

TORTURING BINYAM MOHAMED-BEFORE BYBEE TWO

A few of you have alerted me to this judgment from the Binyam Mohamed case in the UK. As a reminder, Mohamed has been trying to force the British government to release information about torture he suffered at the hands of Americans and Pakistanis. But the British government refuses to allow the information to be revealed publicly because—they say—it'll threaten the relationship (and intelligence sharing) between the UK and US. Here Andy Worthington's post on this ruling, and here's Clive Stafford Smith's.

The ruling suggests that Americans were using torture techniques on Binyam Mohamed in April and May 2002, before use of those techniques was given (dubious) legal sanction with the Bybee Two memo on August 1, 2002.

The ruling is sort of like a Russian egg, arguing that passages from one ruling explaining why passages from an earlier ruling should not be redacted themselves should not be redacted. It is basically an argument in favor of making four passages from an October judgment (these are four passages from ruling five—I'll call them 4/5) publicly available. The Foreign Secretary David Miliband doesn't want those passages to become available because doing so would reveal what was redacted from an earlier judgment (these are seven passages from ruling one—I'll call them 7/1).

[The Foreign Secretary argues that] the four passages in the fifth judgment [4/5] indicate what is in the seven paragraphs redacted from the first judgment [7/1].

But the High Court argues that even if 7/1 should not be released (they don't buy this, but use the assumption to make their argument),

there is no reason 4/5 cannot be.

Now, the High Court appears to be using the Bybee Two memo (the one laying out the 10 techniques approved for use with Abu Zubaydah) as its basis for arguing that 4/5 can be released. They note that “the entire content” of 4/5 is in the public domain. They have already unredacted a passage in this ruling reading,

One of those memoranda dated 1 August 2002 [from Jay Bybee to John Rizzo] made clear that the techniques described were those employed against Mr. Zubdaydah.

And they note that one of the paragraphs redacted in 4/5 “is a verbatim quotation from the memoranda made public on 16 April 2009.” From this, we can assume that the content of that passage is an exact quotation from the Bybee Two memo.

Two more of the 4/5 redactions describe how the 7/1 redactions relate to—presumably—the Bybee Two memo.

paragraph 74(ii): The redacted subparagraph explains that what is in the redacted paragraphs is akin to what is already public.

paragraph 81: The redacted passage explains (1) the relationship of what has been placed into the public domain to what is in the redacted paragraphs, (2) why, in light of that relationship it is impossible to believe that President Obama would take action against the United Kingdom and (3) why publication of the redacted paragraphs is necessary to uphold the rule of law and democratic accountability.

So, to summarize, the High Court is almost certainly arguing:

1. Obama put Bybee Two into the

public domain, making the description of those techniques public

2. The 4/5 redactions basically use a verbatim quote from the Bybee Two memo to show that such description is in the public domain
3. The rest of the 4/5 redactions describe that one or some of the techniques described in Bybee Two were used on Mohamed
4. Because Obama released Bybee Two, he can't complain about releasing details about techniques in there being used on Mohamed

But here's the rub, the last assertion the High Court makes that probably is not so self-evident, when they claim, "it is impossible to believe that President Obama would take action against the United Kingdom and ... why publication of the redacted paragraphs [7/1] is necessary to uphold the rule of law.

One basis for their claim that Obama would not take action against the UK is because, by publishing 7/1, the UK would not be publishing anything about a third country—in this case, Pakistan, where Mohamed was held. The ruling makes it clear that everything in the redacted paragraphs refers to what Americans did to Mohamed. Effectively, the 7/1 redaction includes citations of intelligence reports shared between the UK and US, and the passages just describe what the US said the US did.

But then there's the other critical detail.

Those seven paragraphs [7/1] include a short summary of reports of the

treatment accorded to BM by officials of the United States Government during his unlawful and incommunicado detention in Pakistan in April and May 2002.

[snip]

The seven paragraphs [7/1] simply contain a short summary of the treatment of BM in April and May 2002 and our conclusion on its characterisation.

That is, the High Court is saying that Mohamed was subjected to the techniques approved in August 2002 relying on certain assumptions—notably, that Abu Zubaydah was a top al Qaeda figure with information on future attacks that could only be collected using such methods. Not only weren't those techniques approved in April and May, when they were used on Mohamed (they were probably used on Abu Zubaydah at the same time, but that's another matter). But the US government has now all-but admitted that Mohamed has no ties to al Qaeda and no information about further attacks. Therefore, even buying John Yoo's twisted reasoning, the required preconditions for using torture did not exist for Mohamed, yet Americans used those techniques anyway.

Now, the High Court might well be arguing that all of this treatment is illegal in any case (and note, they mention both torture and cruel and inhuman treatment). But they might also be arguing that Mohamed's treatment according to the US' own description of what they did to him did not meet the terms laid out in Bybee Two. Obama and Holder said repeatedly that those who treated someone in terms outside of the terms laid out in Bybee Two would be eligible for prosecution, which may be one reason the High Court claims that Obama couldn't complain about making these passages available.

Of course, it's not clear whether Obama and Holder still stand by those statements. And it's certainly clear that Obama would prefer keeping

proof secret that—even according to internal intelligence—it knows Mohamed’s interrogators broke the law.

But heck—if arguing the contrary will get this stuff in the public record, all the better.