laden) that they thought he knew? Alternately, it might describe what they had planned for his interrogation going forward.

Interrogation Techniques Used on Abu Zubaydah

By far the most interesting detail in this section is the redaction in the section on which torture techniques they've used on Abu Zubaydah:

The Agency sought and received Department of Justice approval for the following [redacted] enhanced techniques. [Four and a half lines

redacted] the waterboard.

What **should** lie behind those redactions are the word “ten” and the names of the techniques approved in the Bybee Two memo. The fact that the passage is redacted must mean that that’s not what this passage says—which suggests that this document claimed DOJ had approved techniques they had not actually approved (or, that DOJ approved techniques verbally that were not ultimately approved in the Bybee Two memo). Given that we know this document is one John Durham considered important to his investigation, it may support the notion that some things shown on the videos—perhaps things like mock burial—were one of the things CIA was trying to hide by destroying them.

Also, as I noted earlier, this passage suggests how AZ’s sleep deprivation got out of control in the early days. But it doesn’t admit how long they did use sleep deprivation with him.

This section makes the ludicrous claim that AZ “is the author of a seminal al Qaida manual on resistance to interrogation methods,” presumably referring to the Manchester Manual. (Though AZ would describe “the Encyclopedia” in interrogations in June 2003.)

I find this description of James Mitchell and Bruce Jessen laughable:

Agency employees engaged in the interrogation are complemented by expert personnel who possess extensive experience, gained within the Department of Defense, on the psychological and physical methods of interrogation (SERE) and the resistance techniques employed as countermeasures to such interrogation. These expert medical personnel were present throughout the interrogations.

I find it curious that this passage makes no mention that Mitchell and Jessen developed the

torture program, nor that they were contractors. And I'm amused that they are described as "medical" personnel, as if they had any concerns for AZ's medical condition.

I find it really telling that this passage boasts of having done medical examinations before and during the torture, but not psychological evaluations before and after.

Medical evaluations were conducted on Abu Zubaydah before and during the interrogations. In addition, a psychological profile was conducted on him before the interrogation began.

You'd think someone at CIA would order up a psychological evaluation after all this torture, huh? But what this passage seems designed to do, instead, is spin the medical monitoring that was part of the experimental side of AZ's torture as good medical care (which is also what the description of Mitchell and Jessen as "medical personnel" seems designed to do).

Which may be what the following section is designed to do, too:

It is not and has never been the Agency's intent to permit Abu Zubaydah to die in the course of interrogation and appropriately trained medical personnel have been on-site in the event an emergency medical situation arises.

Let's unpack this. First, the denial that the Agency ever intended to let AZ die suggests perhaps the denial itself is untrue. I'm curious why this passage describes these personnel as "appropriately trained medical personnel" and not something like "doctor," "nurse," or "medic"? Is it a way to try to explain away the presence of people collecting medical research information, to suggest that they had to have that kind of training? And the reference to "an emergency medical situation," when we know that they had real concerns about AZ's injuries and

were closely tracking whether torture caused severe pain, is just cynical. The whole passage is one of the creepiest in the entire document!

This section describes the terms of approval for torture from DOJ. But it never once mentions the Bybee memos (perhaps because it might lead someone to discover that the ten techniques in the Bybee Two memo don't match the techniques listed in this section)?

Finally, look at how underwhelming this claim about the effectiveness of torture is:

The use of enhanced interrogation techniques proved productive; Abu Zubaydah provided additional useful information.

It's telling, too, that they make this claim in an entirely different section from where they boast of all the good intelligence AZ provided. They chose not to tie the specific pieces of intelligence he gave to the techniques use.

Redacted title—probably on management controls on interrogation

As I said, the title of the section that includes the videotapes and training is redacted, along with three primary and two secondary bullet points (which span a page and a half) before the videotape section, and two more after the training section (which take up another half page). I'm wondering if this redacted section talks about the reporting from the Field to HQ?

The section on videotapes makes a claim that—from what we see of the McPherson interview report—appears to be false.

The attorney concluded that the cable traffic did in fact accurately describe the interrogation methods employed and that the methods conformed to the applicable legal and policy guidance.

At the time of his interview, it appears that McPherson said he'd have to review the guidance again before he could say whether the torture portrayed in the videotapes matched the guidance (which, the IG team concluded, it did not). And here's how this document describes the state of the discussion on destroying the torture tapes.

After his review, the General Counsel advised the DCI that OGC had no objection to the destruction of the videotapes, but strongly recommended that the new leadership of the committees first be notified about the existence of the tapes and the reasons why the Agency has decided to destroy them.

Boy, I guess Jane Harman really screwed up their plans when she objected, in writing, to the destruction of the tapes? This passage is one of the things that makes me wonder whether this document wasn't written to fill in Stan Moskowitz before he briefed Congress; though I'm inclined to think CIA wouldn't give the Gang of Four this much information, even though it is very deceptive in parts.

The Summary

The Secret Summary section covers the following four areas:

- AZ's nationality
- His role in AQ (again using the "external liaison and logistics coordinator" language)
- The intelligence he gave
- His physical condition

Of note, the intelligence section includes this language, which is either redacted or not present in the Top Secret description of the intelligence he gave.

[AZ] has provided information on Al
Qa'ida's CBRN program and on individuals
associated with that program.

Also compare how the Top Secret report refers to
AZ's intelligence on Padilla and Binyam Mohamed...

Abu Zubaydah identified Jose Padilla and
Binyam Muhammad as al-Qa'ida operatives
who had plans to detonate a uranium-
topped "dirty bomb" in either
Washington, DC, or New York City. Both
have been captured.

...to how the Secret summary refers to it:

Information from AZ was instrumental in
the capture near Chicago of Jose
Padilla, a "dirty bomb" plotter,
explosives expert, and terrorist trainer
at Qandahar.

Other Details

I'm interested, then, in what this says about
Durham's investigation. Obviously, it provides a
great snapshot of what CIA claimed it believed
at the time it first planned to destroy the
torture tapes. It may show CIA claiming it had
approval for torture techniques it did not have
approval for. Oddly, the document doesn't appear
to explain why the tapes were first made—it
appears that the first mention of them comes in
the description of McPherson's review.

This document has three sets of Bates stamps on
it: the five-number series, the six-number
series, and the IG series from 2007. So it has
been reviewed several times in a legal context.

ABU ZUBAYDAH MAY HAVE BEEN WATERBOARDED MORE THAN 83 TIMES

MadDog and I just realized something that should have been apparent since August. He and I have been looking at the passage of yesterday's document dump that refers to CIA keeping OLC informed of how many times waterboarding was used.

First, and most obvious, Jay Bybee's 1 Aug 2002 memo to John Rizzo stated, in part, "Moreover, you have also orally informed us that although some of these techniques may be used with more than once, that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions." (p. 2) and again, "You have indicated that these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition." (p. 11). The OIG review determined that Abu Zubaydah was subjected to [redacted 2 characters?] waterboard sessions, consisting of **at least** 83 separate exposures [redacted sentence] assured us that he gave regular updates to DoJ (i.e. John Yoo [redacted 2-3 words] at OLC) during this time frame, and DoJ was aware of the real numbers, but we were never able to verify this with DoJ, as INV management at the time elected not to interview witnesses outside the building. **In addition to the disparity in numbers, the method of water application as recorded on the tapes was at odds with the Bybee opinion...** [MadDog's transcription and emphasis]

Now, here's what the IG Report itself said about how they came up with that number, 83. (It's worth actually looking at this passage—on PDF 41-42; this entire discussion appears in one paragraph in the "Videotapes on Interrogations" section.)

OIG reviewed the videotapes, logs, and cables [redacted] in May 2003. OIG identified 83 waterboard applications most of which lasted less than 10 seconds.

[4-5 lines redacted]

OIG found 11 interrogation tapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to logs and cables and identified a 21-hour period of time which included two waterboard sessions that was not captured on the videotapes.

That is, they got the number 83 from not just the videotapes, but also the logs and cables. That's because the IG **couldn't** have gotten the total number of waterboard applications from the videos. As the IG Report makes clear in the same paragraph that first mentions the number 83, two entire sessions of waterboarding should have appeared on the tapes that were taped over or otherwise damaged.

Remember the context of this. CIA's Office of General Counsel had, in November-December 2002, reviewed the tapes, purportedly to make sure they matched the guidance the interrogators had gotten from Langley and the cables they sent reporting on the interrogation. Yet, as the IG team had discovered during their investigation, the lawyer who conducted that review (according to the WaPo, John McPherson) hadn't actually compared the guidance to what appeared in the videos. When the IG did a review themselves in May 2003, they discovered that the waterboarding

in the video did not match the guidance. Perhaps that's the only reason the IG Report seems skeptical about the self-reported number that appeared in the log and cables describing the two sessions not videotaped. Or perhaps the IG review of the videotapes had discovered a discrepancy between the numbers shown in the videos and those reported up the chain of command (which might be what the discussion in the four redacted lines is).

The bigger story remains that Abu Zubaydah's torturers appear to have taped over or otherwise destroyed video of two of their waterboarding sessions. But one of the things that obscures about AZ's treatment is the number of times he was actually waterboarded.

HOW ABU ZUBAYDAH'S SLEEP DEPRIVATION GOT OUT OF CONTROL

The latest CIA document dump also provides more background on how Abu Zubaydah got subjected to extended sleep deprivation long before it was approved. PDF page 113-114 explains:

After consulting with the NSC and DOJ, CTC[redacted] originally approved 24-48 hours of sleep deprivation.

In April 2002 CTC[redacted] learned that due to a misunderstanding, that time frame had been exceeded.

However, CTC[redacted] advised that since the process did not have adverse medical effects or result in hallucinations (thereby disrupting profoundly Abu Zubaydah's senses or personality) it was within legal parameters.

There a number of important points about this.

First, note the timing: April. When AZ was still recovering from bullet wounds and surgery.

This was also the same time period when (oops!) Binyam Mohamed was being subjected to extended sleep deprivation, presumably pursuant to the same kind of “misunderstanding.”

But also note the language. The “profoundly disrupt the senses or personality” is the language on severe mental suffering that John Yoo gave John Rizzo on July 13, 2002, which Jonathan Fredman sent to the torturers as their guideline on torture. It seems likely, then, that this (oops!) sleep deprivation was the “incident” that CIA was so concerned about as they were writing the Bybee Memos.

THE GOVERNMENT MAKES NO CLAIM ABU ZUBAYDAH HAD KNOWLEDGE OF IMPENDING TERRORIST PLANS

There’s one more really incendiary passage from the government’s response to Abu Zubaydah’s request for more information in his *habeas* petition (see [here](#), [here](#), and [here](#) for more on this document). In response to a request for evidence indicating that Abu Zubaydah had no knowledge of pending terrorist attacks when he was captured in 2002, the government responds that they have not contended, in this proceeding, that he did have such knowledge.

| The Government also has not contended in

this proceeding that at the time of his capture, Petitioner had knowledge of any specific impending terrorist operations other than his own thwarted plans. Accordingly, there is no reason or basis to compel the Government to search for information indicating that Petitioner had no knowledge of such impending terrorist operations, as Petitioner requests in his Request No. 66.

Now, let's be clear what this statement is not: it's not an admission that the government knows AZ didn't know of any pending terrorist attacks. By limiting their statement to AZ's *habeas* petition—to their legal claim at the moment describing why they're detaining him—they also limit their admission. That is, they **may** now believe that AZ didn't know about any further terrorist attacks. Or they **may** still believe that AZ had knowledge of pending attacks, but can't use that claim because they either have no untainted evidence to support it or doing so would too quickly rely on AZ's tortured statements.

So while this is not a full admission that AZ didn't know of any pending terrorist attacks, it is a pretty good sign that the government either can't or doesn't want to defend that claim.

Compare the caution about making such a claim with the claims made in another legal document submitted last year, the very first passage in Jay Bybee's first response to the OPR report (Bybee submitted this on May 4, 2009, so a full month after the government submitted Abu Zubaydah's factual return, though there's no reason to believe Bybee would have known the content of the factual return).

Six months after the September 11, 2001 attacks, United States forces captured top al Qaeda leader Abu Zubaydah. Because Zubaydah had assumed the role of chief military planner for al Qaeda, he possessed critical imminent threat

information. In particular, the Central Intelligence Agency (“CIA”) determined that Zubaydah had information about a “second wave” of devastating attacks targeting, among other things, the tallest building in Los Angeles.

According to Jay Bybee—the guy who signed off on AZ’s torture—AZ “possessed” critical intelligence. He states this with no caveats.

There’s a reason Bybee still clings to the claim (or clung to it last May—his second response softened this claim somewhat). That’s because the claim that AZ had intelligence on upcoming attacks was the very first assumption OLC laid out in the Bybee Two memo after it stated that if the facts proved to be different, the advice might be different, too.

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

That is, the entire authorization to torture AZ—and therefore the entire authorization for the torture program more generally—depended on the veracity of claims that the CIA would only torture people who, **they knew**, had intelligence about upcoming attacks.

But, as it turns out, the government won't make that claim in an environment in which they'd have to provide proof to back up the claim. Somehow, CIA's certitude (and with it Jay Bybee's) has become a claim that cannot be supported in a legal proceeding.

This is important not just because it means the entire torture program rests on dubious claims. But because it raises questions about why the CIA was so sure AZ had intelligence about further attacks. Was there, ever, specific intelligence about further attacks, which the CIA just assumed AZ knew about because they totally misunderstood who he was? Did the belief that AZ had knowledge about further attacks come as a result of his torture (or that of Ibn Sheikh al-Libi or Binyam Mohammed or someone else)? Or was it even more tenuous than that, chatter about actual weddings collected in Cheney's illegal wiretap program that caused them to panic? Or was it simply a desire to sow fear in August 2002, just in time to roll out the new "Iraq War" product after the August recess; so by torturing AZ they could fearmonger about attacks on banks and bridges and subways he had invented to stop the torture?

For some reason, in summer 2002 CIA told DOJ that it was certain that AZ had intelligence about follow-up attacks. We really deserve to know what the basis for their certainty was. Because at this point, the government refuses to make that claim in a forum in which they'd actually have to provide proof to support their certainty.

ABU ZUBAYDAH EXPERIENCED "HARD"

DISLOCATION AFTER SESSION 63

Whoever wrote Abu Zubaydah's psychological evaluation claimed to have succeeded in subjecting Abu Zubaydah to "hard" dislocation after his 63rd session of torture. And that claim was made before OLC approved the use of torture with him.

I've long been aware that we got two versions of Abu Zubaydah's psychological evaluation last August: the copy purportedly faxed to John Yoo on July 24, 2002. And the copy faxed to the Inspector General on January 31, 2003 as it began its investigation. I had reviewed them last August and—while I found some weird details I'll get to in a second—had concluded that they were effectively the same content.

They're not.

The key difference appears in the top paragraph on the fourth page of the evaluation. The copy purportedly sent to Yoo includes these sentences:

In addition, he showed strong signs of sympathetic nervous system arousal (possibly fear) when he experienced the initial "**confrontational**" dislocation of expectation [] **during an interrogation session**. Due to his incredibly strong resolve, expertise in civilian warfare, resistance to interrogation techniques (the latter two which he trained hundreds of others on) this experience was one of the few that led to him providing significant actionable intelligence. [my emphasis]

In the copy sent to the IG the following year, that passage reads this way.

In addition, he showed strong signs of sympathetic nervous system arousal

(possibly fear) when he experienced the initial “hard” dislocation of expectation **intervention following session 63**. Due to his incredibly strong resolve, expertise in civilian warfare, resistance to interrogation techniques (the latter two which he trained hundreds of others on) this experience was one of the few that led to him providing significant actionable intelligence. [my emphasis]

The copy sent to the IG identifies precisely when this dislocation happened—after session 63—and calls it “hard” dislocation rather than “confrontational.”

I’ll leave it to the psychologists in the crowd to explain precisely what they mean by the phrase “dislocation of expectation.” And while we don’t know what numbering system the torturers were using for their torture sessions, if they had daily sessions the 63rd would have come some time in mid-June. Long before this memo was written. Whatever else this detail shows, it shows that the torturers were far down the path of torture before they wrote this assessment and they had already broken Abu Zubaydah.

Now, I said above that the first assessment linked here was “purportedly” sent to John Yoo on July 24. That’s because (as I and I think others have pointed out before) the document provides conflicting dates. The cover sheet is dated July 24. The instruction for Yoo to “call me at work or at home, whenever” reflects some degree of urgency. But the following pages clearly show a fax timestamp from July 25 at 5:02 PM. Unless this was a dateline issue (that is, unless it was sent from Thailand or something), then the copy we’ve got—the one with the session number removed—is a later iteration of the assessment.

Also note that the fax cover sheet of the July 24/25 version says the document includes 7

pages. And indeed, we do get seven pages. But the Bates stamp in the bottom right hand corner are missing a page from the series, 0000001 (in fact, the series seems to be different, given the "T" that appears on the cover sheet). Note, too, the Bates numbers from the top right hand corner, which show someone couldn't decide whether this was document 71 or document 79 (the number 71 is the number from IG's FOIA response).

One more interesting detail. Both of these assessments came from CIA's IG. (Though the second number on the front page of the July 24/25 document bears a number showing it was once in Counterterrorism Center's legal department.) Thus, even though we know OLC probably got at least two drafts of the assessment (one on July 24 and one on July 25), we haven't seen the copy they should have in their SCIF.

Oh wait. OLC's SCIF.

That would be OLC's leaky SCIF, from which documents have a way of disappearing. In fact, one of the documents we know to have disappeared from OLC's SCIF bears the date July 25, 2002. The missing document is probably not the same document (the missing document is much longer). But as I've said, it's an awfully suspicious day to be losing documents.

GOVERNMENT ADMITS ITS UNDERSTANDING OF ABU ZUBAYDAH HAS "EVOLVED"

I wanted to return to the government's filing on Abu Zubaydah backing off the key claims on which our torture system is based. A year ago, the

government filed its factual return to justify the detention of Abu Zubaydah. In response, AZ's lawyers asked for a bunch more information, such as evidence that AZ was not a member of al Qaeda and didn't know about 9/11 before it happened. This document, which is the government's response to that request, argues that AZ is not entitled to the information, because the government's factual return did not allege that AZ was a member of al Qaeda or knew about 9/11. In other word, the government is arguing that, in spite of all the times that government officials up to and including the President have made such claims, the government is no longer doing so, and so AZ doesn't need to refute such claims, and therefore isn't entitled to information that would refute them.

Which means that what happened to Jose Padilla is happening with AZ: when the government was forced to actually provide evidence to support its claims, it abandoned some of its more sensational claims. Arguably, one of the reasons the government backed off its claims has to do with eliminating all charges that might have come from AZ's torture (though the government hasn't done so with other detainees who were tortured); it says all of the assertions in the factual return are based on things disclosed in AZ's diaries and in one video he shot. But the government did explicitly admit that its understanding of who AZ is has changed.

Petitioner's various requests aimed at uncovering information that suggests that Government agents or agencies questioned or abandoned early assessments about Petitioner's activities (Pet'r's Mem. at 23-26, 29 n.43; Request Nos. 14, 44,45, 51, 56, 66, 96i-j) also do not fall within the scope of CMO § I.E.2. Petitioner has not shown that access to such documents and information would help him contest the information contained in the Government's factual return. The factual return represents the current basis of

the Government's detention and the only relevant basis for purposes of this proceeding. Petitioner cannot obtain habeas relief by merely showing that the Government's understanding of Petitioner's activities has evolved since his capture or that individual Government agents have disagreed with past Government assessments and analyses.

Petitioner's Request Nos. 14, 44, 51, 56, and 66 seek evidence suggesting that the Government's "initial assessments were incorrect or exaggerated," and also seeks information about allegations that the Government has asserted in other cases that are inconsistent with allegations made in this case. The issue in this litigation is whether Petitioner's detention is lawful based on the contentions and evidence that the Government has presented to the Court in its factual return, not whether Petitioner's detention would be lawful under some other set of contentions Petitioner has selected. **The Government's understanding of Petitioner's role in terrorist activities has necessarily evolved with further investigation.** Evidence that the Government has abandoned or revised earlier beliefs about the Petitioner would not make Petitioner's detention unlawful under the Government's current understanding of the facts, as reflected in the factual return. Petitioner's requests for evidence and information about earlier Government assessments fall outside the scope of CMO § 1.0.1 and fail the narrow tailoring, specificity, and good cause requirements of CMO § 1.f.2(1), (2), (3), and (4). [my emphasis]

"Evolved with further investigation." Based on

diaries they've had since 2002.

The contents of this filing fills in some of the allegations that are redacted in the factual return. Together, they show that the government alleges that AZ:

- Trained in a series of mujahadeen training camps (though not at a time when they were targeting the US)
- Paid the expenses for the Khaldan training camp, at which people from persons from al-Qaida, Egyptian Islamic Jihad, Anned Islamic Group, Salafite Group for Preaching and Fighting, Hamas, and Hizballah—including Mohammad al Owhali, one of the embassy bombers, and Khalid al Mihdhar—trained (though both al Owhali and al Mihdhar also trained at other camps)
- Was (according to Ahmed Ressam) “the ‘top guy’ and was in charge [of] moving persons who came to Pakistan/Afghanistan for training and [of] assisting with their papers, money or providing safe harbor at a guesthouse”
- Was associated with a guesthouse in Peshawar at which Ressam met three Saudi men who had attended the al-

Faruq or al-Sidiq al-Qaida training camps

- Gave Ressam a letter that allowed him to train at Derunta training camp
- Learned of Ressam's plan for an attack in the US—though not the time and place
- “Coordinated and cooperated with [OBL] in the conduct of training and trainee movements between their camps,” but didn't necessarily know the identities of people selected to move from Khaldan to al Qaeda training camps
- Met with OBL to discuss the potential union of disparate mujahideen groups under common leadership; the government does not allege AZ agreed with OBL's proposal and they acknowledge that OBL had the Taliban shut down Khaldan in an effort to consolidate control over training camps afterwards
- Made a video supportive of al Qaeda
- Was “an affiliate”—but not a member—of AQ
- “‘Work[ed] in [OBL's] military and security plan to confront an American

counterattack' in Khost, Afghanistan, after the September 2001 attacks"—though AZ refused to submit as an AQ deputy and ultimately left Khost

- Was in Kandahar in November 2001 at the same time as a number of high level al Qaeda figures
- Assisted "militant brothers" and families to escape from Afghanistan after the American attack on it
- Was planning a plot (presumably against Americans) using IEDs
- Moved from safe house to safe house in February and March 2002
- "Harbored terrorists" at the last safe house in Faisalabad, where he was captured

In other words, the case against AZ (though a few allegations remain redacted) consists primarily of Ressay's allegations and accusations that when the US attacked Afghanistan in retaliation for 9/11, AZ supported efforts against them. And in spite of several admissions that AZ directly resisted AQ directions, the government maintains that AZ was "affiliated" with the group. While AZ contests some of these claims entirely (such as that he funded Khalid or was carrying out a plot), in his CSRT he agreed with the general arch of the story.

Which is where I think the government is inching inexorably closer to indefinite detention with

AZ. Obviously, that's where they're headed, anyway, because there is no way they're going to show the public what they've done to this man. But while their case against AZ still has claims to direct, aggressive action against the US, much of it related to Ressam, that case is getting more and more attenuated. And what's left is an old mujahadeen, leftover from the Russian war because—as a Palestinian—he has nowhere to go, still supportive of force against those persecuting Muslims (he claims, though the government contests this, that he only supports targeting military targets). In his CSRT AZ unabashedly declared himself the enemy of the US military. He has undeniably supported Islamic militants. As such, he is dangerous to US forces (assuming he would be competent doing what he used to do anymore). And that, ultimately is where the government ends its discussion of how AZ is not formally a member of AQ but nevertheless a danger to the US.

In light of the nature and extent of the Government's allegations, however, statements and evidence that suggest only that Petitioner was not formally a "member" of al-Qaida, but do not undermine any aspect of the Government's account of Petitioner's conduct and actions, do not materially undermine the Government's asserted basis for detention. As such, statements and evidence of this kind do not fall within CMO § 1.0.1, nor are they likely to result in the discovery of exculpatory evidence for purposes of CMO § I.E.2. See *Hamli v. Obama*, 616 F. Supp. 2d 63, 75, 76-77 (D.D.C. 2009) (Bates, 1.) (noting, upon considering the legal standard for detention, that the Court "will, by necessity, employ an approach that is more functional than formal," and noting that "if the evidence demonstrates that an individual did not identify himself as a member, but ... rendered frequent substantive assistance to al Qaeda, whether operational,

financial or otherwise, then a court might conclude that he was a 'part or the organization").

For the same reason, any evidence that suggested only that Petitioner may have had ideological disagreements with or reservations about al-Qaida, its leaders, or its methods, but that would not undermine Respondent's allegations about the actions Petitioner actually performed or planned, would not fall within CMO § J.D. 1, and its production would not be likely to result in the discovery of exculpatory evidence for purposes of CMO § I.E.2. In simple terms, the issue in this habeas corpus action is Petitioner's conduct. Private or public renunciations of violence would not abrogate the Government's authority to detain a person who has espoused violence in his actions and has demonstrated through his conduct that **he poses a national security threat to the United States consistent with principles derived from the traditional law of war.** [my emphasis]

As I said, there are lots of reasons the government will end up indefinitely detaining AZ (one of the things the government argued it didn't have to release was materials from the Detainee Task Force that has made these determinations). But one of those reasons is that their argument is becoming—evolving, if you will—into an argument that AZ is dangerous, whether or not he is or ever was a member of al Qaeda.

GOVERNMENT ADMITS ABU ZUBAYDAH SUFFERED FROM COGNITIVE IMPAIRMENT

Jason Leopold has made the full filing revealing the scope of the government's claims about Abu Zubaydah here. I'll be reading through it today, but I wanted to point to one more clear admission that would seem to undermine the claims the government made in justifying his torture.

The government admits that AZ suffered from "cognitive impairment" due to the shrapnel wound he had in his head.

Respondent acknowledged in the factual return that [Zubaydah's] diaries indicate that he suffered cognitive impairment from a shrapnel injury for a number of years.

Yet in the Bybee Two memo, John Yoo asserted (based on this psychological evaluation) that AZ had no pre-existing mental conditions or problems that might make him unfit for things like waterboarding.

According to your reports, Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods. Through reading his diaries and interviewing him, you have found no history of mood disturbance or other psychiatric pathology[,] "thought disorder[,] ... enduring mood or mental health problems."

Which is probably why, beyond the narrow admission that AZ's diaries made it very clear

he had had a head injury that caused lasting damage, the government doesn't want to provide any further evidence of mental illness or cognitive impairment.

Further evidence that Petitioner suffered any mental illness or cognitive impairment (Request No. 54) would not be relevant without any indication that one of the specific diary passages relied upon by the Government was actually linked to the mental or cognitive impairment.

Now, there are actually redacted passages in both the Bybee Two memo and AZ's psychological evaluation that might include admissions of this injury (in the long redacted section on page 17 of the Bybee Memo and at the end of the first paragraph on Emotional/Mental States/Coping Skills in the psychological evaluation). But one way or another, CIA and/or John Yoo found ways to dismiss any concerns about waterboarding a guy with a known significant head injury.

ABU ZUBAYDAH'S DRAWINGS

Jason Leopold has a long article on Abu Zubaydah out that you should read in detail. It provides an update on AZ's torture diaries (which his lawyer now has, though in untranslated form). And the tidbit that one reason officials are so worried about information on AZ coming out is that it'll show the massive intelligence failure that resulted in the conclusion that he was a top al Qaeda officer.

These officials claim that while there is some concern within the Justice Department about the details of Zubaydah's interrogations prior to

August 2002 being revealed and leading to renewed calls for an investigation, there is greater unease with the fact that if the case moved forward it would expose the massive intelligence failure that took place in the last months of the Clinton administration and during George W. Bush's first term that resulted in Zubaydah at one point being named the No. 3 official in al-Qaeda and one of the planners of the 9/11 attacks.

There's also further confirmation that Mitchell and Jessen were conducting a human experiment on AZ, including testing how long a human could go without sleep.

For example, one current and three former CIA officials said some videotapes showed Zubaydah being sleep deprived for more than two weeks. Contractors hired by the CIA studied how he responded psychologically and physically to being kept awake for that amount of time. By looking at videotapes, they concluded that after the 11th consecutive day of being kept awake Zubaydah started to "severely break down." So, the torture memo concluded that 11 days of sleep deprivation was legal and did not meet the definition of torture.

But I'm particularly interested in the degree to which AZ's lawyer, Brent Mickum, seems to believe that John Durham is interested in AZ's drawings of the torture done to him.

During a recent meeting with Durham, Mickum said he learned that the special prosecutor had obtained drawings during the course of his probe that Mickum believed were Zubaydah's. In addition to the diaries, Mickum had previously sought from the Justice Department drawings Zubaydah made while in CIA

custody. But the Justice Department told Mickum they could not locate the drawings.

"When I met with John Durham I discovered he had drawings, which, based on my review I believed were my client's," Mickum said. "The drawings were ultimately produced to us in late 2009."

The Justice Department would not discuss the drawings, diaries, or other issues related to Zubaydah's case.

Mickum said in lieu of the torture tapes, the drawings Zubaydah made contain the best description of the torture techniques CIA interrogators used against Zubaydah while he was being held at the agency's black site prison facilities. Mickum said he could not disclose how many drawings Zubaydah made nor could he discuss the content.

"These are a good group of drawings and he is a pretty good artist," Mickum said. "The depictions would be of interest. [Zubaydah] can draw and with great detail."

This suggests two things. First, that until some time last year, DOJ claimed not to be able to locate drawings that had already been turned over to Durham for his investigation. And that those drawings may be detailed enough to clarify precisely what the torturers did to him when.