

10 May 2012

MEMORANDUM FOR The Convening Authority, Military Commissions

Subj: REQUEST FOR IMMEDIATE COMMENCEMENT OF ABU ZUBAYDAH'S  
MILITARY COMMISSION PROCEEDINGS

1. This letter requests that the Convening Authority immediately commence proceedings against our client, Zayn al-Abidin Muhammad Husayn (abu Zubaydah), ISN # 10016. Failure to act would raise serious questions about the integrity and legitimacy of the Convening Authority and, indeed, of the whole process established to try or release Guantanamo detainees.
2. Abu Zubaydah has been detained without a hearing for ten years. Since his capture on 28 March 2002 until the present day, there have yet to be any charges brought against him. There has been no court finding that he needs to be imprisoned, or that he was associated with al Qaeda, or that he committed any act of terrorism as the U.S. government has alleged in the past. To date, his repeated requests for legitimate evaluation of his case have been met with nothing but deafening silence. He now formally requests that the Convening Authority commence prosecution of him before a military commission at the earliest possible date.
3. The failure to convene abu Zubaydah's military commission proceeding jeopardizes the legitimacy of the entire military commission structure. In September 2006, President Bush told a nationally televised audience that abu Zubaydah had been transferred from CIA to DoD custody so that he could be prosecuted in a military commission proceeding. Now, five and half years later, he has yet to be charged. No system that detains prisoners for years without charge can be legitimate. No system that only allows hearings in cases where the government can first secure a guilty plea, or guarantee a conviction, can be legitimate. No system that refuses to give a hearing because the truth will reveal enormous governmental over-reaching, illegal conduct, and false claims by our highest-ranking officials can be legitimate. For the reasons discussed below, abu Zubaydah is entitled to the immediate commencement of his military commission proceedings.
4. This request for prosecution does not rely upon classified information. If the classified evidence corroborates the statements about abu Zubaydah made by some government officers, then a trial would provide the government with an easy victory. But if the classified evidence does not support their reckless hyperbole, this fact would explain why his long-sought hearing has been continually avoided. He simply requests the opportunity to test the government's evidence and demonstrate in a legitimate setting why his detention and treatment during detention have been unwarranted, and that he is innocent of any crimes.

## Why Has Abu Zubaydah Yet to Be Prosecuted Despite President Bush's Statements?

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

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

With these prosecutions, we will send a clear message to those who kill Americans: No matter how long it takes, we will find you and we will bring you to justice. (Emphasis added).<sup>1</sup>

6. Despite the President's promise to the nation, the Office of Military Commissions has taken no steps to prosecute him.
7. A decision to prosecute abu Zubaydah seems commonsensical if what the government has stated publicly about him is true. Officials at the highest levels of government have repeatedly claimed that he was not only associated with al Qaeda but that he committed numerous specified acts of terrorism against the United States. These officials include the President of the United States, the Vice President, the Secretary of Defense, the Director of the CIA, high-level officials in the State Department, and high-level officials in the Department of Justice.
8. For example, in that same September 2006 speech urging the creation of military commissions, President Bush spoke from the East Room about the existence of secret CIA prisons:

Within months of September the 11<sup>th</sup>, 2001, we captured a man known as abu Zubaydah. We believe that Zubaydah was a *senior terrorist leader* and a *trusted associate of Osama bin Laden*. Our intelligence community believes he had *run a terrorist camp* in Afghanistan where some of the 9/11 hijackers trained, and that he *helped smuggle al Qaeda leaders* out of Afghanistan after coalition forces arrived to liberate that country.... (Emphasis added).

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<sup>1</sup> Address on the Creation of Military Commissions to Try Suspected Terrorists (Sep. 6, 2006), in SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH 2001–2008, at 411, available at [http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected\\_Speeches\\_George\\_W\\_Bush.pdf](http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf).

9. The President also claimed that abu Zubaydah provided:

information that helped stop a terrorist attack being planned for inside the United States—an attack about which we had no previous information [and] provided physical descriptions of the operatives and information on their general location. Based on the information he provided, the operatives were detained—one while traveling to the United States.

10. Were even a fraction of such repeated assertions supported by credible evidence, the most straightforward course for the government would be to convene a military commission, produce the appropriate evidence under the relaxed commission standards, obtain what the government seems to think is a foregone conviction, and administer the resulting punishment. And yet this logical course of action has yet to be taken.
11. Abu Zubaydah has not been tried, has not been charged, and has not even had military commission counsel assigned to him. He has requested the appointment of military commission counsel repeatedly but has received no response. This overt failure to prosecute a supposed terrorist *leader* causes the world to wonder why. One possibility is that the claims, despite their number and decibel level, are simply untrue, so that the government cannot prove all (or any) of them. A second possibility is that the prosecution would be successful but only at the unacceptable cost of exposing the government to worldwide censure for the manner in which Zubaydah was treated and the evidence against him was obtained. The third possibility, worst of all, is both that the claims are not true and that his treatment is too shameful to be revealed to the world.
12. The factual premises for these scenarios, if untrue, could be put to rest by beginning the prosecution. Failure to do so can only further erode the legitimacy of the military commission process. The ultimate test of the legitimacy of any judicial system is the willingness to hold hearings even when the truths that the hearings may reveal could be embarrassing or politically damaging to high-level officials. Abu Zubaydah formally requests that he receive his military commission hearing immediately. Without such a hearing he may be detained forever as an uncharged prisoner—not necessarily for anything that he has done but because so many people have made so many false allegations to justify government policies that are themselves indefensible that no possibility of disclosure or, far worse, exoneration can be borne.
13. The public record already reveals that the government has long had reason to doubt the accuracy of its accusations. At the very time that President Bush was making the above statements, he was aware of serious reservations about their truth. According to Pulitzer Prize winning journalist Ron Suskind, even as Bush was publicly proclaiming abu Zubaydah's malevolence, he was privately being briefed about misgivings within the

intelligence community regarding his significance—and mental stability.<sup>2</sup> President Bush was concerned about the consequences for his own reputation. Suskind quotes the following exchange between Bush and then-CIA Director George Tenet:

I said [abu Zubaydah] was important,” Bush said to Tenet at one of their daily meetings. “*You’re not going to let me lose face on this, are you?*” (emphasis added). Director Tenet then assured him he would not.<sup>3</sup>

The government’s failure to prosecute him continues the protection that Tenet promised.

14. Endless delays of a proceeding promised long ago by the President reflect the government’s implicit recognition that the “abu Zubaydah” who was held out to the American public to justify our nation’s torture, rendition, and detention policies was merely a manufactured distortion of the real person. His false portrayal, once known, will discredit many of the government’s most horrific policies. It was largely by virtue of unwarranted and inaccurate characterizations of abu Zubaydah that the government was able to adopt its torture policies, defend its dark sites and rendition policies, and continue on its course of detaining hundreds of individuals around the world without any process.

### **Role of the Discredited “Torture Memos” in Abu Zubaydah’s Military Commission**

15. If abu Zubaydah’s case might inflict the very public embarrassment that President Bush feared so much, as revealed in his exchange with the then-CIA Director, the “torture memos” provide another source of shame for the government. The already notorious memos would be even more universally condemned were it known that their supposed efficacy in revealing the truth about our enemies was based—in significant part, at least—on lies about abu Zubaydah.
16. On August 1, 2002, attorneys with the Office of Legal Counsel completed a memorandum regarding the “Interrogation of al Qaeda Operative” that described the factual basis upon which that torture memo rested.<sup>4</sup> The authors of this memo explained that “[a]s we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization.”<sup>5</sup> The Office of Legal Counsel’s advice was “based upon the following facts, which you have provided to us...”<sup>6</sup>

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<sup>2</sup> Rich Lipski, *Bush's Torture Rationale Debunked*, WASHINGTON POST, March 30, 2009, <http://voices.washingtonpost.com/white-house-watch/looking-backward/bushs-torture-rationale-debunk.html>.

<sup>3</sup> *Id.*

<sup>4</sup> August 1, 2002 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency. The legal analysis used to justify abu Zubaydah’s torture based on fabricated facts was plucked from the most infamous “torture memo” of them all, the August 1, 2002 Bybee to Alberto Gonzales memo titled: *Standards of Conduct for Interrogation under 18 U.S.C. Secs. 2340-2340A*.

<sup>5</sup> *Id.*, pg. 1.

<sup>6</sup> *Id.* “We also understand that you do not have any facts in your possession contrary to the facts outlined here...”

Zubaydah is currently being held by the United States. The interrogation team is certain 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....

...Zubaydah, though only 31, rose quickly from very low level mujahedin to third or fourth man in al Qaeda. He has served as Usama Bin Laden's senior lieutenant. In that capacity, he has managed a network of training camps. He has been instrumental in the training of operatives for al Qaeda, the Egyptian Islamic Jihad, and other terrorist elements inside Pakistan and Afghanistan. He acted as the Deputy Camp Commander for al Qaeda training camp (sic) in Afghanistan, personally approving entry and graduation of all trainees during 1999-2000. From 1996 until 1999, he approved all individuals going in and out of Afghanistan to the training camps. Further, no one went in and out of Peshawar, Pakistan without his knowledge and approval. He also acted as al Qaeda's coordinator of external contacts and foreign communications. Additionally, he has acted as al Qaeda's counter-intelligence officer and has been trusted to find spies within the organization.

Zubaydah has been involved in every major terrorist operation carried out by al Qaeda. He was a planner of the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. Two of the central figures in this plot who were arrested have identified Zubaydah as the supporter of their cell and the plot. He also served as a planner for the Paris Embassy plot in 2001. Moreover, he was one of the planners of the September 11 attacks. Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.<sup>7</sup>

17. What an incredible political embarrassment it would be for the world to discover that the torture and mistreatment of abu Zubaydah were pointless exercises in cruelty. Vice President Cheney, CIA Director Michael Hayden, and many others all have claimed that the torture and mistreatment of abu Zubaydah led to the discovery of useful information. Vice President Cheney stated that:

[t]he techniques worked.... Abu Zubaydah gave up information about Ramzi bin al-Shibh who had assisted the 9/11 hijackers, and on the one-year anniversary of the 9/11 attacks was captured after a shoot-out in Pakistan. At the time of his

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<sup>7</sup> *Id.*, pg. 7.

apprehension he was plotting to use commercial airliners in suicide attacks on Heathrow Airport and other structures in London.<sup>8</sup>

18. Director Hayden also stated that abu Zubaydah's interrogation "led to reliable information," that he was a "prolific producer" of information, and that roughly 25 percent of the information on al Qaeda that came from human sources that originated from him.<sup>9</sup> Imagine the political and policy implications that would follow the revelation that no such information was obtained from visiting these abuses on him.

### **Role of Rendition and Indefinite Detention in Abu Zubaydah's Military Commission Proceedings**

19. The torture policies are not the only programs that would be exposed during the military commission hearing. The U.S. government's justification of its policies of extraordinary rendition, maintaining secret CIA black sites, and indefinite detention would also be shown to have rested on false and exaggerated claims. Obviously, statements about abu Zubaydah were not the only basis for the creation of the Global War on Terror apparatus. There were many other claims. However, he was the symbol constantly deployed to justify the creation of that apparatus. The numerous fabricated statements made about him constituted a key part of the foundation of that structure. For instance, abu Zubaydah's supposed misdeeds were used to justify the CIA's use of black sites and extraordinary rendition as critical elements in the War on Terror.<sup>10</sup>
20. John Kiriakou, the highest ranking CIA officer on the ground in Pakistan involved in abu Zubaydah's capture, reported as follows:

He was one of the financiers of the September 11<sup>th</sup> attacks. He was a logistics chief of al Qaeda. We knew that he was close to bin Laden, although not co-located obviously.... [W]e knew at the time that he had a line to bin Laden.<sup>11</sup>

[We knew] that he knew everybody who was worth knowing in al Qaeda. He knew cell leaders. He knew logistics people. He knew finance people. We knew that he was really one of the intellectual leaders of the group.<sup>12</sup>

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<sup>8</sup> *Dick Cheney's Wars: The Former Vice President on 9/11, Iraq and the Future*, THE WALL STREET JOURNAL, Aug. 30, 2011, <http://online.wsj.com/article/SB10001424053111904199404576538481141793772.html> (quoting DICK CHENEY, *IN MY TIME, A PERSONAL AND POLITICAL MEMOIR*)

<sup>9</sup> Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS THE BLOTTER, <http://abcnews.go.com/Blotter/TheLaw/story?id=4244423&page=1#.T43-y9nkaSp>.

<sup>10</sup> See Transcript, *President Bush's Speech on Terrorism*, NEW YORK TIMES, Sept. 6, 2006, [http://www.nytimes.com/2006/09/06/washington/06bush\\_transcript.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?_r=1&pagewanted=all).

<sup>11</sup> ABC News Report by B. Ross, *CIA -- ABU ZUBAYDAH*, INTERVIEW WITH JOHN KIRIAKOU, 1<sup>st</sup> trans., pg.

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<sup>12</sup> *Id.*, pgs. 10-11.

21. John Rizzo was the CIA's acting general counsel during the Enhanced Interrogation Techniques (EIT) program. He was interviewed on September 13, 2011, about abu Zubaydah:

He wasn't necessarily a shooter or a guy who would climb into an airplane, fly into a building. But he basically was moralistically chief operating officer, made sure and facilitated the plan, the travel of various al Qaeda officials. So there was a lot of information derived from him on that score that I recall.... And it's not just me saying it. Subsequent investigations by the CIA inspector general and other independent bodies confirmed that there was valuable, actionable intelligence derived first from Abu Zubaydah and later (from) other high-value detainees that were subject to the enhanced techniques....<sup>13</sup>

22. Abu Zubaydah has also been frequently used to justify the continued operation of Guantanamo. For example, consider the statement of the State Department's John Bellinger:

I will just say up front that the issue of Guantanamo...is a source of great frustration for this administration. On the one hand, it serves a very important purpose, to hold and detain individuals who are extremely dangerous, people like Khalid Sheikh Mohammed, Abu Zubaydah, people who have been planners of 9/11, others who were captured on the battlefield in Afghanistan and who personally killed U.S. soldiers.<sup>14</sup>

## Conclusion

23. The government fears that a military commission hearing for abu Zubaydah will reveal that the facts upon which the American torture policy substantially rests were false and known to be false at the time. The military commission hearing will also reveal that many statements made by the highest officials about him were false and known to be false when made. The government has attempted to conceal the fabrication of the factual basis for his torture, the same basis detailed in the "torture memo" that focused exclusively on him.
24. The government has also gone to great lengths to destroy all evidence that one of its most trusted attorneys had written a dissenting memo arguing that the treatment approved by the "torture memos" was torture that should have been known to be torture. The legal memo revealing the robust dissent to the very practices inflicted upon abu Zubaydah was not only concealed but extraordinary efforts were made to destroy all copies of the memo. Although use of the word "concealment" may seem harsh, this characterization

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<sup>13</sup> John Rizzo: *CIA's Enhanced Interrogation 'Necessary and Effective,'* www.pbs.org, Sept. 13, 2011, pg. 5.

<sup>14</sup> Rep. Alcee L. Hastings Holds a Briefing on the Guantanamo Bay Detention Facility, POLITICAL TRANSCRIPT WIRE, June 22, 2007, <http://www.accessmylibrary.com/article-1G1-165429230/rep-alcee-l-hastings.html>.

is, if anything, an understatement. The more accurate description of this conduct would be spoliation of evidence revealing the false factual and legal basis upon which abu Zubaydah was tortured. The spoliation efforts were revealed by Phillip Zelikow, a high ranking State Department lawyer and confidant of Secretary Condoleeza Rice, in an appearance before the Senate Judiciary Committee in 2009. His memo titled “The McCain Amendment and U.S. Obligations under Article 16 of the Convention Against Torture,” dated February 15, 2006, concluded that several of the enhanced interrogation techniques, “singly or in combination, should be considered ‘cruel, inhuman or degrading treatment or punishment’ within” the meaning of the Convention Against Torture. Zelikow explained that the memo caused senior figures in the Bush White House to become enraged, and that they actually sought to collect and destroy all the copies.<sup>15</sup>

25. The government that has engaged in the spoliation of evidence, including authoritative legal dissent about abu Zubaydah’s treatment, is the same government that holds him in indefinite pretrial detention, too afraid to prosecute him—because such a hearing would reveal even more disturbing truths.
26. The refusal to bring charges and seek judicial review of abu Zubaydah’s case, to provide a forum that will reveal the truth about him and the demonstrably false factual basis for the torture memos and his torture is but another way to conceal the truth. That a government concealed and destroyed documents evidencing dissent to its justification for torture speaks volumes about why that government would refuse to provide abu Zubaydah judicial process that would disclose an even more damning truth: that the factual basis for his torture was false and known to be false at the time.
27. The failure of the Office of Military Commissions to charge and try abu Zubaydah inevitably will be viewed as part of the lamentable pattern of conduct that began with the assertion of false facts to justify his torture in 2002, and produced distorted, inaccurate and incomplete legal opinions as the government labored in vain to contrive the legality of his torture. And that perception undermines the legitimacy of the entire military commission program.
28. Abu Zubaydah asks only for what he was promised by the president of this nation: a military commission hearing. The reformed military commissions have been trumpeted as wholly consistent with basic American precepts of justice. So we say: charge abu Zubaydah and let the chips fall where they may.
29. If the military commissions are to be viewed as legitimate, they should not appear to be complicit in disguising the truth. Instead, military commissions should serve as a vehicle that reveals the truth. The failure to prosecute abu Zubaydah discredits not only American political practices but also the military commissions themselves. Abu Zubaydah asks simply that he be allowed to have a legitimate hearing at which he may

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<sup>15</sup> S. Horton, *Witness for the Prosecution*, www.harpers.org, April 16, 2005, pg. 1.

challenge the allegations and evidence leveled against him. But as time lingers on, what legitimacy will be found in a system that continues to delay the trial of a man the government once described as a high-ranking al Qaeda operative? Abu Zubaydah is ready for the process to begin, and after ten years of detention and evidence gathering, the government ought to be too.

30. After more than ten years of waiting, your prompt consideration of this request is appreciated.

Very truly yours,

/s

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