

THE GOVERNMENT MAKES NO CLAIM ABU ZUBAYDAH HAD KNOWLEDGE OF IMPENDING TERRORIST PLANS

There's one more really incendiary passage from the government's response to Abu Zubaydah's request for more information in his *habeas* petition (see [here](#), [here](#), and [here](#) for more on this document). In response to a request for evidence indicating that Abu Zubaydah had no knowledge of pending terrorist attacks when he was captured in 2002, the government responds that they have not contended, in this proceeding, that he did have such knowledge.

The Government also has not contended in this proceeding that at the time of his capture, Petitioner had knowledge of any specific impending terrorist operations other than his own thwarted plans. Accordingly, there is no reason or basis to compel the Government to search for information indicating that Petitioner had no knowledge of such impending terrorist operations, as Petitioner requests in his Request No. 66.

Now, let's be clear what this statement is not: it's not an admission that the government knows AZ didn't know of any pending terrorist attacks. By limiting their statement to AZ's *habeas* petition—to their legal claim at the moment describing why they're detaining him—they also limit their admission. That is, they may now believe that AZ didn't know about any further terrorist attacks. Or they may still believe that AZ had knowledge of pending attacks, but can't use that claim because they either have no

untainted evidence to support it or doing so would too quickly rely on AZ's tortured statements.

So while this is not a full admission that AZ didn't know of any pending terrorist attacks, it is a pretty good sign that the government either can't or doesn't want to defend that claim.

Compare the caution about making such a claim with the claims made in another legal document submitted last year, the very first passage in Jay Bybee's first response to the OPR report (Bybee submitted this on May 4, 2009, so a full month after the government submitted Abu Zubaydah's factual return, though there's no reason to believe Bybee would have known the content of the factual return).

Six months after the September 11, 2001 attacks, United States forces captured top al Qaeda leader Abu Zubaydah. Because Zubaydah had assumed the role of chief military planner for al Qaeda, he possessed critical imminent threat information. In particular, the Central Intelligence Agency ("CIA") determined that Zubaydah had information about a "second wave" of devastating attacks targeting, among other things, the tallest building in Los Angeles.

According to Jay Bybee—the guy who signed off on AZ's torture—AZ "possessed" critical intelligence. He states this with no caveats.

There's a reason Bybee still clings to the claim (or clung to it last May—his second response softened this claim somewhat). That's because the claim that AZ had intelligence on upcoming attacks was the very first assumption OLC laid out in the Bybee Two memo after it stated that if the facts proved to be different, the advice might be different, too.

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. Zubayda 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.

That is, the entire authorization to torture AZ—and therefore the entire authorization for the torture program more generally—depended on the veracity of claims that the CIA would only torture people who, they knew, had intelligence about upcoming attacks.

But, as it turns out, the government won't make that claim in an environment in which they'd have to provide proof to back up the claim. Somehow, CIA's certitude (and with it Jay Bybee's) has become a claim that cannot be supported in a legal proceeding.

This is important not just because it means the entire torture program rests on dubious claims. But because it raises questions about why the CIA was so sure AZ had intelligence about further attacks. Was there, ever, specific intelligence about further attacks, which the CIA just assumed AZ knew about because they totally misunderstood who he was? Did the belief that AZ had knowledge about further attacks come as a result of his torture (or that of Ibn Sheikh al-Libi or Binyam Mohammed or someone else)? Or was it even more tenuous than that, chatter about actual weddings collected in Cheney's illegal wiretap program that caused them to panic? Or was it simply a desire to sow fear in August 2002, just in time to roll out the new "Iraq War" product after the August

recess; so by torturing AZ they could fearmonger about attacks on banks and bridges and subways he had invented to stop the torture?

For some reason, in summer 2002 CIA told DOJ that it was certain that AZ had intelligence about follow-up attacks. We really deserve to know what the basis for their certainty was. Because at this point, the government refuses to make that claim in a forum in which they'd actually have to provide proof to support their certainty.