DOJ POINTS TO DAVID PASSARO'S TRIAL AS PROOF WE INVESTIGATE TORTURE, BUT IT ACTUALLY PROVES JOHN YOO SHOULD BE TRIED

Update: Meanwhile, the Spanish judge threw out the case.

> *A SPANISH judge overnight dismissed a complaint filed against former top US officials over alleged torture at the Guantanamo Bay detention camp. Judge Eloy Velasco decided to throw out the case as he said the US justice system is competent to handle any such complaint.*

The last time Spain considered investigating American torture, DOJ and Spain's Chief Prosecutor Jose Zaragoza worked together to find a way for Spain to decline the case: shortly after Zaragoza told us that "if a proceeding regarding this matter were underway in the U.S., that would effectively bar proceedings in Spain," Eric Holder asked John Durham to investigate torture. There's no visible sign in the least, mind you, that Durham has investigated the crimes in his mandate (which includes, among other things, the use of death threats against Abd al Rahim al-Nashiri and the manslaughter of Gul Rahman in Afghan's Salt Pit). But his investigation serves as a convenient diplomatic stunt to shield American torture from Spanish law.

DOJ attempts to stave off Spanish investigations by claiming we investigate torture

DOJ's back in the diplomatic stunt business with a letter attempting to convince Spain to drop its investigations of the lawyers who authorized

torture.

> We understand from Judge Velasco's request that a criminal complaint has been made by the Association for the Dignity of Spanish Prisoners, claiming that the United States, as part of a strategy in its conflict with the Taliban and Al Qaeda and its affiliates, sanctioned a series of executive orders supported by legal memoranda drawn up by the above-listed persons and their legal counsel and advisors, authorizing interrogation techniques in violation of international conventions in force. We have also been advised that the complaint further alleges that U.S. government personnel used the memoranda as a legal basis to conduct interrogations using these illegal techniques upon persons suspected of acting in concert with Al Qaeda and the Taliban. In the request, Judge Velasco seeks information indicating whether any U.S. authority has instituted investigations or proceedings in connection with the facts describes in the above-referenced complaint, and, if so, the specific authority (administrative or judicial) that has dealt or is dealing with such matters. The request further notes that if the facts are currently being investigated by U.S. authorities, that the referenced complaint will be sent to the United States in order that the facts reported therein may be investigated by the United States.

There's a lot that is misleading about DOJ's response letter. But one of its key strategies is badly fraudulent: the centrality of its focus on David Passaro's conviction for assault. The letter boasts:

> In 2003 [EW: it was 2004], the U.S. Department of Justice brought criminal

> charges against Passaro, a CIA contractor accused of brutally assaulting a detainee in Afghanistan in 2003. The CIA described his conduct as "unlawful, reprehensible, and neither authorized nor condoned by the Agency." The then Attorney General stated that "the United States will not tolerate criminal acts of brutality and violence against detainees…." And the U.S. Attorney noted that the extraterritorial jurisdiction exercised by the United States is "[n]ot only vital to investigating and prosecuting terrorists, but also it is instrumental in protecting the civil liberties of those on U.S. military installations and diplomatic missions overseas, regardless of their nationality." See press release at http://www.justice.gov/opa/pr2004/June/04_crm_414.htm, a copy of which is annexed as Attachment A hereto. Following a jury trial, Passaro was convicted of felony assault. On August 10, 2009, the United States Court of Appeals for the Fourth Circuit upheld the conviction, holding that a U.S. federal court has jurisdiction over the trial of an American citizen for committing assaults on the premised of U.S. military missions abroad. The full opinion of the court is annexed as Attachment B hereto. In February 2010, the U.S. Supreme Court refused to hear an appeal by Passaro. Passaro was sentenced to 8 years and 4 months in prison. [EW: his sentence was reduced to 80 months on appeal.]

But there's a lot that's wrong with this boast, aside from the error of date and the representation that Passaro's ultimate sentence was 20 months longer than it ultimately was.

There were irregularities with Passaro's trial

As I've described, Passaro was charged and convicted with assault that led to the death of a suspect Afghan insurgent, Ahmed Wali, at Asadabad firebase on June 21, 2003. There's a lot that's funky about Passaro's case: The military prevented any autopsy on Wali, making it impossible for Passaro to refute arguments the government made about cause of death. There was a Special Forces person with access to Wali whose role was never explored at trial, and the two guards who had custody (and unsupervised access) to Wali during the period leading up to his death were magically assigned to duty in Alaska during Passaro's trial, making them unavailable to be cross-examined during the trial.

But the central problem with Passaro's conviction is that the government withheld all the evidence he asked for that would have shown that, even if his treatment of Wali did lead to his death, it had been officially sanctioned under the CIA's detention policy. And that evidence goes straight to John Yoo's role in sanctioning torture.

Passaro was denied directly responsive evidence that goes to heart of Yoo's role in torture

Passaro attempted to use a public authority defense, basically arguing he had been ordered to use any force he used with Wali. In addition to asking for evidence on SERE training—indicating that Passaro knew well the CIA, with John Yoo's sanction, had used SERE as the basis for its interrogation program—Passaro asked for (in part):

- All memoranda from OLC on the capture, detention, and interrogation of members of the Taliban, al Qaeda, or other terrorist organizations operating in Afghanistan
- All memoranda from CIA's

Office of General Counsel on the capture, detention, and interrogation of members of the Taliban, al Qaeda, or other terrorist organizations operating in Afghanistan

- "[C]omplete contents of the rules of engagement for the CIA that address the capture, detention, and/or interrogation of the Taliban, al Qaeda, or other terrorist organizations or combatants operating in Afghanistan" including those categorized as "force protection targets"
- "[A]ll written documents, photographs, video, and sound recordings that contain the methods employed in Afghanistan by members of CIA, DOD, or OGA for the capture, detention, and/or interrogation of members of the Taliban, al Qaeda, or other terrorist organizations, or other combatants operating in Afghanistan, including policies and guidelines developed in early 2003 for use by Special Operations forces"
- "[A]ll orders, directives, and/or authorizations by

President George W. Bush; ex-CIA Director George J. Tenet; the CIA Director of Operations; and the head of CIA's Counterterrorist Center, Office of Military Affairs, or any other CIA component, that address the capture, detention, and/or interrogation of members of the Taliban, al Qaeda or other terrorist organizations or combatants operating in Afghanistan"

- All information on Passaro's training [my emphasis]

In response, the government gave Passaro an otherwise never-released guidance [see PDF 21] which the CIPA summary claimed was "an excerpt of guidance provided to the field on 03 December 2002 in support of ongoing CIA operations in Afghanistan and along the Pakistan border" which read,

> When CIA officers are involved in interrogation of a detainee, the conduct of such interrogation should not encompass any significant physiological aspects (e.g., direct physical contacts, unusual mental distress, unusual physical restraints, or deliberate environmental deprivations)—beyond those reasonably required to ensure the safety and security of the detainee—without prior and specific headquarters guidance.

Note the date: December 3, 2002. But remember, Wali died on June 21, 2003. And in between the time that guidance was issued and the time when Wali died, CIA issued four more documents that

were directly responsive to Passaro's request but which the government didn't turn over (and which weren't released in this form until several weeks after the Appeals decision cited in DOJ's letter):

- CIA's Guidelines on Confinement, dated January 28, 2003, signed by George Tenet (written after consultation with John Yoo)
- CIA's Guidelines on Interrogation, dated January 28, 2003, signed by George Tenet (written after consultation with John Yoo)
- The Bullet Point document created by the CounterTerrorism Center with John Yoo's involvement, delivered from CIA General Counsel Scott Muller to John Yoo on April 28, 2003
- The Bullet Point document, described as a "final summary" sent from CTC to OLC's Patrick Philbin on June 16, 2003

Between the Tenet Guidelines and the Bullet Points, a number of the actions for which Passaro was convicted were sanctioned by the CIA at the time Wali died.

Documents withheld sanction much of the treatment of Ahmed Wali

The Tenet Guidelines on Interrogation, for example, specify that they control over any Directorate of Operations guidelines and therefore may well have superceded the December 2002 guidance submitted to the court. They

specified that they applied to “CIA officers and other personnel acting on behalf of CIA,” thus extending to contractors like Passaro. The standard techniques included sleep deprivation and reduced caloric intake, both of which were reportedly factors in Wali’s death. And while the guidelines require prior approval to use enhanced techniques, they include things like stress techniques and insult slaps used with Wali (though the stress position to which Wali was subjected—the “iron chair”—was ordered by DOD personnel).

And the Bullet Points are even more damning. Notwithstanding the Appeals Court opinion cited in DOJ’s letter, the Bullet Points show that CTC and CIA’s Office of General Counsel claimed that,

> 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. The only two federal criminal statutes that might apply to these interrogations are the War Crimes statute, 18 U.S.C. 2441, and the prohibition against torture, 18 U.S.C. 2340-2340A.

(Asadabad was far less a US territory than the Salt Pit, and CIA used this territorial argument to avoid charging the CIA officers involved in Gul Rahman’s death.)

It went on to assert that the use of techniques (and comparable techniques), including reduced caloric intake, the facial slap, wall standing, stress positions, and sleep deprivation “does not violate any Federal statute or other law” so long as the “CIA interrogators do not

specifically intend to cause the detainees to undergo severe physical or mental pain or suffering."

In other words, the bulk of the actions used against Wali were sanctioned by the CIA. The exceptions submitted as evidence—hitting Wali with a flashlight and kicking him with a boot—were precisely the actions Passaro successfully challenged upward deviations in sentencing on appeal because of the absence of an autopsy report. And the CIA's chain of command held at the time of Wali's death that people conducting interrogations on behalf of CIA would not be charged with any criminal charge—like assault—for actions taken in the course of interrogation.

These documents were not released until after the Fourth Circuit ruled

Now, Passaro did try to get the Fourth Circuit to consider precisely these issues based on the 2003 John Yoo memo covering DOD interrogations (the Bybee memos came out several weeks after Passaro's appeal was argued on March 27, 2009; the Tenet Guidelines and Bullet Points were released on August 24, 2009, two weeks after the Fourth Circuit ruled—but I'm sure the timing on these releases was all coinkydink). But the Fourth Circuit didn't buy it, because Passaro (working under a strict protection order) had not had a way to submit evidence about what he had relied on in his interrogation, not even the training he had received as part of SERE or in preparation to go train Afghan and Pakistani paramilitaries.

> The court admitted some of the evidence in full, admitted some in redacted form, and excluded some as irrelevant, cumulative, or corroborative. With one exception, Passaro does not object to the redaction or exclusion of any specific piece of evidence.7
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> 7 The lone exception is the 2003 OLC Memorandum on which Passaro relies

> throughout. See supra note 5. But the record lacks any evidence that Passaro read or knew of, let alone relied on, this memorandum prior to his assault on Wali. Even if he had, such reliance would simply amount to a mistake of law, which provides no defense to the assault charges. See Cheek v. United States, 498 U.S. 192, 199 (1991). For similar reasons, CIA memoranda that have recently come to light do not aid Passaro's defense. See, e.g., Mark Mazzetti & Scott Shane, Debate Over Interrogation Methods Sharply Divided the Bush White House, N.Y. Times, May 4, 2009, at A13.

But the Tenet Guidelines and the Bullet Points are different, for Passaro's case, for two reasons. First, it appears that by providing the December 3, 2002 guidance, the government was presenting guidance that may have been superceded by the Tenet Guidelines; that is, it is possible (though we can't be sure from the redactions and the CIPA summary) that the government submitted guidance that was no longer operative at the time of Wali's death.

Furthermore, a key reason why the Circuit ruled against Passaro's appeal is that he couldn't prove that the CIA officials—like George Tenet and the head of CTC (who would have been Jose Rodriguez)—whom he had subpoenaed would provide testimony in his favor.

> Passaro argues at length that the district court permitted the Government to use CIPA as a "sword" to prevent him from discovering the authorization necessary to his public authority defense. But to establish such an affirmative defense, Passaro must prove that someone with actual authority sanctioned an otherwise unlawful act.
>
> [snip]

> Nevertheless, Passaro contends that the district court abused its discretion when it quashed his subpoenas to CIA officials who he asserts could have provided support for his public authority defense. To obtain such compulsory process of a witness, the Sixth Amendment requires a defendant to demonstrate that the witness will testify "'in his favor.'" [emphasis original]

With these documents in hand, Passaro would have been able to prove that if Tenet or Rodriguez had testified as to the official stance on interrogations at the time of Wali's death, they would have supported a public authority defense. That is, whereas the OLC documents show what advice Tenet and Rodriguez relied on, these documents show Tenet and CTC explicitly implementing that authority to sanction techniques used with Wali.

DOJ's withholding of these documents prove that it can't investigate whether Yoo's advice led to detainee deaths

But all that's irrelevant to the case before the Spanish court, which pertains to (among others) John Yoo's role in sanctioning torture. That's important because Yoo is involved in both of these documents. He was at a meeting with CIA's lawyers and DOJ's criminal heads on January 24, 2003, just four days before Tenet developed his interrogation guidelines, at which the legal terms of the CIA's interrogation program were discussed. He specifically told John Rizzo on January 28 that CIA could develop its own fact set as it considered what was and was not illegal. And he was involved (and Jennifer Koester, whom he was directly supervising, was closely involved) in drafting the Bullet Point document.

More importantly, the specific role of the Bullet Points—as laid out in this post—shows their importance to the non-investigation of

torture. CIA maintained that Yoo and Koester were closely involved in the preparation of the Bullet Points.

> … the document "was fully coordinated with John Yoo … as well as with [Koester], who reported to Mr. Yoo at OLC. 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."

According to Koester, 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.

So all of the CIA Inspector General's decisions about the legality of the abuse he laid out in his report (which the DOJ also points to as evidence we can investigate torture ourselves) *relied on the Bullet Points*. Not only that, but according to Scott Muller, CIA presented a slide based on the Bullet Points for a July 29, 2003 meeting at which the Principals Committee recommitted to torture. And finally, while the OPR Report (another thing the DOJ letter points to to claim we can investigate) discussed the Bullet Points, they were not within the scope of the actual documents it judged; so DOJ has specifically declined to investigate one of the documents most closely tied with our decisions not to prosecute torture. (You could also argue that DOJ's disinterest in investigating how precisely these documents disappeared from DOJ's

SCIF is further evidence that we can't investigate these issues ourselves.)

Granted, Yoo's role in sanctioning actions that led to the death of Ahmed Wali would be stronger had CIA given Passaro the documents he requested, and had Passaro questioned Tenet and Rodriguez about the guidelines on interrogation at the time of Wali's death. But the fact that CIA (improperly, IMO) withheld several directly pertinent documents is not proof that our legal system is really capable of testing whether the advice Yoo gave led to Wali's death. On the contrary, it is proof that our legal system prevented that from happening.