

# JOEL BRENNER REVEALS DAVID ADDINGTON'S SOURCES AND METHODS

Several people (including Dan Froomkin) have pointed to the speech former NSA Inspector General Joel Brenner gave at NSA today for the confirmation of what was pretty clear from the joint IG Report on Stellar Wind – that David Addington ran the program out of OVP.

The seed of the problem was planted shortly after 9/11, when the White House determined to undertake certain collection outside the FISA regime under a highly classified, but now mostly declassified, program called STELLAR WIND. That program was not SAP'ed, because the creation of a new special access program requires Congressional notification, but it was run directly by the Office of the Vice President and put under the direct personal control of the Vice President's counsel, David Addington.

But there's another detail I find more interesting (aside from Brenner's note that parts of the program remain classified, which people often forget).

Stellar Wind *was not* SAP'ed, Joel Brenner (who was, at least according to the IG Report, not read in himself until far later than he makes out in his speech).

Because if it were SAP'ed – if it were made a Special Access Program – then Congress would have had to be notified.

I'm interested in that for two reasons.

First (and most prosically), the Executive was messing around with the classification of Stellar Wind at least until January 2009, when they appear to have been making last minute

adjustments to gain advantage in the *al-Haramain* suit.

More interestingly, because the Executive claims Congress was notified (even in that IG Report, though interestingly enough, some accountings of Congressional briefings got redacted in the underlying reports). Joel Brenner is here suggesting that they weren't, really. Which is consistent with the fact that the briefing Congress got on March 10, 2004 was different in substance than what they had gotten before then.

Finally, because there are questions about when and who made the torture program a SAP. It appears not to have happened until early 2003 (and some of CIA's own briefing records suggest that's when the first torture briefings were, notwithstanding the September 2002 briefings for the Gang of Four).

Brenner's suggestion makes it likely (as if it weren't already) that that decision, too, was driven by Addington.

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## WYDEN ET AL: SPOT THE LIE IN BRENNAN'S CFR SPEECH CONTEST!

As the Daily Dot reported, Senators Wyden, Heinrich, and Hirono wrote John Brennan a letter trying to get him to admit that he lied about hacking the Senate Intelligence Committee.

But, as often happens with Wyden-authored letters, they also included this oblique paragraph at the end:

Additionally, we are attaching a separate classified letter regarding inaccurate public statements that you made on another topic in March 2015. We

ask that you correct the public record regarding these statements immediately.

A game!!! Find the lies Brennan told in March!!!

The most likely place to look for Brennan lies comes in this appearance at the Council on Foreign Relations, where Brennan took questions from the audience.

While you might think Brennan lied about outsourcing torture to our allies, his answer on CIA involvement with interrogations conducted by our partners was largely truthful, even if he left out the part of detainees being tortured in custody.

But on a related issue, Brennan surely lied. He claimed – in response to a questions from an HRW staffer – not to partner with those who commit atrocities.

QUESTION: I'm going to try to stand up. Sarah Leah Whitson, Human Rights Watch. Two days ago, ABC News ran some video and images of psychopathic murderers, thugs in the Iraqi security forces, carrying out beheadings, executions of children, executions of civilians. Human Rights Watch has documented Iraqi militias carrying out ISIS-like atrocities, executions of hundreds of captives and so forth.

And some of the allies in the anti-ISIS coalition are themselves carrying out ISIS-like atrocities, like beheadings in Saudi Arabia, violent attacks on journalists in Saudi Arabia—how do you think Iraqi Sunni civilians should distinguish between the good guys and the bad guys in this circumstance?

BRENNAN: It's tough sorting out good guys and bad guys in a lot of these areas, it is. And human rights abuses, whether they take place on the part of

ISIL or of militias or individuals who are working as part of formal security services, needs to be exposed, needs to be stopped.

And in an area like Iraq and Syria, there has been some horrific, horrific human rights abuses. And this is something that I think we need to be able to address. And when we see it, we do bring it to the attention of authorities. And when we see it, we do bring it to the attention of authorities. And we will not work with entities that are engaged in such activities.

As I noted at the time, Brennan totally dodged the question about Saudi atrocities. But it is also the case that many of the “moderates” we’ve partnered with in both Syria and Iraq have themselves engaged in atrocities.

So I suspect his claim that “we will not work with entities that are engaged in such activities” is one of the statements Wyden et al were pointing to.

A potentially related alternative candidate (the letter did say Brennan had made false statements, plural) is this exchange. When Brennan claimed, at the time, he has no ties to Qasim Soleimani, I assumed he was lying, not just because we’re actually fighting a way in IRGC’s vicinity but also because Brennan seemed to exhibit some of the “tells” he does when he lies.

QUESTION: James Sitrick, Baker & McKenzie. You spent a considerable amount of your opening remarks talking about the importance of liaison relationships. Charlie alluded to this in one of his references to you, on the adage—the old adage has it that the enemy of your enemy is your friend. Are we in any way quietly, diplomatically,

indirectly, liaisoning with Mr. Soleimani and his group and his people in Iraq?

BRENNAN: I am not engaging with Mr. Qasem Soleimani, who is the head of the Quds Force of Iran. So no, I am not.

I am engaged, though, with a lot of different partners, some of close, allied countries as well as some that would be considered adversaries, engaged with the Russians on issues related to terrorism.

We did a great job working with the Russians on Sochi. They were very supportive on Boston Marathon. We're also looking at the threat that ISIL poses both to the United States as well as to Russia.

So I try to take advantage of all the different partners that are out there, because there is a strong alignment on some issues—on proliferation as well as on terrorism and others as well.

I happen to think it an exaggeration that the Russians "were very supportive on Boston Marathon," but maybe that's because FSB was rolling up CIA spies who were investigating potentially related groups in Russia.

Finally, while less likely, I think this might be a candidate.

QUESTION: Thank you. Paula DiPerna, NTR Foundation. This is probably an unpopular suggestion, but is it feasible or how feasible would it be to do a little selective Internet disruption in the areas concerned, a la a blockade, digital blockade, and then an international fund to indemnify business loss?

BRENNAN: OK. First of all, as we all know, the worldwide web, the Internet,

is a very large enterprise. And trying to stop things from coming out, there are political issues, there are legal issues here in the United States as far as freedom of speech is concerned. But even given that consideration, doing it technically and preventing some things from surfacing is really quite challenging.

And we see that a number of these organizations have been able to immediately post what they're doing in Twitter. And the ability to stop some things from getting out is really quite challenging.

As far as, you know, indemnification of various companies on some of these issues, there has been unfortunately a very, very long, multi-year effort on the part of the Congress to try to pass some cybersecurity legislation that addressed some of these issues. There has been passage in the Senate.

I think it's overdue. We need to update our legal structures as well as our policy structures to deal with the cyber threats we face.

Remember, Ron Wyden has been pointing to an OLC opinion on Common Commercial Services (which, however, CIA's now General Counsel Carolyn Krass said publicly she wouldn't rely on) for years. I suspect indemnity is one of the things it might cover.

Plus, I do think it likely that we've disrupted the Internet in various circumstances.

Who knows? Maybe Brennan just told a lot of lies.

It wouldn't be the first time.

Update: NatSec sources are already dismissing this Sy Hersh piece on the real story behind the bin Laden killing. But if there's truth to this

detail, then it would suggest I was overly optimistic when I suggested Brennan was truthful about outsourcing our interrogation to allies.

The retired official told me that the CIA leadership had become experts in derailing serious threats from Congress: 'They create something that is horrible but not that bad. Give them something that sounds terrible. "Oh my God, we were shoving food up a prisoner's ass!" Meanwhile, they're not telling the committee about murders, other war crimes, and secret prisons like we still have in Diego Garcia. The goal also was to stall it as long as possible, which they did.'

If we do still have a secret prison in Diego Garcia, then the claim that we outsource everything to allies would be the key lie here.

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## **DEAN BAQUET EXPLAINS THAT THE CIA CRIES WOLF, BUT MISSES HOW TRANSPARENCY HELPS HOLD FEINSTEIN ACCOUNTABLE**

Jack Goldsmith conducted a fascinating interview with NYT Executive Editor Dean Baquet about the latter's decision to name Michael D'Andrea and two other top CIA officials whose identities the CIA was trying to suppress.

He attributes his decision to three factors: The CIA has increasingly taken on a new military role that demands some accountability, the CIA

admitted these three figures were widely known anyway, and the CIA (*and NSA's*) explanations in the past have proven lame.

There are some interesting points, but I think Baquet – and Goldsmith – miss two aspects of accountability that the NYT article permitted.

## Widely known figures

Baquet reveals that even the CIA didn't claim these men were secret, even if it still pretends they are under cover.

DB: These guys may technically be undercover. But even the CIA admitted when they called – and this was a big factor in the decision – that they are widely known, and they were known to the governments where they were stationed. The CIA's pitch was not that these guys are secret or that people don't know about them. The CIA's pitch to me was, "Look, its one thing to be widely known, and to be known to governments and to be on web sites; but when they appear on the front page of the New York Times, that has a larger meaning." So they were known anyway. The gentleman at the very top [of the CTC] runs a thousand-person agency, and makes huge decisions, personally, that have tremendous repercussions for national security. I'm not making judgments about him, but that's the reality.

Later in the interview Goldsmith appears to totally ignore this point when he worries that these men don't have the same kind of security as their counterparts running drone programs in the military. He suggests they might come under new threat because their names have been published on the front page of the NYT.

But that assumes our adversaries are too dumb to look in the places where these men's names have been published before – just like CIA's

successful attempt to suppress Raymond Davis' association with the CIA even after it was broadly known in Pakistan. It assumes our adversaries who seek out this information are not going to find where it's hiding in plain sight.

The CIA isn't keeping these secrets from our adversaries. They already know them. Which makes CIA's efforts to keep them from the US public all the more problematic.

## Crying wolf

Baquet's argument about CIA's squandered credibility is two fold. First, he notes that the CIA always claims people are under cover, which makes their claims less credible as a result.

JG: Let me ask you a different question. What do you think about the claim by Bob Litt, the General Counsel of the DNI, that you've put these guys' lives and their families' lives in jeopardy, and also the people they worked with undercover abroad? How do you assess that? How do you weigh that?

DB: I guess I would say a couple of things. I wish the CIA did not say that about everybody and everything. They hurt their case.

JG: They say it a lot?

DB: They say it all the time. I wish they were a little more measured in saying that. Sometime it's a little difficult to deal with the Agency. When somebody says that and has a track record of rarely saying that, it really gives me pause. But they [the CIA] say it whenever we want to mention a [covert] CIA operative or CIA official.

But – perhaps more importantly for a guy who has taken heat for killing important stories in the

past – Baquet also mentions the times agencies convince him to kill stories that turn out to get published anyway. Baquet uses sitting on the detail that the US used a drone base in Saudi Arabia to kill Anwar al-Awlaki as his example.

DB: I'll give you an example. When Al-Awlaki was killed by a drone strike, we were on deadline, and I was the Managing Editor. The Acting Director of the CIA called up because we were going to say in the middle of the story that the drone that killed Al-Awlaki took off from a base in Saudi Arabia. (I can give you twenty examples, but this is just one.) He called up and said, "If you say that the drone took off from a base in Saudi Arabia, we are going to lose that base. The Saudis are going to go nuts, they don't want people to know that we are flying drones from their base." And so I took it out. And I think we made it something like, "The drones took off from a base in the Arabian Peninsula," something vague. Sure enough, the next day, everybody other than us said it was Saudi Arabia. When I thought hard about it, [I concluded] that was not a good request. And I later told the CIA it was not a good request. And they should have admitted that was not a good request. Everyone knew they had a base. It was for geopolitical reasons, not really national security reasons. I think that's one where they shouldn't have asked and I shouldn't have said "yes" so automatically. So now I am tougher. Now I just say to them, "Give me a compelling reason, really really tell me." Because to not publish, in my way of thinking, is almost a political act. To not publish is a big deal. So I say, "Give me a compelling reason." And I don't think I said that hard enough earlier on. That influences me now. It does make me want to say to the CIA, and the NSA, and other agencies involved in

surveillance and intelligence: "Guys, make the case. You can't just say that it hurts national security. You can't just say vaguely that it's going to get somebody killed. You've got to help me, tell me." In cases where they have actually said to me something really specific, I have held it. There is still stuff that's held, because it is real. But I think I am tougher now and hold them to higher standards. And part of that is that secrecy now is part of the story. It's not just a byproduct of the story. It's part of the story. I think there is a discussion in the country about secrecy in government post-9/11. It was provoked partly by Snowden, it was provoked partly by the secrecy of the drone program. And I think that secrecy is now part of it. And that puts more pressure on me to reveal details when I have them.

But I find his invocation of Snowden (and the mention of the NSA which he makes 4 times) all the more interesting.

Remember, in 2006, Mark Klein brought the story, with documents to prove the case, that the NSA had tapped into AT&T's Folsom Street switch to Baquet when the latter was at the LAT. Baquet killed the story, only to have the NYT publish the story shortly thereafter.

Back in 2006, former AT&T employee Mark Klein revealed information that proved the communications giant was allowing the NSA to monitor Internet traffic "without any regard for the Fourth Amendment." Klein initially brought the story to The Los Angeles Times, but it never made it to print under Baquet, who recently replaced the fired Jill Abramson as executive editor of The New York Times.

Klein told HuffPost Live's Alyona

Minkovski that he gave 120 pages of AT&T documents to an LA Times reporter who “was promising a big front-page expose” on the story. But the reporter eventually told Klein there was a “hangup,” and the story was abandoned shortly after with no explanation.

Months later, producers from ABC’s “Nightline” who were working on the story contacted editors at the LA Times to ask if they had, in fact, decided not to print it. The producers were told that Baquet killed the story, Klein said.

“That’s when Dean Baquet came out with this lame excuse that he just couldn’t figure out my technical documents, so he didn’t think they had a story. I don’t think anybody really believed that argument because, as I said, a few weeks after the LA Times killed the story, I went to The New York Times and they had no trouble figuring it out,” Klein said.

Any question of the clarity in the documents Klein produced “was just Dean Baquet’s lame cover story for capitulating to the government’s threats,” Klein alleged.

And while Baquet still claims he didn’t kill the story due to pressure from the government, the claim has always rung hollow.

The CIA and NSA have not only cried wolf once too often, they have cried wolf with Baquet personally.

## **Missing accountability**

There are two things that are, sadly, missing from this discussion.

First, no one actually believes that Michael D’Andrea, who (as I pointed out yesterday) the CIA helped Hollywood turn into one of the heroes

of the Osama bin Laden hunt) is really under cover. But it's important to look at what suppressing his actual name does for accountability. And the torture report is the best exhibit for that.

If you can't connect all the things that D'Andrea – or Alfrea Bikowsky or Jonathan Fredman – have done in their role with torture, you can't show that certain people should have known better. After KSM led Bikowsky to believe, for 3 months, that he had sent someone to recruit black Muslims in Montana to start forest fires, any further unfathomable credulity on her part can no longer be deemed an honest mistake; it's either outright incompetence, or a willful choice to chase threats that are not real. Hiding D'Andrea's name, along with the others, prevents that kind of accountability.

But there's one other crucial part of accountability that's core to the claim that our representative government adequately exercises oversight over CIA.

A key part of the NYT story (and Baquet emphasized this) was challenging whether the Intelligence Committees were exercising adequate oversight over the drone strikes. The NYT included really damning details about Mike Rogers and Richard Burr pushing to kill Americans.

Yet the article was most damning, I think, for Dianne Feinstein, though it didn't make the case as assertively as they could have. Consider the implications of this:

In secret meetings on Capitol Hill, Mr. D'Andrea was a forceful advocate for the drone program and won supporters among both Republicans and Democrats. Congressional staff members said that he was particularly effective in winning the support of Senator Dianne Feinstein, the California Democrat who was chairwoman of the Senate Intelligence Committee until January, when

Republicans assumed control of the chamber.

[snip]

The confidence Ms. Feinstein and other Democrats express about the drone program, which by most accounts has been effective in killing hundreds of Qaeda operatives and members of other militant groups over the years, stands in sharp contrast to the criticism among lawmakers of the now defunct C.I.A. program to capture and interrogate Qaeda suspects in secret prisons.

But both programs were led by some of the same people.

The implication – which should be made explicit – is that Dianne Feinstein has been protecting and trusting a guy who also happens to have been a key architect of the torture program (Feinstein did the same with Stephen Kappes).

Feinstein can complain about torture accountability all she wants. But she has the ability to hold certain people to a higher standard, and instead, in D'Andrea's case and in Kappes, she has instead argued that they should maintain their power.

And that's the kind of the thing the public can and should try to hold Feinstein accountable for. Rogers and Burr, at least, are not hypocrites. They like unchecked and ineffective CIA power, unabashedly. But Feinstein claims to have concerns about it ... sometimes, but not others.

The public may not be able to do much to hold the CIA accountable. But we can call out Feinstein for failing to do the things she herself has power to do to get accountability for torture and other CIA mismanagement. And that, at least, is a key value of having named names.

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# OLC LOWERS ITS STANDARDS FOR RETROACTIVE LEGAL REVIEWS

There's an interesting passage in the DOJ IG discussion of Jack Goldsmith's efforts to rewrite the Stellar Wind OLC memos (PDF 456).

The first passage describes Jim Comey permitting a lower standard of review to apply for activities already in process.

In explaining the rationale for the revise opinion, Comey described to the OIG his view of two approaches or standards that could be used to undertake legal analysis of government action. If the government is contemplating taking a particular action, OLC's legal analysis will be based on a "best view of the law" standard. However, if the government already is taking the action, the analysis should instead focus on whether reasonable legal arguments can be made to support the continuation of the conduct.<sup>137</sup>

<sup>137</sup> Goldsmith emphasized to us that this second situation almost never presents itself, and that OLC rarely is asked to furnish legal advice on an ongoing program because the pressure "to say 'yes' to the President" invariably would result in applying a lower standard of review. Goldsmith stated that OLC's involvement in Stellar Wind was "unprecedented" because OLC is always asked to review the facts and formulate its advice "up front."

If it was unprecedented on March 1, 2004, it quickly became common.

After all, Goldsmith was asked to consider how the Geneva Convention applied to various types of detainees in Iraq, after the Administration had already been and continued to render people out of that occupied country. And he was also in the midst of a review of the torture program.

Indeed, Daniel Levin, who would go on to reconsider torture approvals until Cheney booted him out of the way to have Steven Bradbury rubberstamp things, would have been a part of those discussions.

So when, in fall 2004, he was asked to reconsider torture, that lower standard of review would have been in his mind.

You could even say that this standard of review gave CIA an incentive to start and continue torturing Janat Gul, on whom they pinned their need to resume torture, even after they accepted he was not, as a fabricator had claimed, planning election year plots in the US. So long as they tortured Gul, Levin would be permitted to apply a lower standard to that torture.

In any case, if this was unprecedented then, I suspect it's not anymore. After all, by the time David Barron first considered the drone killing memo for Anwar al-Awlaki, the Administration had apparently already tried to kill him once. And the Libyan war had already started when OLC started reviewing it (though they made a heroic effort to rule it illegal, which is a testament to just how illegal it was).

With regards to the Stellar Wind OLC, the discussion of what Goldsmith found so problematic is mostly redacted. Which is why I'm interested in his opinion that "'we can get there' as to [redacted] albeit by using an aggressive legal analysis." That says that one of the things his opinion would approve – either the content collection of one-end foreign communications or the dragnet collection of telephone metadata – involved "aggressive legal

analysis” even to meet this lower standard.

It’d sure be nice to know which practice was considered so marginally legal.

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## AMERICA’S INTELLIGENCE EMPIRE

I’ve been reading *Empire of Secrets*, a book about the role of MI5 as the British spun off their empire. It describes how, in country after country, the government that took over from the British – even including people who had been surveilled and jailed by the British regime – retained the British intelligence apparatus and crafted a strong intelligence sharing relationship with their former colonizers. As an example, it describes how Indian Interior Minister, Sardr Patel, decided to keep the Intelligence Bureau rather than shut it down.

Like Nehru, Patel realised that the IB had probably compiled records on himself and most of the leaders of Congress. However, unlike Nehru, he did not allow this to colour his judgment about the crucial role that intelligence would play for the young Indian nation.

[snip]

Patel not only allowed the continued existence of the IB, but amazingly, also sanctioned the continued surveillance of extremist elements within this own Congress Party. As Smith’s report of the meeting reveals, Patel was adamant that the IB should ‘discontinue the collection of intelligence on orthodox Congress and Muslim League activity’, but at the same time he authorised it to continue observing ‘extremist organisations’. Patel was particularly

concerned about the Congress Socialist Party, many of whose members were communist sympathisers.

[snip]

The reason Patel was so amenable to continued surveillance of some of his fellow Indian politicians (keeping tabs on his own supporters, as one IPI report put it) was his fear of communism.

And the same remarkable process, by which the colonized enthusiastically partnered with their former colonizers to spy on their own, happened in similar fashion in most of Britain's former colonies.

That's what I was thinking of on March 13, when John Brennan gave a speech to the Council on Foreign Relations. While it started by invoking an attack in Copenhagen and Charlie Hebdo, a huge chunk of the speech talked about the value of partnering with our intelligence allies.

Last month an extremist gunned down a film director at a cafe in Copenhagen, made his way across town and then shot and killed a security guard at a synagogue. Later the same day the terrorist group ISIL released a video showing the horrific execution of Coptic Christians on a beach in Libya.

The previous month, in a span of less than 24 hours, we saw a savage attack on the staff of the satirical newspaper Charlie Hebdo in France. We saw a car bomb kill dozens at a police academy in Yemen.

[snip]

As CIA tackles these challenges, we benefit greatly from the network of relationships we maintain with intelligence services throughout the world. This is a critically important and lesser known aspect of our efforts.

I cannot overstate the value of these relationships to CIA's mission and to our national security. Indeed, to the collective security of America and its allies.

By sharing intelligence, analysis, and know-how with these partner services, we open windows on regions and issues that might otherwise be closed to us. And when necessary, we set in concert to mitigate a common threat.

By collaborating with our partners we are much better able to close key intelligence gaps on our toughest targets, as well as fulfill CIA's mission to provide global coverage and prevent surprises for our nation's leaders. There is no way we could be successful in carrying out our mission of such scope and complexity on our own.

*Naturally these are sensitive relationships built on mutual trust and confidentiality. Unauthorized disclosures in recent years by individuals who betrayed our country have created difficulties with these partner services that we have had to overcome.*

But it is a testament to the strength and effectiveness of these relationships that our partners remain eager to work with us. With the stakes so high for our people's safety, these alliances are simply too crucial to be allowed to fail.

From the largest services with global reach to those of smaller nations focused on local and regional issues, CIA has developed a range of working and productive relationships with our counterparts overseas. No issue highlights the importance of our international partnerships more right

now than the challenge of foreign fighters entering and leaving the conflict in Syria and Iraq.

We roughly estimate that at least 20,000 fighters from more than 90 countries have gone to fight, several thousand of them from Western nations, including the United States. One thing that dangers these fighters pose upon their return is a top priority for the United States intelligence community, as well as our liaison partners.

We exchange information with our counterparts around the world to identify and track down men and women believed to be violent extremists. And because we have the wherewithal to maintain ties with so many national services, we act as a central repository of data and trends to advance the overall effort.

On this and in innumerable other challenges, our cooperation with foreign liaison quietly achieves significant results. Working together, we have disrupted terrorist attacks and rolled back groups that plot them, intercepted transfers of dangerous weapons and technology, brought international criminals to justice and shared vital intelligence and expertise on everything from the use of chemical armaments in Syria to the downing of the Malaysian airliner over Ukraine.

These relationships are an essential adjunct to diplomacy. And by working with some of these services in building their capabilities we have helped them become better prepared to tackled the challenges that threaten us all.

[snip]

With CIA's support, I have seen counterparts develop into sophisticated

and effective partners. Over time our engagement with partner services fosters a deeper, more candid give and take, a more robust exchange of information and assessments, and a better understanding of the world that often ultimately encourages better alignment on policy.

*Another advantage of building and maintaining strong bilateral and multilateral intelligence relationships is that they can remain, albeit not entirely, insulated from the ups and downs of diplomatic ties. These lengths can provide an important conduit for a dispassionate dialogue during periods of tension, and for conveying the U.S. perspective on contentious issues.*

In recognition of the importance of our liaison relationships, I recently reestablished a senior position at the CIA dedicated to ensuring that we are managing relationships in an integrated fashion. To developing a strategic vision and corporate goals for our key partnerships and to helping me carryout my statutory responsibility to coordinate the intelligence communities' foreign intelligence relationships. [my emphasis]

We are and still remain in the same position as MI5, Brennan seems to want to assure the CFR types, in spite of the embarrassment experienced by our intelligence partners due to leaks by Chelsea Manning and Edward Snowden. Information sharing remains the cement of much of our relationships with allies; our ability to let them suck off our dragnet keeps them in line.

And of particular note, Brennan described these "strong bilateral and multilateral intelligence relationships ...remain[ing], albeit not entirely, insulated from the ups and downs of diplomatic ties."

The spooks keep working together regardless of what the political appointees do, Brennan suggested.

But that speech is all the more notable given the revelations in this Der Spiegel story. It describes how, because of the Snowden leaks, the Germans slowly started responding to something they had originally discovered in 2008. The US had been having BND spy on selectors well outside the Memorandum of Understanding governing the countries' intelligence sharing, even including economic targets. At first, BND thought this was just 2,000 targets, but as the investigation grew more pointed, 40,000 suspicious selectors were found. Only on March 12 – the day before Brennan gave this remarkable speech – did Merkel's office officially find out.

But in October 2013, not even the BND leadership was apparently informed of the violations that had been made. The Chancellery, which is charged with monitoring the BND, was also left in the dark. Instead, the agents turned to the Americans and asked them to cease and desist.

In spring 2014, the NSA investigative committee in German parliament, the Bundestag, began its work. When reports emerged that EADS and Eurocopter had been surveillance targets, the Left Party and the Greens filed an official request to obtain evidence of the violations.

At the BND, the project group charged with supporting the parliamentary investigative committee once again looked at the NSA selectors. In the end, they discovered fully 40,000 suspicious search parameters, including espionage targets in Western European governments and numerous companies. It was this number that SPIEGEL ONLINE reported on Thursday. The BND project group was also

able to confirm suspicions that the NSA had systematically violated German interests. They concluded that the Americans could have perpetrated economic espionage directly under the Germans' noses.

Only on March 12 of this year did the information end up in the Chancellery.

This has led to parliamentary accusations that BND lied in earlier testimony. The lies are notable, given how they echo the same kind of sentiment John Brennan expressed in his speech.

According to a classified memo, the agency told parliamentarians in 2013 that the cooperation with the US in Bad Aibling was consistent with the law and with the strict guidelines that had been established.

The memo notes: "The value for the BND (lies) in know-how benefits and in a closer partnership with the NSA relative to other partners." The data provided by the US, the memo continued, "is checked for its conformance with the agreed guidelines before it is inputted" into the BND system.

Now, we know better. It remains to be determined whether the BND really was unaware at the time, or whether it simply did not want to be aware.

The NSA investigative committee has also questioned former and active BND agents regarding "selectors" and "search criteria" on several occasions. Prior to the beginning of each session, the agents were informed that providing false testimony to the body was unlawful. The BND agents repeatedly insisted that the selectors provided by the US were precisely checked.

As almost a snide aside, Der Spiegel notes that in spite of these lies, the public prosecutor has not yet been informed of these lies.

That is, the spooks have been lying – at least purportedly including up to and including Merkel’s office. But the government seems to be uninterested in pursuing those lies.

As Brennan said as this was just breaking out, the spooks retain their “strong bilateral and multilateral intelligence relationships ...remain[ing], albeit not entirely, insulated from the ups and downs of diplomatic ties.”

And as with Brennan – who, as Gregory Johnsen chronicles in this long profile of the CIA Director published yesterday – the spooks always evade accountability.

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## BOB GRAHAM’S CREDIBILITY

On Monday, the NYT had a story on former Senator Bob Graham’s continuing efforts to shed light on the Saudi role in 9/11. The article cast Graham’s obstinance on the Saudi role in 9/11 against FBI efforts to get him to shut up, noting for example that the recent 9/11 follow-up report dismissed FBI’s former interest in a Florida couple that had ties to some of the hijackers (though the NYT did not note how hackish the report is).

Against FBI’s insistence the Saudis had no role on 9/11, NYT balances the comments of Graham’s former colleagues about his judgement. And they point to his prescience.

Mr. Graham’s refusal to drop what many in the intelligence community consider to be long-settled issues has stirred

some private criticism that the former senator has been out of the game too long and is chasing imagined conspiracies in an effort to stay relevant as he lectures and writes books. Intelligence officials say the claims in the secret 28 pages were explored and found to be unsubstantiated in a later review by the national commission.

Former colleagues are not so ready to write off a lawmaker they remember for sounding the alarm against the invasion of Iraq. He warned that shifting attention to removing Saddam Hussein would debilitate efforts to rid Afghanistan of Al Qaeda, which Mr. Graham said posed a far greater threat to the United States.

"Bob Graham has proven to be prescient about many things," said Jane Harman, the former California congresswoman who once served as the top Democrat on the House Intelligence Committee.

Never one of the flashiest members of the Senate, Mr. Graham was seen more as a cautious, conscientious lawmaker eager to dig into the dry details of policy. His unglamorous reputation no doubt contributed to his inability to catch on during an abbreviated run for the Democratic presidential nomination in 2003. But his colleagues also saw him as a man who would not be easily dissuaded.

"Bob is kind of quiet, but once he is on to something, he is like a dog with a bone," said Tom Daschle, the former Senate Democratic leader.

The NYT only raises Graham's prescience on the Iraq War, not the "many things" Jane Harman raises (who didn't overlap in the Gang of Four with Graham, but closely followed him).

But it's worth reminding that, in addition to being right about the Iraq War, Graham was right about torture. Indeed, in his last months as ranking member on Senate Intelligence Committee, he made initial moves to learn more about CIA's detention program, only to have Pat Roberts agree to stop the effort in early 2003. And, interestingly, Graham (and Nancy Pelosi, Graham's counterpart on the Gang of Four) linked the two, tying the erroneous claims about Iraq to the non-briefings on torture they were getting in September 2002.

Now that they are explicitly stating that CIA lied in its September briefings on torture, Nancy Pelosi and Bob Graham are also both linking those lies with the lies they were telling—at precisely the same time—in the Iraq NIE. Here's Pelosi:

Of all the briefings that I have received at this same time, earlier, they were misinforming the American people there were weapons of mass destruction in Iraq and it was an imminent threat to the United States. I, to the limit of what I could say to my caucus, told them, the intelligence does not support the imminent threat that this Administration is contending. Whether it's on the subject of what's happening in Iraq, whether it's on the subject of techniques used by the intelligence community on those they are interrogating, every step of the way, the Administration was misleading the Congress.

And that is the issue. And that is why we need a truth commission.

And here's Graham:

Yes, they're obligated to tell the full Intelligence Committee, not just the leadership. This was the same time within the same week, in fact, that the CIA was submitting its National Intelligence Estimate on weapons of mass destruction in Iraq which proves so erroneous that we went to war, have had thousands of persons killed and injured as a result of misinformation.

Now, it's quite possible Graham and Pelosi are tying these two lies together just to remind reporters how unreliable the CIA is. Perhaps they're doing it to remind reporters of how they got burned leading into the Iraq War, trusting the spin of the Administration.

But perhaps they're trying to say there's a direct connection, an explicit one, between the NIE and torture. We know Ibn Sheikh al-Libi's claims appeared in there. Did anything that came out of Abu Zubaydah's interrogation? Or Ramzi bin al-Shibh?

Graham would have also been briefed on Stellar Wind, including in briefings with Harman, though he has been less outspoken about that.

None of this is to say these four issues – Saudi support for an enormous attack on the US, spying on Americans, torturing detainees, and trumping up the Iraq War – are connected (though all have ties). It just seems like Graham copped onto the larger project of obfuscation during his tenure on SSCI, in a way that is rather interesting.

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# JUDGE REJECTS PANETTA REVIEW FOIA BECAUSE REVIEW IS TRUE

Fresh off approving the phone dragnet for what might be the last time, Judge James Boasberg rejected Jason Leopold's FOIA for the Panetta Report. Ultimately, Boasberg upheld a broad Exemption 5 deliberative privilege claim.

But his discussion to justify that claim is pretty funny. Basically, he says CIA doesn't have to release the report because (presumably unlike everything else CIA has released on its torture) this report was frank and truthful.

[R]equiring disclosure of the Reviews would cause the sort of harm that the deliberative-process privilege was designed to prevent – *i.e.*, inhibiting frank and open communications among agency personnel.

[snip]

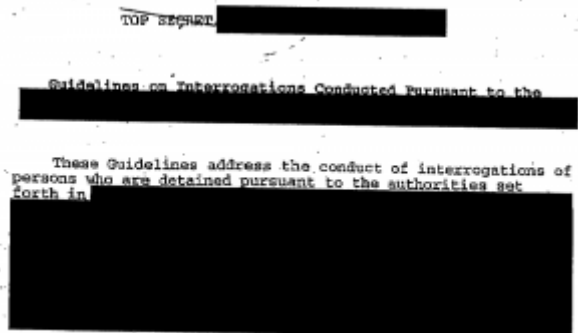
Had the SRT known that the Reviews could become public, its members would likely have been tempted to highlight on the information that would paint the agency's prior actions in a positive light and to avoid calling attention to information that could have embarrassed the agency or its officials.

Everyone knows the Panetta's CIA is only supposed to talk about torture in highly produced torture snuff like Zero Dark 30. God forbid citizens be able to balance that propaganda against the actual truth.

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# DID AUTHORIZING TORTURE MAKE THE NATIONAL SECURITY COUNCIL AN AGENCY SUBJECT TO FOIA?

Almost  
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judge in the ACLU torture FOIA, Alvin Hellerstein (who recently ordered the Administration to release images from torture), was trying to force the Administration to declassify a phrase making it clear torture had been authorized by the September 17, 2001 "Gloves Come Off" Memorandum of Notification. The phrase appeared on a January 28, 2003 Guidelines on Interrogation document signed by George Tenet (this post describes what great CYA including the phrase was).

In my reporting on it, I noted that National Security Advisor James Jones had secretly written a declaration in the suit arguing the phrase couldn't be released. And I also noted that CIA's own declarations conflicted about who had made torture a Special Access Program, CIA or the National Security Council.

Ultimately, however, the 2nd Circuit – in an opinion written by Judge Richard Wesley – reversed Hellerstein and permitted the Administration to keep that short phrase secret (though the Administration permitted that detail

to be declassified for the Torture Report).

These issues have resurfaced in a related FOIA suit being reviewed by the 2nd Circuit (including Wesley and Judges Reena Raggi and Gerard Lynch).

Back in late 2012, Main Street Legal Services FOIAed the NSC for records on drone killing (including minutes of NSC meetings in 2011). The government refused to respond, arguing NSC is not an Agency subject to FOIA. So Main Street asked for discovery that might help it show that NSC is an Agency. It lost that argument with District Judge Eric Vitaliano, and this Appeal focuses on the issue of whether NSC is an Agency for purposes of FOIA or not.

In addition to pointing to statutory and historical reasons why NSC is an Agency, the appeal also points to things – including torture, but also including things like cybersecurity, crafting Benghazi talking points, and drone-killing – that were run out of NSC. The government, in response, argued that the President was very closely involved in NSC and presided over the Principals Committee, meaning NSC was too proximate to the President to be subject to FOIA. The response also keeps insisting that NSC is an advisory body, not anything that can make decisions without the President.

That back and forth took place in the first half of 2014.

Then, the Torture Report Summary got released, showing that CIA records indicate President Bush was not briefed on torture until 2006 but that NSC figures – Alberto Gonzales and Condi Rice, among others – told CIA torture was authorized. Main Street wrote a letter in February pointing to the evidence that the President was not in the loop and that NSC authorized torture.

The SSCI Report found that NSC committees, on which the President does not sit, debated, authorized, and directed CIA to apply specific

interrogation techniques to specific detainees. In 2004, for example, CIA “sought special approval from the National Security Council Principals Committee” to use “enhanced interrogation techniques” on detainee Janat Gul. Thereafter, NSC principals met and “agreed that ‘[g]iven the current threat and risk of delay, CIA was authorized and directed to utilize” the techniques on Mr. Gul.

The question of who authorized torture thus became a central issue at the oral argument in this suit on March 2 (this discussion starts after 34:00). After Raggi raised this issue, Wesley went on with some urgency about the possibility that someone started torturing without the input of the President.

Judge Wesley: Are you saying then that anything the CIA did in terms of enhanced interrogation techniques clearly, was clearly a Presidential directive?

NSC Counsel Jaynie Lilley: No, your honor –

Wesley: Well then, well if that’s not the case, its a very curious position for you to take because some of these bear heavy burdens. Some of these assertions that you’re making that the President is at the end of all these decision chains bear heavy burdens and I don’t quite understand it. Congress said sole duty is to advise and assist the President. If someone else decides to use enhanced interrogation techniques and we decide that this is done by the group, solely by the advisor, assistant to the President, then it’s the President’s decision is it not? Did the decision flow through the NSC?

Lilley: Your Honor, many decisions–

Wesley: Would it, structurally, I'll it easier, would it structurally have flowed through the NSC as it's currently structure pursuant to presidential order and an act of Congress, would a decision to conduct enhanced interrogation techniques have flowed through the NSC up to the President. Pursuant to the way it's structured now.

Lilley: Your Honor, let me be sure I'm answering the question that your asking. There are decisions that are made on matters of national security policy that come through the various—

Wesley: Pursuant to law and the structure of the NSC *who* had the authority? Did only *one person* have the authority to order enhanced interrogations techniques?

Lilley: Your Honor, —

Wesley [voice is rising]: Yes or no?!

Lilley: I cannot speak to individual decisions —

Wesley: Well, if you can't tell me, then you're telling me that then the President perhaps *didn't* make that decision. And then you're telling me that someone else did. And if someone else did, then I begin to have a problem. Because I have a hard time understanding how their sole function is to advise or assist the President if suddenly they decide, independent of any Presidential approval, that they can torture someone!

Lilley: Your Honor—

Wesley: It's very simple Counselor, and I've been troubled by the government's position on this throughout. I've been troubled — for twenty years the Office of Legal Counsel said that this was an

Agency. And then suddenly in a letter, in 1994, for some reason the Agency flips. We have in the legislative record, we have the committee notes from the two committees, and what is one of the entities that's listed when they decided to include the Executive office, what is one of the Agencies that Congress lists, one of the groups that Congress lists as an Agency? The NSC. Who created the NSC? The President didn't. An act of Congress did. An Act of Congress creates two of the Subcommittees. A very curious advisor forced on the President – it sounds like a Separation of Powers issue to me. But, tell me. And then I won't ask again. And if you don't want to answer my question don't answer.

Pursuant to the way the it is currently structured if in your view the NSC is solely an advisory authority, *who had the authority* to order enhanced interrogation techniques? *Who?*

Lilley: In any matter of national security policy, there are two places where decisions can be made. One by the President and one by that Agency with the statutory authority to take the act.

Wesley: So you're telling me that the CIA had the authority to do that?

[snip]

Wesley: The Director of the CIA could have done this independent of the President's directive?

Lilley: Your Honor, I cannot speak to that.

Wesley: But for purposes of this discussion you're saying 'not someone in the NSC'?

Lilley: The NSC could not – does not

direct any individual Agency to take individual actions.

Wesley went onto to describe the plight of the CIA that might not want to do something (torture) it has been ordered to do by the NSC, "it's on him, legally, not on the NSC." "Yes, your Honor," Lilley agreed.

While Wesley didn't say so, that is, precisely, what Tenet argued when he noted Torture was done pursuant to Presidential order on his 2003 Interrogation document, dodging responsibility for torture. But if Lilley's claim is correct, then *CIA bears all the legal responsibility for torture.*

At the end of the hearing, Wesley asked Lilley whether they intend to respond to Main Street's letter. When Lilley said no, Wesley and Raggi specifically instructed Lilley to respond, noting actual page numbers.

In its response on March 16, the government – some members of which have been arguing for months that the NSC approved torture at every step of the process – newly asserted (ignoring the references that show Bush was never briefed until 2006) that George Tenet was only getting NSC's advice; he was not being ordered or authorized by them.

Another cites a CIA official's notes indicating that the Principals Committee "agreed" that CIA was "authorized and directed" to engage in certain activity, confirming the CIA had such authority, and that the then-Attorney General approved the resulting action. See *id.* at 345. These references confirm that the NSC functions in accordance with the advice and assistance role assigned to it by statute and by the President (currently in Presidential Policy Directive-1) as an interagency forum for coordination and exercises no independent decisional authority. The

authority for the underlying decisions rested with the relevant heads of departments and agencies or the President himself.

Remember, DOJ has been claiming it never opened this document. Has it now done so?

But the SSCI evidence that Bush was never briefed is a point Main Street made in a letter last night.

Defendant still fails to explain who authorized the torture if not NSC, as CIA's own records describe, especially given that CIA did not brief the President until years later.

A great deal of documentation shows that "NSC" (or rather, Dick Cheney and David Addington) authorized torture. But the NSC is trying to sustain the unsustainable position that a Memorandum of Notification not listing torture authorized torture, that Bush never got briefed on torture, and that all those meetings at which NSC members (and Dick Cheney) authorized torture didn't amount to authorizing torture.

Because if it admitted the truth – that NSC or the Vice President authorized torture without any review by the President – then it would make all these documents, the 9000 documents President Obama got CIA to successfully hide, subject to FOIA.

And then we'd really start having some fun.

Update: I've added some to my transcription from the hearing and some additional analysis.

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# CHELSEA MANNING WARNED OF NURI AL- MALIKI'S CORRUPTION IN 2010. DAVID PETRAEUS' SUBORDINATES SILENCED HER.

In early 2010, Chelsea Manning discovered that a group of people Iraq's Federal Police were treating as insurgents were instead trying to call attention to Nuri al-Maliki's corruption. When she alerted her supervisors to that fact, they told her to "drop it," and instead find more people who were publishing "anti-Iraqi literature" calling out Maliki's corruption.

On 27 February 2010, a report was received from a subordinate battalion. The report described an event in which the FP detained fifteen (15) individuals for printing "anti-Iraqi literature." By 2 March 2010, I received instructions from an S3 section officer in the 2-10BCT Tactical Operations Center to investigate the matter, and figure out who these "bad guys" were, and how significant this event was for the FP.

Over the course of my research, I found that none of the individuals had previous ties with anti-Iraqi actions or suspected terrorist or militia groups. A few hours later, I received several photos from the scene from the subordinate battalion.

[snip]

I printed a blown up copy of the high-resolution photo, and laminated it for ease of storage and transfer. I then

walked to the TOC and delivered the laminated copy to our category 2 interpreter. She reviewed the information and about a half-hour later delivered a rough written transcript in English to the S2 section.

I read the transcript, and followed up with her, asking for her take on its contents. She said it was easy for her to transcribe verbatim since I blew up the photograph and laminated it. She said the general nature of the document was benign. The documentation, as I assessed as well, was merely a scholarly critique of the then-current Iraqi Prime Minister, Nouri al-Maliki. It detailed corruption within the cabinet of al-Maliki's government, and the financial impact of this corruption on the Iraqi people.

After discovering this discrepancy between FP's report, and the interpreter's transcript, I forwarded this discovery, in person to the TO OIC and Battle NCOIC.

The TOC OIC and, the overhearing Battlecaptain, informed me they didn't need or want to know this information any more. They told me to "drop it" and to just assist them and the FP in finding out where more of these print shops creating "anti-Iraqi literature" might be. I couldn't believe what I heard, (24-25)

At the time, David Petraeus was the head of CENTCOM, the very top of the chain of command that had ordered Manning to "drop" concerns about Iraqis being detained for legitimate opposition to Maliki's corruption.

Manning would go on to leak more documents showing US complicity in Iraqi abuses, going back to 2004. None of those documents were

classified more than Secret. Her efforts (in part) to alert Americans to the abuse the military chain of command in Iraq was ignoring won her a 35-year sentence in Leavenworth.

Compare that to David Petraeus who pretends, to this day, Maliki's corruption was not known and not knowable before the US withdrew troops in 2011, who pretends the US troops under his command did not ignore, even facilitate, Maliki's corruption.

#### **What went wrong?**

The proximate cause of Iraq's unraveling was the increasing authoritarian, sectarian and corrupt conduct of the Iraqi government and its leader after the departure of the last U.S. combat forces in 2011. The actions of the Iraqi prime minister undid the major accomplishment of the Surge. (They) alienated the Iraqi Sunnis and once again created in the Sunni areas fertile fields for the planting of the seeds of extremism, essentially opening the door to the takeover of the Islamic State. Some may contend that all of this was inevitable. Iraq was bound to fail, they will argue, because of the inherently sectarian character of the Iraqi people. I don't agree with that assessment.

The tragedy is that political leaders failed so badly at delivering what Iraqis clearly wanted – and for that, a great deal of responsibility lies with Prime Minister Maliki.

Unlike Manning, Petraeus adheres to a myth, the myth that this war was not lost 12 years ago, when George Bush ordered us to invade based on a pack of lies, when Petraeus and his fellow commanders failed to bring security after the invasion (largely through the priorities of their superiors), when Paul Bremer decided to criminalize the bureaucracy that might have

restored stability – and a secular character – to Iraq.

Of course, Petraeus' service to that myth is no doubt a big part of the reason he can continue to influence public opinion from the comfort of his own home as he prepares to serve his 2 years of probation for leaking code word documents, documents far more sensitive than those Manning leaked, as opposed to the 35 years in Leavenworth Manning received.

Which is, of course, a pretty potent symbol of our own corruption.

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## THE UNOPENED TORTURE REPORT AND TRUSTING CIA ON OTHER COVERT OPERATIONS

Yesterday, Pat Leahy issued a Sunshine Week statement criticizing Richard Burr for attempting to reclaim all copies of the Torture Report, but also complaining that State and DOJ haven't opened their copy of the Torture Report.

I also was appalled to learn that several of the agencies that received the full report in December have not yet opened it. In a Freedom of Information Act (FOIA) lawsuit seeking release of the full report, Justice Department and State Department officials submitted declarations stating that their copies remain locked away in unopened, sealed envelopes. I do not know if this was done to attempt to bolster the government's position in the FOIA

lawsuit, or to otherwise avoid Federal records laws. I certainly hope not. Regardless of the motivation, it was a mistake and needs to be rectified.

The executive summary of the torture report makes clear that both the State Department and the Justice Department have much to learn from the history of the CIA's torture program. Both agencies were misled by the CIA about the program. Both should consider systemic changes in how they deal with covert actions. Yet neither agency has bothered to open the final, full version of the report, or apparently even those sections most relevant to them.

Today, Ron Wyden issued a Sunshine Week release linking back to a February 3 letter Eric Holder is still ignoring. The letter – which I wrote about here – addresses 4 things: 1) the unclear limits on the President's ability to kill Americans outside of war zones 2) the common commercial service agreement OLC opinion that should be withdrawn 3) some action the Executive took that Wyden and Russ Feingold wrote Holder and Hillary about in late 2010 and 4) DOJ's failure to even open the Torture Report. Wyden's statement, lumps all these under "secret law."

U.S. Senator Ron Wyden, D-Ore., renewed his call for Attorney General Eric Holder to answer crucial questions on everything from when the government believes it has the right to kill an American to secret interpretations of law. The Justice Department has ignored these questions or declined to answer them, in some cases for years.

[snip]

"It is never acceptable to keep the basic interpretations of U.S. law secret from the American people. It doesn't make our country safer, and erodes the

public's confidence in the government and intelligence agencies in particular," Wyden said. "While it is appropriate to keep sources, methods and operations secret, the law should never be a mystery. Sunshine Week is the perfect time for the Justice Department to pull back the curtains and let the light in on how our government interprets the law."

This may be secret law.

But I find it interesting that both Wyden's letter and Leahy's statement tie covert operations to the lessons from the Torture Report.

There are many reasons DOJ (and FBI) are probably refusing to open the Torture Report. The most obvious – the one everyone is pointing to – is that by not opening it, these Agencies keep it safe from the snooping FOIAs of the ACLU and Jason Leopold.

But the other reason DOJ and FBI might want to keep this report sealed is what it says about the reliability of the CIA.

The CIA lied repeatedly to DOJ, FBI, and FBI Director Jim Comey (when he was Deputy Attorney General) specifically. Specifically, they lied to protect the conduct of what was structured as a covert operation, CIA breaking the law at the behest of the President.

Of course, both DOJ generally and FBI specifically continue to partner with CIA as if nothing has gone on, as if the spooks retain the credibility they had back in 2001, as if they *should* retain that credibility. (I'm particularly interested in the way FBI participated in the killing of Anwar al-Awlaki, perhaps relying on CIA's claims there, too, but it goes well beyond that.)

That's understandable, to a point. If DOJ and the FBI are going to continue pursuing

(especially) terrorists with CIA, they need to be able to trust them, to trust they're not being lied to about, potentially, everything.

Except that ignores the lesson of the Torture Report, which is that CIA will lie about anything to get DOJ to rubber stamp criminal behavior.

No wonder DOJ and FBI aren't opening that report.