

December 13, 2007

MEMORANDUM

To: Tom Kean and Lee Hamilton

From: Philip Zelikow

Subj: Interrogations and Recordings: Relevant 9/11 Commission Requests and CIA Responses

Following up on your December 7 request to NARA, invoking the Commission's agreement with NARA on access to its records, Steve Dunne and I have reviewed Commission records relevant to ongoing inquiries into alleged CIA recording of interrogations. According to press stories that began appearing on December 6, the CIA recorded hundreds of hours of interrogations of Abu Zubaydah and Abd al Rashim al Nashiri and perhaps others, during 2002 and perhaps at other times. These recordings are reported to have been destroyed in November 2005.

Summary: The Commission made broad initial requests for intelligence information from interrogations, specifically including Zubaydah and Nashiri. After evaluating the responses, the Commission followed up with repeated requests for very detailed information about the context of these interrogations, the character of the questioning, the credibility of the statements elicited, the assessments of the interrogators, the quality of the language interpretation, and other matters. The Commission was dissatisfied with the answers it received to these questions. It even sought (unsuccessfully) to question detainees or their interrogators directly in order to get better answers. None of the officials involved in these exchanges disclosed the existence of recordings that might have contained facts material to the Commission's questions on these points. Further investigation is needed to determine whether these nondisclosures violated federal law. End summary.

The Commission's initial requests

The Commission was not investigating the treatment of captives. But it did seek information not only about the 9/11 plot, but also any intelligence

information about the history and evolution of al Qaeda and its connections to other terrorist entities. Therefore, from the start, the Commission sought to obtain all relevant information gleaned from the interrogation of captives.

At first the commissioners and staff had only a vague understanding of what to seek. They had not seen any interrogation reports. Their initial presumption was that perhaps there were transcripts of the interrogations that were turned into reports. The initial document request for interrogation material (DCI Document Request No. 4 filed on June 6, 2003) thus asked broadly for “all TDs and other reports of intelligence information obtained from interrogations” of forty named individuals. Later supplements added requests for information gained from interrogations of seventy-eight other named persons. The initial request included both Abu Zubaydah and Abd al Rashim al Nashiri. Such requests went to the CIA, DOD, and the FBI.

The requests also stated that if any requested documents were being withheld from the Commission, even temporarily, the agency should immediately identify what documents or class of documents were being withheld “with sufficient specificity to allow a meaningful challenge to such withholding.”

Because the initial requests yielded very little information from the interrogations of Nashiri, the Commission later underscored its interest in getting this information, even if it did not relate directly to the 9/11 attacks, asking the CIA for “all TDs and reports related to the attack on the USS Cole, including intelligence information obtained from the interrogations of Abd al Rashim al Nashiri.” (DCI Document Request No. 37 dated February 9, 2004)

The initial requests also warned that the Commission “may request more detailed information about specific interrogations, including selected transcripts, as we review these reports and identify particular concerns.” Concerns were soon identified, leading to further requests for detailed information about a number of specific interrogations.

Concerns, and the next wave of information requests

The CIA responded to the initial requests by supplying a large number of disseminated intelligence reports (“TDs”) that came from interrogations.

After reviewing and digesting this material, Commission staff concluded that this information was not as detailed as they had expected. So, as reflected in internal staff emails in August 2003, the staff decided it had to probe much further into the detainee interrogation process.

Several staffers had discussions with CIA officials about the interrogation process and the preparation of reports from it in the late summer and early fall of 2003, including meetings on September 22 and September 25, 2003. The Commission staffers who took part in these discussions (Zelikow, Marcus, Snell, Dunne, and De) recall being told that interrogations were turned into written reports, first through operational cables sent to reports officers and then as the reports officers wrote up the material for dissemination to the intelligence community. The staff was repeatedly assured that there were no material or substantive differences between the information contained in the operational cables and the information in the disseminated reports. Thus any gaps in the reports would not be solved by consulting the operational cables. (The Commission had sought and obtained access to CIA operational cables on other issues, as needed.)

But the CIA officials assured Commission staff that, if the Commission would pose specific questions about the interrogations, the Agency would do all it could to answer them. Commission staff then developed requests for much more detailed information.

This next wave of requests were sent to CIA General Counsel Scott Muller on October 14 and 16, 2003.

- The October 14 questions (from Marcus, Dunne, and Snell to Muller), "Questions for CIA Regarding Detainee Interrogation," posed dozens of very specific questions about puzzles in the interrogation reports themselves, including questions for anyone involved in the interrogations (e.g., interrogation administrators, interrogators, or reporting officers) to clarify statements made in Abu Zubaydah's interrogations (among others) or to clarify statements with further questions to the detainees.
- The October 16 questions (from Zelikow to Muller, cc'd to Dan Levin at the Department of Justice), "Evaluating Primary Information about the 9/11 Plot," were more general. They included questions about the translation process in the interrogations; the knowledge base of the

interrogators; the way the interrogators had handled inconsistencies in the detainees' stories; the context of what particular questions had been asked in order to elicit the reported information; the context of how interrogators had followed up on particular lines of questioning; and more information to assess the credibility and demeanor of the detainees in making the reported statements – and the views or assessments of the interrogators themselves.

If there was some confusion about what materials would be responsive to such requests, the Commission was ready to help. In one example involving another agency, corresponding with a DOD lawyer regarding one of its detainees, a Commission staffer noted that once DOD had determined “precisely what other types of custodial interview materials exist, we can resolve whether [this particular document] will be sufficient for the Commission’s purposes. At the end of the day, the Commission is interested in receiving whatever materials DOD considers the closest thing to a transcript, write-up, report, or first-hand summary of any given custodial interview.”¹

The CIA responded in writing to the October 14 and October 16 memoranda on October 31 and November 7, 2003, in particular in a memo from Assistant General Counsel Robert Morean to Zelikow dated November 7. The responses took the form of supplying additional disseminated reports and providing general, summary written replies to the questions about the context and character of the interrogations. The Agency did not supply any information about the conduct or approach of particular interrogations, except for an example about the way one query had been followed up in the questioning of KSM. The CIA did not disclose that any interrogations had ever been recorded or that it had preserved any further detailed information, in any form, about the questions the Commission had asked.

The Commission was not satisfied with these responses. It then made another prolonged effort to get more information to evaluate reported detainee statements and to address other questions raised by the information it had received.

¹ Email from Raj De to Stewart Aly, October 22, 2003.

The third wave of efforts to get information from and about detainees

Based on CIA's written responses to its questions, the Commission concluded that the CIA had provided all the responsive information in its possession. Therefore the only way to get more information to answer its detailed questions was to question the detainees directly, and perhaps the interrogators as well. Since this would be a challenging undertaking for all sides, the Commission chose to seek such access only for seven detainees who appeared at that time to have played a central role in the 9/11 plot. One of these was Abu Zubaydah.

Staff developed this proposal in detail during December 2003 and, after being rebuffed at lower levels, Chairman Kean and Vice-Chair Hamilton presented the proposal directly to DCI Tenet in a lunch meeting on December 23, 2003. Tenet refused, arguing that this might disrupt the interrogation process. After further discussion, Tenet offered to do everything he could to address the Commission's concerns, short of "physical access." He also offered to allow Commission staff to meet with interrogators.

Using a talking point he had reviewed in advance, Hamilton also emphasized – for all the Commission's requests – that the CIA should provide any responsive documents, even if the Commission had not specifically asked for them. In response, Tenet alluded to several documents he thought would be helpful to the Commission.² He did not mention any other information that would shed light on the Commission's questions about particular interrogations.

The full Commission considered this issue in a meeting on January 5, 2004 and decided the CIA responses were insufficient. It directed the staff to prepare a letter to administration officials that would make the dispute public. There were then discussions between Hamilton and White House counsel Alberto Gonzales and several meetings of CIA lawyers with Commission staff. The Commission offered various compromises to avoid

² In addition to Tenet, Kean, and Hamilton, other participants from the Commission were staffers Zelikow and Kojm. Other participants from CIA were John McLaughlin, John Moseman, Scott Muller, and Rudy Rousseau. This account draws on the Commission's memorandum for the record on this meeting, prepared later that day; supplemented by the briefing memorandum prepared beforehand by Zelikow and Kojm for Kean and Hamilton.

disrupting the interrogation process, including direction or observation of questioning in real-time using one-way glass, adjoining rooms, or similar techniques. In a January 15, 2004 memo to Gonzales, Muller, and Undersecretary of Defense Steve Cambone, Zelikow wrote, “We remain ready to work creatively with you on any option that can allow us to aid the intelligence community in cross-examining the conspirators on many critical details, clarify for us what the conspirators are actually saying, and allow us to evaluate the credibility of these replies.”

But these negotiations made little progress. Hamilton and commissioner Fred Fielding then met with Gonzales, Tenet, Secretary of Defense Rumsfeld, and Chris Wray from the Department of Justice. The administration offered to take sets of written followup questions, pose them to detainees, relay answers back to the Commission, and take further questions. In a January 26, 2004 meeting the Commission accepted this proposal as the best information it could obtain to address its longstanding questions. None of the government officials in any of these 2004 meetings alluded to the existence of recordings of interrogations or any further information in the government’s possession that was relevant to the Commission’s requests.

This agreement was implemented and produced some additional statements from detainees that were of value to the Commission. Nonetheless, Commission staff continued to regard the information as insufficient to address the questions that had been raised about the credibility and meaning of the interrogation reports. These concerns were eventually highlighted in a text box in in the Commission report (p. 146).

Late in its investigation, reacting to press allegations that Abu Zubaydah had referred to a Saudi prince in his interrogations, the Commission asked “what information does the CIA have” about whether such assertions were made in Zubaydah’s interrogations. (CIA Question for the Record No. 3, dated May 20, 2004). We knew the CIA believed this was untrue but we asked the question formally to get any relevant information for the record. We cannot find a record of a CIA response.

Near the conclusion of the Commission’s work, responding to a request the Commission made to all agencies, DDCI McLaughlin formally confirmed (on June 29, 2004) that the CIA “has taken and completed all reasonable steps necessary to find the documents in its possession, custody, or control

responsive” to the Commission’s formal requests and “has produced or made available for review” all such documents.

Relation to federal law

The principal statute of interest in this context is 18 U.S.C. section 1001, punishing the concealment of material facts in a matter within the jurisdiction of the United States government. The Commission has always viewed its activities as covered by this statute as an “investigation or review” conducted pursuant to the authority of a “commission” of the Congress, or a matter within the jurisdiction of the executive branch.

The statute penalizes anyone who “knowingly and willfully ... conceals, or covers up” a “material fact” in such an investigation or makes “any materially false” statement or representation to the investigating agency.

The Commission’s requests established that various aspects of the interrogations of the named individuals, including Zubaydah and Nashiri, were material to its investigation. If the CIA held recordings of the interrogations of either of these individuals, or any other detainee named in its requests who made statements about the development of al Qaeda in general or the 9/11 attack in particular, then those recordings may well have contained a great deal of information on the matters raised by the Commission.

We do not have information to form an opinion on whether the recordings actually existed or what they documented. Nor do we have the information needed to judge whether anyone concealed the facts or covered them up, as those terms are defined under federal criminal law, or whether any such acts were knowing or willful.