DAVID PASSARO THREATENED TO EXPOSE THE SERE-TORTURE TIE

As I said in my last post on David Passaro, the only CIA guy to be prosecuted for detainee abuse, Passaro knew (or learned, in anticipation of his indictment) how to defend himself against charges stemming from torture. As I'll show here, he was trying to expose the tie between SERE and the government's torture program in spring 2004, long before it became public.

Passaro Prepared to Deal with Criminal Charges

As his pre-indictment lawyer described, from the time he received a target letter in February 2004 until he was arrested in June, he continued to work—with security clearance—at Fort Bragg, collecting information that might be helpful to his defense.

> [H]e was gathering documents and information he felt would be helpful to his defense, which he would deliver to me, and in the event of his being charged, would see were delivered to me.
>
> [snip]
>
> David continued to meet with me regularly on the matter, to assemble material helpful to his defense, and to take steps to raise funds to retain counsel if he were indicted.
>
> [snip]
>
> Despite [knowing that an indictment was imminent, Passaro] continued to report daily to his top secret Fort Bragg post, continued to meet with [Beaver] on a weekly basis, continued to try and raise money for his defense and continued to accumulate documentary evidence to

> assist me in his defense.

During this period, Passaro's lawyer tried to get discovery from the government; DOJ lawyers told him that they wouldn't turn over information unless and until Passaro was indicted, and at that point, it would be subject to CIPA.

The Government Tried to Prevent Passaro from Using What He Knew

It appears that, after the indictment, the government worked quickly to prevent Passaro from using any of the information he had collected. The week after the indictment, the government moved to get a protective order, protecting not just classified documents, but also "any information or document … that refers to national security or intelligence matters." More troubling, the day after the hearing on the protective order, the government got a warrant to seize a briefcase Passaro had. Passaro had said publicly that the briefcase included "legal materials." But it took 11 months for the government to even ask the judge to check whether two manila folders inside the briefcase were protected by attorney-client privilege.

Clearly, it seems, the government was worried about that Passaro might use information he already knew.

In the months after the government moved (in June) and got (in August) this protection order, they stalled on both getting Passaro's lawyers security clearances and on turning over any evidence to him.

Then, all of a sudden, in October, they changed their minds. When, on October 5, Passaro plead not guilty, the Court expressed some concern that the delay on clearances was impinging on Passaro's right to a speedy trial. A week later, at a hearing on the matter, the government announced that they had decided that the trial was not a big fight over classified information after all, but instead a simple assault case.

They claimed they could try it without classified information.

Passaro Used Two (Plus) of John Yoo's Favorite Torture Defenses

And Passaro's immediate response was, best as he could, to act on the information he had. In the first several months of November, Passaro's legal team initiated two of the legal strategies they would try to take to the Supreme Court.

> Jurisdiction: Remember that post I did showing how Jennifer Koester and John Yoo, in the early months of 2003 (that is, before Wali's death), put together a set of Legal Principles that—among other things—said the only two crimes a CIA person conducting detainee interrogations could be convicted of were Torture and War Crimes?
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> > 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.
>
> Passaro argued a version of that (bmaz will elaborate in a later post), saying that the Asadabad base was outside of the maritime and territorial jurisdiction of the US, and therefore any crimes there couldn't be prosecuted.
>
> Public Authority Defense: This is a defense that argues that an illegal act was undertaken in response to a request from an agency of the government—a defense particularly useful to CIA people who are routinely asked to do

> things that violate US law. It's slightly different from a Commander-in-Chief defense (though Passaro would try a version of that, before too long), but Passaro did invoke Bush's authority as part of this defense. More importantly, he invoked the whole regime of authorization for torture as part of his defense (remember, the Bybee One memo was leaked in the weeks before Passaro was indicted).

Both of these defenses, notably, invoked the kind of Get Out of Jail Free Card that John Yoo and David Addington envisioned when they crafted the Bybee Memo in July 2002. Passaro knew how to say that CIA interrogators couldn't be held responsible for crimes committed during CIA interrogations.

But Passaro did more than that. He also asked for a bunch of damning information that struck at the core of the Bush Administration's torture regime.

Passaro Knew the Torture Program Was Based on SERE

Though Passaro had started to ask for this information starting in May 2004, here's just some of the information he requested in the weeks following the government's proclamation that they were going to try this as a simple assault case:

- "All information in the possession of HQ regarding SERE (Survival, Evade, Resist, and Escape) School and training"
- Interrogation rules of engagement
- Any governmental plan giving advance approval to kill or capture terrorists

- A range of communications from Asadabad, including a specific request for Sat Phone tapes or transcripts and "High Side" communications about Wali's death

We've talked about the request for "High Side" communication before. And the request for "advance approval" would get you rather close to the September 17, 2001 Presidential Notification for CIA capture and detention program.

But I'm particularly interested in the other two bits.

Passaro, a SERE-trained Delta Force veteran working at Fort Bragg with some kind of clearance asked for a description of the SERE training he presumably endured in the 1980s. And he asked for CIA's rules of engagement for interrogation. Which, we now know—but he apparently intended to prove in spring 2004—were based on SERE techniques.

In response to the request for information on SERE training, the government responded, in January 2005,

> The defendant's demand for production of SERE training material, in addition to being so ill-defined as to be as a practical matter nearly indecipherable, is groundless. There is no reasonable basis to contend that the sort of assault with which the defendant is charged, including brutal booted kicking of the victim is justified by this or any other training program. The Court need not go further than the understanding of the acronym Survival, Evasion, Resistance and Escape. This is not a DOD interrogation program and is therefore irrelevant to the pending assault charges. While the nature of

> SERE training might be admissible should the Government choose to offer it in rebuttal to some specious claim mounted by the defense, there is no legitimate basis to require its production pre-trial.

To which Passaro responded,

> 2. Mr. Passaro's Request Nos. 5 & 8 seek evidence of the interrogation rules of engagement and practices in effect for suspected members of the Taliban, al Qaeda, and other terrorist organizations. (D.E. #51). The government refuses to produce this evidence and characterizes it as "groundless." (D.E. #81. at 10, 12). Mr. Passaro respectfully submits that interrogation rules and practices are directly material to the public authority defense in a prosecution based on alleged acts which occurred during the interrogation of a suspected terrorist. With respect to Request No. 8, Mr. Passaro is fully prepared to present evidence of the "migratory patterns" of interrogation practices utilized by Department of Defense personnel and those utilized by other government agencies.
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> 3. With respect to the relevancy to the public authority defense of Request No. 5, information regarding Survival, Evade, Resist and Escape Training (SERE) which Mr. Passaro endured while in the Special Forces, the attached New York Times article reports: "Many of the interrogation techniques in the C.I.A.'s list were adopted from the Air Force's Survival, Evasion, Rescue, and Escape training program." David Johnston, Neil A. Lewis and Doug Jehl, Nominee Gave Advice to C.I.A. on Torture Law, N.Y.Times, January 29, 2005, at A1 (Attach. 1, p.2). Unless the government

> contends that the Army's SERE training is nothing like the Air Force's SERE training, it cannot maintain that "there is no legitimate basis to require its production." (D.E. #81 at 11).

You know that superb report put out by SASC in 2008 (and declassified in 2009) showing how torture authorities migrated from Thailand to GItmo to Afghanistan (where Passaro was stationed) and Iraq? Passaro was promising he could make that argument—in Court—in 2005. And the assertion that the US torture program was based on reverse engineered SERE techniques—Passaro cites the NYT piece, one of the first pieces of public reporting to make the connection, nine months after he first made it—has since been extensively documented.

The point being, David Passaro, a SERE-trained veteran and CIA contractor who spent four months working with clearance at Fort Bragg waiting to be indicted for torture-related crimes, knew exactly how to respond. In addition to mobilizing some of John Yoo's favorite defenses, Passaro asked for the evidence he needed to prove that the government had reverse-engineered SERE techniques and approved them for use on detainees.

Which, depending how the jury was to interpret the evidence surrounding Wali's death (remember that the jury appears not to have believed that Passaro used his flashlight on Wali), is precisely what Passaro did with him.

As we'll see in an upcoming post, the government probably violated rules of discovery to prevent Passaro from making that case.

Passaro's Timeline

February 10, 2004: Passaro gets a target letter

February 12, 2004: Passaro engages Gerald Beaver for pre-indictment representation

May 7, 2004 (followed by letters on May 14 and May 18): Passaro asks for a range of evidence, including SERE training resources and rules of engagement

May 18 and May 25, 2004: DOJ responds that such materials will not be made unavailable unless and until Passaro is indicted and then only under CIPA

June 17, 2004: Passaro indicted

June 18, 2004: Passaro files a request for discovery

June 24, 2004: Government moves for a protective order covering "any information or document … that refers to national security or intelligence matters" and requiring the construction of SCIFs for the trial

June 25, 2004: Pursuant to a warrant, US Marshal seizes Passaro's briefcase, knowing (because of a comment of his) that it included "legal materials"

August 2, 2004: With a few changes, the Court accepts protective order

October 5, 2004: Passaro pleads not guilty; Court expresses concern about speedy trial because of delays on clearances for Passaro's legal team

October 13, 2004: Government changes position on case and asserts "this is a simple assault case. We believe we can try this case without any classified information utilized;" Court Security Officer gives interim clearances for Passaro's defense team

October 27, 2004: Government admits its has classified discovery for Passaro, though doesn't turn it over right away

November 11, 2004: Passaro first argues that the government had no jurisdiction to charge assault

November 12, 2004: Passaro first argues that he operated under Public Authority; Passaro reiterates his request for SERE and

interrogation information

May 20, 2005: Government alerts Court to seized briefcase (see June 25, 2004) and asks it to check two manila folders to see if they include privileged lawyer-client information