

# THE TORTURE MEMOS AND THE FBI-CIA DISPUTE

I wanted to revisit this David Johnston article from September 10, 2006, written shortly after Bush brought the High Value Detainees to Gitmo (the second time, for some of them). At the time, the article served to challenge Bush's portrayal of a fine-tuned interrogation system and pretty obviously aired the two sides of the FBI-CIA dispute over torture.

But rather than the smooth process depicted by Mr. Bush, interviews with nearly a dozen current and former law enforcement and intelligence officials briefed on the process show, the interrogation of Mr. Zubaydah was fraught with sharp disputes, debates about the legality and utility of harsh interrogation methods, and a rupture between the Federal Bureau of Investigation and the C.I.A. that has yet to heal.

Read now, the article provides a lot of background to details that have been confirmed since the release of the memos—and as such it helps elucidate the information coming from the memos. And, by reading it in conjunction with the torture memos, it shows why the dispute between FBI and CIA has remained so intractable.

## **Background Details for the Memos**

For example, the article appears to report on something Michael Hayden blurted out the other day (and which Steven Aftergood picked up); the interrogation program started as a covert operation.

For the C.I.A., Mr. Zubaydah was a test case for an evolving new role, conceived

after Sept. 11, in which the agency was to act as jailer and interrogator for terrorism suspects.

According to accounts by three former intelligence officials, the C.I.A. understood that the legal foundation for its role had been spelled out in a sweeping classified directive signed by Mr. Bush on Sept. 17, 2001. The directive, known as a memorandum of notification, authorized the C.I.A. for the first time to capture, detain and interrogate terrorism suspects, providing the foundation for what became its secret prison system.

That 2001 directive did not spell out specific guidelines for interrogations, however, and senior C.I.A. officials began in late 2001 and early 2002 to draw up a list of aggressive interrogation procedures that might be used against terrorism suspects. They consulted agency psychiatrists and foreign governments to identify effective techniques beyond standard interview practices.

A memorandum of notification is closely related to a finding. Which, as Aftergood pointed out, **should** mean that Congress' intelligence committees were informed.

That timing is important for another reason. As Valtin first pointed out, the Administration was researching how to torture at least as early as December 2001. This article suggests the "research" went back even further, to just days after 9/11. Also, the description of Abu Zubaydah as a "test case" certainly accords with the ICRC report—particularly the way it shows interrogators experimenting with different techniques.

This article also reveals a detail made clear in the Bybee Memo. The interrogation started with

just oral guidelines.

Three former intelligence officials said the techniques had been drawn up on the basis of legal guidance from the Justice Department, but were not yet supported by a formal legal opinion.

The Bybee Memo states,

This letter memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002.

(Though I suspect that's not a comprehensive description of the timing—I would bet that chronology pre-dates July 24.)

#### **The FBI-CIA Dispute about Abu Zubdaydah**

Now, one of the things I find most intriguing about Johnston's description of the squabble between FBI and CIA are the terms used to describes Abu Zubaydah's cooperation or lack thereof.

In Thailand, the new C.I.A. team concluded that under standard questioning Mr. Zubaydah was revealing only a small fraction of what he knew, and decided that more aggressive techniques were warranted.

[snip]

F.B.I. agents on the scene angrily protested the more aggressive approach, arguing that persuasion rather than coercion had succeeded. But leaders of the C.I.A. interrogation team were convinced that tougher tactics were warranted and said that the methods had been authorized by senior lawyers at the White House.

[snip]

Crucial aspects of what happened during Mr. Zubaydah's interrogation are sharply

disputed. Some former and current government officials briefed on the case, who were more closely allied with law enforcement, said Mr. Zubaydah cooperated with F.B.I. interviewers until the C.I.A. interrogation team arrived. They said that Mr. Zubaydah's resistance began after the agency interrogators began using more stringent tactics.

Other officials, more closely tied to intelligence agencies, dismissed that account, saying that the C.I.A. had supervised all interviews with Mr. Zubaydah, including those in which F.B.I. agents asked questions. These officials said that he proved a wily adversary. "He was lying, and things were going nowhere," one official briefed on the matter said of the early interviews. "It was clear that he had information about an imminent attack and time was of the essence."

Several officials said the belief that Mr. Zubaydah might have possessed critical information about a coming terrorist operation figured significantly in the decision to employ tougher tactics, even though it later became apparent he had no such knowledge.

"As the president has made clear, the fact of the matter is that Abu Zubaydah was defiant and evasive until the approved procedures were used," one government official said.

We've long known that the FBI insisted they had gotten valuable information from Abu Zubaydah from persuasion. We've long known that the CIA focuses instead on purportedly valuable information they got through torture. But the chronology here is critical: FBI is interrogating Abu Zubaydah. CIA takes over and

that new team—almost immediately, it seems—decides Abu Zubaydah is withholding information. At least partly because Abu Zubaydah had not produced any information about an impending attack, the CIA pushed for more coercion. But always, for the CIA partisans in this fight, there is the claim that "he was defiant and evasive until the approved procedures were used."

The torture memos offer one reason for that formula, I think—indeed, they explain the furor of this debate. Check out what the second paragraph of the Bybee Memo says:

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. Zubaydah 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.** Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently level of "chatter" equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an "increased pressure phase." [my emphasis]

That is, the entire memo pre-approving their actions is premised on CIA's representation that, first, Abu Zubaydah was evasive, and second, that he had more information. That's got to be one reason the CIA guys are so adamant on this point. It's their legal lifeline, and if that fact is challenged—as, indeed, the CIA guys knew it to be at the time—then their entire legal cover for their actions falls apart.

And look at how Bradbury enshrines that restriction in his May 10, 2005 memo (recall that this memo formally superseded the Bybee Memo, though it "confirms the conclusion of [Bybee Memo] that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations herein, would not violate sections 2340-2340A," so interrogators were relying on this memo as well).

You have explained that the waterboard technique is used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack.

In addition, in the May 30 Bradbury memo, he cited a March 2, 2005 "Effectiveness Memo" and April 15, 2005 "Briefing Notes on the Value of Detainee Reporting" that make very specific claims about what they got through torture. For example, the "Briefing Notes" claim Abu Zubaydah only revealed KSM's identity after the use of enhanced interrogation.

Interrogations of Zubaydah—again, once enhanced techniques were employed—furnished detailed information regarding al Qaeda's "organizational structure, key operatives, and modus operandi" and identified KSM as the

mastermind of the September 11 attacks.

The entire edifice of legal cover the CIA built themselves rests on the premise that 1) Abu Zubaydah was uncooperative and 2) Abu Zubaydah was hiding critical intelligence. Sure, the CIA guys may have believed it at the time (or they may have said those things to win their turf war and to get the chance to try out their fancy new techniques on Abu Zubdaydah). But the further we get from that time and the more that claim is called into question, the more important defending the claim becomes legally.

Because that's all they've got keeping them out of the pokey.