

THE ABU ZUBAYDAH STANDARD IN OBAMA'S MIRANDA MEMO

Here are the claims the Bybee Two memo premised its authorization to torture Abu Zubaydah on:

As we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization,

[snip]

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.

Compare that with the description of an “operational terrorist” whose Miranda rights may be delayed under a memo issued by DOJ last October.

For these purposes, an operational terrorist is an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual

knowledgeable about operational details of a pending terrorist operation.

The two claimed preconditions for torturing AZ—that he was a high ranking member of an international terrorist group and knowledgeable about operational details of pending terrorist operations—are **exactly** the same as two possible premises (of three) for delaying an American detainee’s Miranda warning.

Only, with AZ, the CIA had to send John Yoo a bunch of information purportedly proving their claims before they got to torture AZ.

Here’s how such claims will be checked under the Miranda exception.

There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government’s interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation. [4] In these instances, agents should seek SAC approval to proceed with unwarned interrogation after the public safety questioning is concluded. Whenever feasible, the SAC will consult with FBI-HQ (including OGC) and Department of Justice attorneys before granting approval.

[snip]

As noted above, **if there is time to consult with FBI-HQ (including OGC) and Department of Justice attorneys regarding the interrogation strategy to be followed prior to reading the defendant his Miranda rights, the field office should endeavor to do so.** Nevertheless, **the agents on the scene**

who are interacting with the arrestee are in the best position to assess what questions are necessary to secure their safety and the safety of the public, and how long the post-arrest interview can practically be delayed while interrogation strategy is being discussed. [my emphasis]

In other words, while FBI says it'd be nice if the folks holding the detainee consult with the lawyers in DC before delaying a suspect's Miranda warning, they provide a great big invitation—"the agents on the scene who are interacting with the arrestee are in the best position to assess what questions are necessary to secure their safety and the safety of the public"—for them not to do so. And far be it for FBI Agents to refuse such a kind invitation!

So an FBI Agent in the field can decide on his own (for reasons of urgency, you understand) not to Mirandize a guy that he has decided, with no review, is a top ranking terrorist or knows about an upcoming terrorist attack. And a plain reading of the text doesn't even require that the terrorist attack be related to international terrorism; it could be an environmental attack, for example. If an FBI Agent believes some vegan wants to free a bunch of pigs used in experimentation, he can declare it a planned terrorist attack and hold the vegan without Miranda warning. Since Main DOJ does not require that it oversee this process, it will be able to claim it has no responsibility for any abuses that result.

It will look like this in the eventual DOJ IG Report: "No one could have predicted that FBI Agents would abuse a policy written so broadly."

Now, as it happens, when the government started making claims **in court** about AZ, in a venue in which both an independent judge and AZ's lawyer could challenge what evidence the government actually turned over, the government chose not to claim that he was either a top-ranking al

Qaeda member or aware of upcoming terrorist plots.

There's good reason they didn't make such claims. That's because he wasn't. As the government eventually admitted to AZ, after they waterboarded him 83 times. And after spending the better part of a summer chasing down the terrorist plots he invented to try to get the torture to stop.

The CIA IG Report explained how it was that the government came to have such a mistaken understanding of AZ and others.

The Agency lacked adequate knowledge of what particular Al-Qa'ida leaders—who later became detainees—knew. This lack of knowledge led analysts to speculate about what a detainee “should know,” vice information the analyst could objectively demonstrate the detainee did know.

But don't worry—I'm sure a couple of FBI Agents from, say, Iowa, working alone their first terrorism case with no required review from Main DOJ won't make the same kind of assumptions about what a detainee should know. Really.

Now, don't get me wrong. I'm not saying FBI Agents would use a Miranda delay to waterboard a detainee (waterboarding is CIA turf, after all). The CIA system clearly provided the opportunity for much more abuse.

But consider the one detainee known to be treated in such a fashion: Faisal Shahzad. The government claimed a central reason why they had to hold him without charge is that they needed unfettered access to him, 24/7, so they could immediately verify any new intelligence they picked up. Call me crazy, but interrupting a detainee repeatedly, 24/7, to ask a question sounds like a great way—even better than the Frequent Flier program used at Gitmo—to sleep deprive someone under the guise of doing something else. Since Shahzad eventually plead

guilty (remember that Pakistan basically detained his family members, perhaps including his wife and kids, while he was being questioned), the judge never really challenged whether his confession was coerced.

So we only have to look at the one prior case where such a delay was used to understand what kind of abuse can be done during the time before a detainee gets a lawyer.

So perhaps I am justified to be horrified by the parallel structure used in this memo and that used in John Yoo's notoriously problematic Bybee Memo.