

## Torture Used to Link Saddam with 9/11

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Hayden had confirmed that the Bush administration only waterboarded Khalid Sheikh Mohammed, Abu Zabaydah, and Abd al-Rahim al-Nashirit for one minute each. I told Franks that I didn't believe that. Sure enough, one of the newly released torture memos reveals that Mohammed was waterboarded 183 times and Zubaydah was waterboarded 83 times. One of Stephen Bradbury's 2005 memos asserted that "enhanced techniques" on Zubaydah yielded the identification of Mohammed and an alleged radioactive bomb plot by Jose Padilla. But FBI supervisory special agent Ali Soufan, who interrogated Zubaydah from March to June 2002, wrote in the *New York Times* that Zubaydah produced that information under traditional interrogation methods, before the harsh techniques were ever used.

Why, then, the relentless waterboarding of these two men? It turns out that high Bush officials put heavy pressure on Pentagon interrogators to get Mohammed and Zubaydah to reveal a link between Saddam Hussein and the 9/11 hijackers, in order to justify Bush's illegal and unnecessary invasion of Iraq in 2003. That link was never established.

President Obama released the four memos in response to a Freedom of Information Act request by the ACLU. They describe unimaginably brutal techniques and provide "legal" justification for clearly illegal acts of torture and cruel, inhuman or degrading treatment. In the face of monumental pressure from the CIA to keep them secret, Obama demonstrated great courage in deciding to make the grotesque memos public. At the same time, however, in an attempt to pacify the intelligence establishment, Obama said, "it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution."

In startlingly clinical and dispassionate terms, the authors of the newly-released torture memos describe and then rationalize why the devastating techniques the CIA sought to employ on human beings do not violate the Torture Statute (18 U.S.C. sec. 2340).

The memos justify 10 techniques, including banging heads into walls 30 times in a row, prolonged nudity, repeated slapping, dietary manipulation, and dousing with cold water as low as 41 degrees. They allow shackling in a standing position for 180 hours, sleep deprivation for 11 days, confinement of people in small dark boxes with insects for hours, and waterboarding to create the perception they are drowning. Moreover, the memos permit many of these techniques to be used in combination for a 30-day period. They find that none of these techniques constitute torture or cruel, inhuman or degrading treatment.

Waterboarding, admittedly the most serious of the methods, is designed, according to Jay Bybee, to induce the perception of "suffocation and incipient panic, i.e. the perception of drowning." But although Bybee finds that "the use of the waterboard constitutes a threat of imminent death," he accepts the CIA's claim that it does "not anticipate that any prolonged

mental harm would result from the use of the waterboard.” One of Bradbury’s memos requires that a physician be on duty during waterboarding to perform a tracheotomy in case the victim doesn’t recover after being returned to an upright position.

As psychologist Jeffrey Kaye points out, the CIA and the Justice Department “ignored a wealth of other published information” that indicates dissociative symptoms, changes greater than those in patients undergoing heart surgery, and drops in testosterone to castration levels after acute stress associated with techniques that the memos sanction.

The Torture Statute punishes conduct, or conspiracy to engage in conduct, specifically intended to inflict severe physical or mental pain or suffering. “Severe mental pain or suffering” means the prolonged mental harm caused by or resulting from either the intentional infliction or threatened infliction of severe physical pain or suffering, or from the threat of imminent death.

Bybee asserts that “if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent.” He makes the novel claim that the presence of personnel with medical training who can stop the interrogation if medically necessary “indicates that it is not your intent to cause severe physical pain.”

Now a federal judge with lifetime appointment, Bybee concludes that waterboarding does not constitute torture under the Torture Statute. However, he writes, “we cannot predict with confidence whether a court would agree with this conclusion.”

Bybee’s memo explains why the 10 techniques could be used on Abu Zubaydah, who was considered to be a top Al Qaeda operative. “Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from [the CIA’s] proposed interrogation methods,” the CIA told Bybee. But Zubaydah was a low-ranking Al Qaeda operative, according to leading FBI counter-terrorism expert Dan Coleman, who advised a top FBI official, “This guy is insane, certifiable, split personality.” This was reported by Ron Suskind in his book, *The One Percent Doctrine*.

The CIA’s request to confine Zubaydah in a cramped box with an insect was granted by Bybee, who told the CIA it could place a harmless insect in the box and tell Zubaydah that it will sting him but it won’t kill him. Even though the CIA knew that Zubaydah had an irrational fear of insects, Bybee found there would be no threat of severe physical pain or suffering if it followed this procedure.

Obama’s intent to immunize those who violated our laws banning torture and cruel treatment violates the President’s constitutional duty to “take Care that the Laws be faithfully executed.”

U.S. law prohibits torture and cruel, inhuman or degrading treatment, and requires that those who subject people to such treatment be prosecuted. The Convention against Torture compels us to refer all torture cases for prosecution or extradite the suspect to a country that will undertake a criminal investigation.

Obama has made a political calculation to seek amnesty for the CIA torturers. However, good faith reliance on superior orders was rejected as a defense at Nuremberg and in Lt. Calley’s Vietnam-era trial for the My Lai Massacre. The Torture Convention provides unequivocally, “An order from a superior officer or a public authority may not be invoked as

a justification for torture.”

There is evidence that the CIA was using the illegal techniques as early as April 2002, three to four months before the August memo was written. That would eliminate “good faith” reliance on Justice Department advice as a “defense” to prosecution.

The Senate Intelligence Committee revealed that Condoleezza Rice approved waterboarding in July 17, 2002 “subject to a determination of legality by the OLC.” She got it two weeks later from Bybee and John Yoo. Rice, Dick Cheney, John Ashcroft, Alberto Gonzales and George Tenet reassured the CIA in spring 2003 that the abusive methods were legal.

Obama told AP’s Jennifer Loven in the Oval Office: “With respect to those who formulated those legal decisions, I would say that is going to be more of a decision for the Attorney General within the parameters of various laws, and I don’t want to prejudge that.” If Holder continues to carry out Obama’s political agenda by resisting investigations and prosecution, Congress can, and should, authorize the appointment of a special independent prosecutor to do what the law requires.

The President must fulfill his constitutional duty to ensure that the laws are faithfully executed. Obama said that “nothing will be gained by spending our time and energy laying blame for the past.” He is wrong. There is more to gain from upholding the rule of law. It will make future leaders think twice before they authorize the cruel, illegal treatment of other human beings.

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