HOW CIA AVOIDED NEGLIGENT HOMICIDE CHARGES IN THE SALT PIT KILLING

Since the AP story on the Salt Pit death, reporters have focused a lot of attention to a particular footnote in Jay Bybee's second response to the OPR Report and what it claims about intent (and, to a lesser degree, what it says about Jay Bybee's fitness to remain on the 9th Circuit). In it, Jay Bybee references a memo CIA's Counterterrorism Center wrote in response to Gul Rahman's death at the Salt Pit; the memo argued that the CIA officer in charge should not be prosecuted under the torture statute because he did not have the specific intent to make Rahman suffer severe pain when he doused him with water and left him exposed in freezing temperatures.

> Notably, the declination memorandum prepared by the CIA's Counterterrorism Section regarding the death of Gul Rahman provides a correct explanation of the specific intent element and did not rely on any motivation to acquire information. Report at 92. If [redacted], as manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack specific intent under the anti-torture statute. And it is also telling that the declination did not even discuss the possibility that the prosecution was barred by the Commander-in-Chief section of the Bybee memo.

As Scott Horton noted the other day, analysis of the torture statute should not have been the only thing in the declination memo. Prosecutors should have analyzed whether or not Rahman's

killing constituted negligent homicide, among other things.

> Note that the declination, issued by politically loyal U.S. attorneys who were subsequently rewarded with high postings at Main Justice, carefully follows the rationalizations that Yoo and Bybee advanced for not prosecuting deaths or serious physical harm resulting from state-sanctioned torture. But the obvious problem, as John Sifton notes at Slate, is that torture and homicide are hardly the only charges that could be brought in such a circumstance. Negligent homicide or milder abuse charges would have obviously been available, and a survey of comparable cases in the setting of state and local prisoners suggests that they are far more common. By looking only at homicide and torture, the prosecutors were paving the way for a decision not to charge.

But the OPR Report and the Legal Principles/Bullet Points documents it describes may explain why this didn't happen. The Legal Principles/Bullet Points document shows that CIA claimed—possibly, with the tacit approval of the Principals Committee—that the only two criminal statutes that could be applied to its interrogation program were the Torture Statute and the War Crimes Statute.

As a threshold matter, Horton appears to be misstating what the declination memo described in the footnote is and—more importantly—who wrote it. "Politically loyal US Attorneys" did not write the declination described here. Some lawyer at CIA's CTC wrote it. That's because, as the OPR Report explains in the section preceding the entirely redacted passage that discusses this letter (the declination letter appears on PDF 98, which appears in the same section as the following quotes from pages PDF 96 and 97), DOJ told CIA to go collect facts about the abuses

they reported in January 2003 (which include the Salt Pit killing and threats of death used with Rahim al-Nashiri) themselves.

> According to a CIA MFR drafted by John Rizzo on January 24,2003, Scott Muller (then CIA General Counsel), Rizzo and [redacted] met with Michael Chertoff Alice Fisher, John Yoo, and [redacted—probably Jennifer Koester] to discuss the incidents at [redacted]. According to Rizzo, he told Chertoff before the meeting that he needed to discuss "a recent incident where CIA personnel apparently employed unauthorized interrogation techniques on a detainee."
>
> [snip]
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> Chertoff reportedly commented that the CIA was correct to advise them because the use of a weapon to frighten a detainee could have violated the law. He stated that the Department would let CIA OIG develop the facts and that DOJ would determine what action to take when the facts were known. According to Rizzo, "Chertoff expressed no interest or intention to pursue the matter of the [redacted].
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> On January 28, 2003, CIA Inspector General John Helgerson called Yoo and told him that the CIA OIG was looking into the [redacted] matter. According to Helgerson's email message to Rizzo, Yoo "specifically said they felt they do not need to be involved until after the OIG report is completed." Rizzo responded to Helgerson: "Based on what Chertoff told us when we gave him the heads up on this last week, the Criminal Division's decision on whether or not some criminal law was violated here will be predicated on the facts that you gather and present to them."

Alerted that, in the course of interrogating detainees, CIA had killed one and threatened to kill another detainee, DOJ's first response (at least according to two different CIA versions of what happened) was to tell CIA to go collect information on the events themselves. Only after CIA finished investigating and presented the facts of the case would DOJ weigh in on whether a crime had been committed.

Four completely redacted pages in the OPR Report explain OPR's analysis leading up to its recommendation, on PDF 101, that one of the declination decisions in particular—which may well be Rahman's death, since this passage discusses the declination memo—be reexamined, as well as the others more generally. But the Legal Principles/Bullet Points document (which the OPR Report discusses starting on PDF 106) shows the legal framework CIA used to analyze the killing.

Here's how Jennifer Koester explained the Legal Principles/Bullet Points document to OPR:

> She understood that the Bullet Points were drafted to give the CIA OIG a summary of OLC's advice to the CIA about the legality of the detention and interrogation program. [Koester] understood that the CIA OIG had indicated to CTC[redacted] that it might evaluate the legality of the program in connection with its investigation, and that the Bullet Points were intended to demonstrate that OLC had already weighed in on the subject.

That is, this was CIA's own summary of the legal guidelines that governed its interrogation program, the guidelines it would use to analyze the facts on things like Rahman's death before reporting those facts to DOJ.

The rest of the OPR Report makes it clear that John Yoo and Jennifer Koester were freelancing when they worked on this document with CIA. The document was never signed, nor did it ever

appear on OLC stationary. The CIA would eventually claim that, "It was drafted in substantial part by Mr. Yoo and [Koester] and was approved verbatim. It reflects the joint conclusion of the CIA Office of General Counsel and the DoJ Office of Legal Counsel." But Yoo, when Jack Goldsmith asked him about the document when CIA was trying to use it to avoid criminal referrals coming out of the CIA IG Report, would argue that, "to the extent [the Legal Principles/Bullet Points] may have been used to apply the law to a set of facts, they did not constitute the official views of OLC. Yoo stated that 'OLC did not generate the Bullet Points, and that, at most, OLC provided summaries of the legal views that were already in other OLC opinions.'"

Whatever the official status of the document, on April 28, 2003, CIA sent Yoo and Koester a document claiming, among other things, that CIA interrogations were exempt from all but two US criminal laws.

> The United States is at war with al-Qa'ida. Accordingly, **US criminal statutes do not apply to official government actions directed against al-Qa'ida detainees except where those statutes are specifically applicable in the conduct of war or to official actions**.
>
> [snip]
>
> CIA interrogations of foreign nationals are not within the "special maritime or territorial jurisdiction" of the United States where the interrogation takes place on foreign territory in buildings that are not owned or leased or under the legal jurisdiction of the US government. [my emphasis]

In what appears to be her response (the typeface of the second version of this document is one used by DOJ, not CIA, and the original fax

itself was only 3-pages long), Koester tweaked the description of detainee interrogations as immune from almost all law this way:

> CIA interrogations of foreign nationals are not within the "special maritime and territorial jurisdiction of the United States where the interrogation occurs on foreign territory in buildings that are not owned or leased by or under the legal jurisdiction of the U.S. government. The criminal laws applicable to the special maritime and territorial jurisdiction therefore do not apply to such interrogations. Additionally CIA interrogations of foreign nationals are not within the sovereign territory of the United States. Thus, the federal criminal laws that apply within that territory do not apply to these interrogations. **The only two federal criminal statutes that might apply to these interrogations are: The War Crimes Statute, 18 USC 2441, the prohibition against torture, 18 USC 2340-2340A**. [my emphasis]

Assuming I'm right about the drafting history, Koester appears to have taken out a paragraph claiming certain techniques "and … comparable, approved techniques" violate neither criminal statute nor the Constitution. But that section was put back in the document before June 16, 2003, when CTC faxed the "final legal summary" to Patrick Philbin as a *fait accompli* after Yoo's departure. Both the section claiming a set of techniques "and comparable, approved techniques" were authorized, and the paragraph stating that only two laws applied to CIA interrogations, remained in the document when Scott Muller tried to get Jack Goldsmith to "reaffirm" it on March 2, 2004. Presumably, then, Muller had asserted those two claims when he and George Tenet briefed—among others—Dick Cheney, Condi Rice, Alberto Gonzales, and John Ashcroft seven months earlier on July 29, 2003,

when the Principals reapproved the program. While Patrick Philbin and Jack Goldsmith disputed the Legal Principles/Bullet Points document, CIA nevertheless claimed that it governed its interrogation program.

In other words, when DOJ learned of Gul Rahman's death, they told CIA to investigate it and report back. CIA did so and wrote a declination memo that appears to have been used as the basis for DOJ's own review of the death. But when CIA wrote the memo, it was operating under the claim—one that the Principals had presumably accepted on July 29, 2003—that not only could CIA use the techniques approved for use on Abu Zubadaydah with other detainees, but that the only two laws that governed the use of such techniques were the Torture Statute and the War Crimes Statute.

So there's a reason why Gul Rahman's killer wasn't charged with negligent homicide. The declination memo used to analyze the death worked under the claim that such laws didn't apply.