

# GOVERNMENT ADMITS ITS UNDERSTANDING OF ABU ZUBAYDAH HAS “EVOLVED”

I wanted to return to the government’s filing on Abu Zubaydah backing off the key claims on which our torture system is based. A year ago, the government filed its factual return to justify the detention of Abu Zubaydah. In response, AZ’s lawyers asked for a bunch more information, such as evidence that AZ was not a member of al Qaeda and didn’t know about 9/11 before it happened. This document, which is the government’s response to that request, argues that AZ is not entitled to the information, because the government’s factual return did not allege that AZ was a member of al Qaeda or knew about 9/11. In other word, the government is arguing that, in spite of all the times that government officials up to and including the President have made such claims, the government is no longer doing so, and so AZ doesn’t need to refute such claims, and therefore isn’t entitled to information that would refute them.

Which means that what happened to Jose Padilla is happening with AZ: when the government was forced to actually provide evidence to support its claims, it abandoned some of its more sensational claims. Arguably, one of the reasons the government backed off its claims has to do with eliminating all charges that might have come from AZ’s torture (though the government hasn’t done so with other detainees who were tortured); it says all of the assertions in the factual return are based on things disclosed in AZ’s diaries and in one video he shot. But the government did explicitly admit that its understanding of who AZ is has changed.

Petitioner’s various requests aimed at uncovering information that suggests that Government agents or agencies

questioned or abandoned early assessments about Petitioner's activities (Pet'r's Mem. at 23-26, 29 n.43; Request Nos. 14, 44,45, 51, 56, 66, 96i-j) also do not fall within the scope of CMO § I.E.2. Petitioner has not shown that access to such documents and information would help him contest the information contained in the Government's factual return. The factual return represents the current basis of the Government's detention and the only relevant basis for purposes of this proceeding. Petitioner cannot obtain habeas relief by merely showing that the Government's understanding of Petitioner's activities has evolved since his capture or that individual Government agents have disagreed with past Government assessments and analyses.

Petitioner's Request Nos. 14, 44, 51, 56, and 66 seek evidence suggesting that the Government's "initial assessments were incorrect or exaggerated," and also seeks information about allegations that the Government has asserted in other cases that are inconsistent with allegations made in this case. The issue in this litigation is whether Petitioner's detention is lawful based on the contentions and evidence that the Government has presented to the Court in its factual return, not whether Petitioner's detention would be lawful under some other set of contentions Petitioner has selected. **The Government's understanding of Petitioner's role in terrorist activities has necessarily evolved with further investigation.** Evidence that the Government has abandoned or revised earlier beliefs about the Petitioner would not make Petitioner's detention unlawful under the Government's current understanding of the facts, as reflected

in the factual return. Petitioner's requests for evidence and information about earlier Government assessments fall outside the scope of CMO § 1.0.1 and fail the narrow tailoring, specificity, and good cause requirements of CMO § 1.f.2(1), (2), (3), and (4). [my emphasis]

"Evolved with further investigation." Based on diaries they've had since 2002.

The contents of this filing fills in some of the allegations that are redacted in the factual return. Together, they show that the government alleges that AZ:

- Trained in a series of mujahadeen training camps (though not at a time when they were targeting the US)
- Paid the expenses for the Khaldan training camp, at which people from persons from al-Qaida, Egyptian Islamic Jihad, Anned Islamic Group, Salafite Group for Preaching and Fighting, Hamas, and Hizballah—including Mohammad al Owhali, one of the embassy bombers, and Khalid al Mihdhar—trained (though both al Owhali and al Mihdhar also trained at other camps)
- Was (according to Ahmed Ressay) "the 'top guy' and was in charge [of] moving persons who came to

Pakistan/Afghanistan for training and [of] assisting with their papers, money or providing safe harbor at a guesthouse”

- Was associated with a guesthouse in Peshawar at which Ressam met three Saudi men who had attended the al-Faruq or al-Sidiq al-Qaida training camps
- Gave Ressam a letter that allowed him to train at Derunta training camp
- Learned of Ressam’s plan for an attack in the US—though not the time and place
- “Coordinated and cooperated with [OBL] in the conduct of training and trainee movements between their camps,” but didn’t necessarily know the identities of people selected to move from Khaldan to al Qaeda training camps
- Met with OBL to discuss the potential union of disparate mujahideen groups under common leadership; the government does not allege AZ agreed with OBL’s proposal and they acknowledge that OBL had the Taliban shut down Khaldan in an effort to consolidate

control over training camps afterwards

- Made a video supportive of al Qaeda
- Was “an affiliate”—but not a member—of AQ
- “‘Work[ed] in [OBL’s] military and security plan to confront an American counterattack’ in Khost, Afghanistan, after the September 2001 attacks”—though AZ refused to submit as an AQ deputy and ultimately left Khost
- Was in Kandahar in November 2001 at the same time as a number of high level al Qaeda figures
- Assisted “militant brothers” and families to escape from Afghanistan after the American attack on it
- Was planning a plot (presumably against Americans) using IEDs
- Moved from safe house to safe house in February and March 2002
- “Harbored terrorists” at the last safe house in Faisalabad, where he was captured

In other words, the case against AZ (though a few allegations remain redacted) consists primarily of Ressam’s allegations and accusations that when the US attacked

Afghanistan in retaliation for 9/11, AZ supported efforts against them. And in spite of several admissions that AZ directly resisted AQ directions, the government maintains that AZ was "affiliated" with the group. While AZ contests some of these claims entirely (such as that he funded Khaldan or was carrying out a plot), in his CSRT he agreed with the general arch of the story.

Which is where I think the government is inching inexorably closer to indefinite detention with AZ. Obviously, that's where they're headed, anyway, because there is no way they're going to show the public what they've done to this man. But while their case against AZ still has claims to direct, aggressive action against the US, much of it related to Ressay, that case is getting more and more attenuated. And what's left is an old mujahadeen, leftover from the Russian war because—as a Palestinian—he has nowhere to go, still supportive of force against those persecuting Muslims (he claims, though the government contests this, that he only supports targeting military targets). In his CSRT AZ unabashedly declared himself the enemy of the US military. He has undeniably supported Islamic militants. As such, he is dangerous to US forces (assuming he would be competent doing what he used to do anymore). And that, ultimately is where the government ends its discussion of how AZ is not formally a member of AQ but nevertheless a danger to the US.

In light of the nature and extent of the Government's allegations, however, statements and evidence that suggest only that Petitioner was not formally a "member" of al-Qaida, but do not undermine any aspect of the Government's account of Petitioner's conduct and actions, do not materially undermine the Government's asserted basis for detention. As such, statements and evidence of this kind do not fall within CMO § 1.0.1, nor are they likely to result in the discovery of exculpatory

evidence for purposes of CMO § I.E.2. See Hamlily v. Obama, 616 F. Supp. 2d 63, 75, 76-77 (D.D.C. 2009) (Bates, 1.) (noting, upon considering the legal standard for detention, that the Court “will, by necessity, employ an approach that is more functional than formal,” and noting that “if the evidence demonstrates that an individual did not identify himself as a member, but ... rendered frequent substantive assistance to al Qaeda, whether operational, financial or otherwise, then a court might conclude that he was a ‘part or the organization”).

For the same reason, any evidence that suggested only that Petitioner may have had ideological disagreements with or reservations about al-Qaida, its leaders, or its methods, but that would not undermine Respondent’s allegations about the actions Petitioner actually performed or planned, would not fall within CMO § J.D. 1, and its production would not be likely to result in the discovery of exculpatory evidence for purposes of CMO § I.E.2. In simple terms, the issue in this habeas corpus action is Petitioner’s conduct. Private or public renunciations of violence would not abrogate the Government’s authority to detain a person who has espoused violence in his actions and has demonstrated through his conduct that **he poses a national security threat to the United States consistent with principles derived from the traditional law of war.** [my emphasis]

As I said, there are lots of reasons the government will end up indefinitely detaining AZ (one of the things the government argued it didn’t have to release was materials from the Detainee Task Force that has made these determinations). But one of those reasons is

that their argument is becoming—evolving, if you will—into an argument that AZ is dangerous, whether or not he is or ever was a member of al Qaeda.