

THE SALT PIT AND THE BYBEE MEMOS

The AP has a long article out providing details behind the Salt Pit death of a detainee named Gul Rahman—a former militant associated with Gulbuddin Hekmatyar who was captured on October 29, 2002 at the home of Hekmatyar's son-in-law, Dr. Ghairat Baheer, along with the Baheer and three others. A week later, Rahman was separated from the others. He was subjected to stress positions and water dousing and—on November 20—left in 36 degree cold, only to die a few hours later.

Aside from finally providing details on a story that has long been known, the story is interesting for the way it shows the how the CIA's torture system fit with DOJ's approvals in the Bybee Memos. The Rahman death shows that CIA's managers (probably in the Counterterrorism Center) were involved in direct guidance on a technique that got someone killed. That technique was specifically not approved in the Bybee Two memo. But when CTC worked to exonerate the guy in the field—the manager of the Salt Pit—they pointed to the intent language of the Bybee One memo, and claimed that anything short of intending severe pain could not qualify as torture. Ultimately, CIA's managers used the Get Out of Jail Free Card that John Yoo had written them to prevent accountability for themselves when they gave approval for a technique that got someone killed.

Gul Rahman died from water dousing

The AP describes how, in response to Rahman's resistance to US guards (he threw a latrine bucket), he was subjected to stress positions and dousing.

At one point, the detainee threw a latrine bucket at his guards. He also threatened to kill them. His stubborn responses provoked harsher treatment.

His hands were shackled over his head, he was roughed up and doused with water, according to several former CIA officials.

The exact circumstances of Rahman's death are not clear, but the Afghan was left in the cold cell on the morning of Nov. 20, when the temperature dipped just below 36 degrees. He was naked from the waist down, said two former U.S. officials familiar with the case. Within hours, he was dead.

Though the AP doesn't say it, the language used here makes it clear CIA thought of this as water dousing—a technique that would not be approved by DOJ for use until August 26, 2004. After Rahman died, the CIA tried to invent the Legal Principles document as a way to authorize murder and other crimes, but Jack Goldsmith would go on to not only refuse to consider that document OLC authorization, but to refuse to approve water dousing specifically in March 2004.

In other words, three years and our third review of this case later, and DOJ still hasn't decided whether wetting someone down in close to freezing temperatures is a crime, even though this was a torture technique that DOJ had not approved at the time.

The Salt Pit manager relied on the advice of his superiors

Now, the guy who wet down Rahman apparently wasn't working off a list of approved techniques. Rather, he was asking for guidance from his superiors.

The [Inspector General's] report found that the Salt Pit officer displayed poor judgment in leaving the detainee in the cold. But it also indicated the officer made repeated requests to superiors for guidance that were largely ignored, according to two former U.S. intelligence officials.

That raised concerns about both the responsibility of the station chief and the CIA's management in Langley. Similar concerns about CIA management were later aired in the inspector general's review of the CIA's secret interrogation program.

In fact, John Yoo, appears to blame the people interpreting the Bybee Memos for any untoward results from torture. For example, he refers to a written document (probably cables to the field) that appear to be derivative of the Bybee Memo, suggesting those didn't properly account for pain that might amount to death.

The Memo says that the pain must rise to the level that "would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions." Bybee Memo at 6. There is no way to interpret this sentence other than that if the pain is equivalent to the pain that accompanies those conditions, the infliction qualifies as torture, whether or not it actually does result in those conditions. It certainly would not be so misinterpreted by the sophisticated legal audience at which the Bybee Memo was directed—especially given the analysis in the Classified Bybee Memo, which carefully examined the level of physical pain caused by the individual interrogation techniques even though none of those techniques cause death, organ failure, or serious impairment of bodily functions. See Classified Bybee Memo at 9-10 ("With respect to physical pain, we previously concluded that 'severe pain' within the meaning of Section 2340 is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical

injury.”)40

40 [long redaction] But, of course neither Professor Yoo nor Judge Bybee have anything to do with writing or reviewing [redacted] and they could reasonably assume their own work product would be read in good faith and consistently with its terms by a sophisticated audience even if a particular reader did not read it carefully or willfully disregarded its terms. [emphasis original]

That is, Yoo seems to blame whoever both read the Bybee Memo and—having interpreted the memo in a “sophisticated” manner—passed on authorization for techniques that did result into death.

Now, the AP article and its former CIA officer sources appear to blame the Kabul station chief—who has since become a top CIA officer—for the death.

It remains uncertain whether any intelligence officers have been punished as a result of the Afghan’s death, raising questions about the CIA’s accountability in the case. The CIA’s then-station chief in Afghanistan was promoted after Rahman’s death, and the officer who ran the prison went on to other assignments, including one overseas, several former intelligence officials said.

[snip]

But several former senior CIA officials questioned the Kabul station chief’s career advancement inside the agency after Rahman died. Now a senior officer, the man was promoted at least three times since leaving Afghanistan in 2003, former officials said.

But the record we've seen with other torture authorizations show heavy cable traffic going back and forth from the field and Langley, suggesting the "sophisticated" reader who translated the Bybee Memo into torture may well have been in the Counterterrorism Center. And it's notable that the CIA's own accountability review board who reviewed this incident was led by Dusty Foggo, a guy who would later go on to have his own abuse of power—and his inappropriate girlfriend—protected by John Rizzo at Office of General Counsel, another person who was in the loop of torture approvals.

Bybee One and Bybee Two work to pre-authorize some torture and retroactively approve murder

Ultimately, though, this case points to how the Bybee One and Two memos worked in tandem, with Bybee Two authorizing things like waterboarding, and Bybee One including that giant loophole of intent. The AP says that Paul McNulty and Chuck Rosenberg's reviews of the murder could not prove that the manager of the Salt Pit intended to murder Rahman.

The former U.S. official familiar with the case said federal prosecutors could not prove the CIA officer running the Salt Pit had intended to harm the detainee – a point made in a recently released government document that also disclosed Rahman's name.

But the unnamed document referred to above does not say DOJ's prosecutors made this determination (I'm working on being able to say more about this document). Rather, it says that the Counterterrorism Center wrote a declination memo for this case specifically, and appealed to the intent language of the Bybee One memo. And that declination memo said that since the manager of the Salt Pit did not intend for Rahman to suffer severe pain from being watered down and left in a near-freezing cell, he did not violate the torture statute.

But understand what's happening here: the manager of the Salt Pit had no fucking clue what he should do with Rahman—he didn't have the Bybee Two memo, for example. He asked for guidance from his superiors repeatedly, almost certainly CTC. Those superiors approved a SERE technique that had not been approved by OLC, and that technique led to Rahman's death. And it was CTC that got to write CIA's summary of what happened in a declination memo that presumably went to DOJ's own prosecutors.

That is, the guys who probably approved an unauthorized technique, the guys who probably had read both Bybee Memos, relied on the intent language of the Bybee One memo to excuse that unauthorized technique, and declare the deliberate exposure of someone to near-freezing temperatures not to be murder or torture.