

GUL RAHMAN AND MANADEL AL-JAMADI INVESTIGATIONS: THE NEW INFORMATION

In his announcement that John Durham is investigating the deaths by torture of two CIA detainee, Eric Holder suggested that John Durham reviewed information that had not been reviewed by the prosecutors who had earlier declined to prosecute the cases.

That review included both information and matters that had never previously been examined by the Department.

He implied that one source of that new information might be some of the reports—among other things, the CIA IG Report and the OPR Report.

He identified the matters to include within his review by examining various sources including the Office of Professional Responsibility's report regarding the Office of Legal Counsel memoranda related to enhanced interrogation techniques, the 2004 CIA Inspector General's report on enhanced interrogations, additional matters investigated by the CIA Office of Inspector General, the February 2007 International Committee of the Red Cross Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, and public source information.

I wanted to look at what that new information might be.

Manadel al-Jamadi

The AP advances the issue in the case of Manadel al-Jamadi by reporting on what Lynndie England

and other Abu Ghraib testified about at their grand jury appearance earlier this month (England's testimony was first reported by Jane). Of note, the prosecutor asked who put al-Jamadi in the stress position that ultimately ended up effectively crucifying him—and asked questions about a hood that “disappeared.”

Another person who testified told the AP that prosecutors asked about a hood placed over al-Jamadi's head that later disappeared and who shackled al-Jamadi's arms behind his back and bound them to a barred window. This witness requested anonymity to avoid being connected publicly with the case.

As a threshold matter, if this person offered some new insight into the people personally involved in al-Jamadi's asphyxiation—perhaps something that had been reflected in the IG report—then it might constitute new information. There's also the question of how al-Jamadi's treatment exceeded the torture John Yoo authorized; both the type of stress position used and the hood might qualify (and the importance of it would be reflected in the 2007 ICRC Report). We know, for example, that on May 26, 2010, Jay Bybee told the House Judiciary Committee that the CIA had not asked about—and so the Bybee Memo had not addressed—whether shackling someone to the ceiling fit the memo's definition of a stress position.

Jerrold Nadler: Does Bybee Memo 2 or any other legal advice you gave at OLC authorize shackling a detainee to a hook in the ceiling as was described in my earlier question?

Jay Bybee: I don't recall that any place in Bybee Memo 2 that we have addressed the question of shackling. So I don't think it was one of the assumptions on which the CIA requested our advice.
(Page 85-86)

So one new piece of evidence is Bybee's testimony that he—and therefore Yoo—did not approve the crucifixion-type stress position that contributed to al-Jamadi's death.

But that disappearing hood is worth noting by itself—it reflects an intent to cover up the crime.

Gul Rahman

I'm more interested in the possibly new information about Gul Rahman, because some reporting I've done reflects why DOJ revisited some of this.

As I noted here, amidst a discussion about prosecution declinations on PDF 72 of the second draft of the OPR Report, the OPR recommended reopening a specific declination because of the changed legal landscape.

The EDVA Memorandum was issued after the Bybee Memo had been publicly withdrawn, but before the Supreme Court's decision in Hamdan. Accordingly, the prosecutors may have relied upon OLC's erroneous determination that the War Crimes Act did not apply to suspected terrorists held abroad. We found no indication, however, that the EDVA declination decisions were revisited after Hamdan. In reviewing the declination decisions, the Department will have to determine whether prior OLC opinions and executive orders bar prosecution of these matters.

Now, this reference might refer to the death threats used with Abd al Rahim al-Nashiri (which today's announcement suggests have been dropped), because that's what the discussion preceding the four redacted pages immediately preceding this discussion treats. But we know from a footnote in Jay Bybee's Second Response to the report that page 92 of the IG Report—that is, at least part of the second page of redaction—refers to the CIA's argument that Rahman's death shouldn't be prosecuted, so it

may well be Rahman. In any case, what's key is that the OPR Report notes the EDVA's reliance on OLC's claim that crimes committed overseas couldn't be prosecuted to be false.

That's not the only "new" jurisdictional issue addressing whether crimes against Rahman could be prosecuted.

As I have written at length, the Bullet Point document—which appears to have been drafted as part of CIA's information collection process in response to the IG Report and used as part of the declination process—also directly addressed whether crimes committed in the process of torture could be prosecuted. And one of the things included in it was the claim that no ordinary crimes (like negligent homicide, which would be relevant to Rahman's death) could be prosecuted.

And in August 10, 2009, the 4th Circuit made it clear in David Passaro's case that the Asadabad Firebase counted as a military mission at which US law applied. That's precisely the kind of jurisdictional issue prosecutors used to decline the case in the past.

CIA officials referred the Salt Pit case to the Justice Department five years ago. Prosecutors concluded at the time that the Afghan prison was outside the reach of U.S. law, even though the CIA funded it and vetted its home-country guards.

Given that EDVA is in the same circuit, and given that Asadabad was less established than the Salt Pit, the fairly broad reading of this jurisdictional issue in Passaro's case may impact Gul Rahman's.

But the Bullet Point document is interesting for another reason that may pertain to Rahman's death: because Rahman was reportedly water doused. Particularly given Holder's emphasis on Yoo's approvals, it's relevant that the CIA stuck water dousing into the Bullet Point

documents, after Rahman's death, to suggest OLC had approved it as a torture technique.

But they hadn't.

Which Bybee confirmed when he testified to HJC.

Nadler: Did Bybee Memo 2 or any other legal advice you gave at OLC authorize dousing detainees with cold water to keep them awake?

Bybee: Dousing with cold water was not one of the techniques that we were asked about in Bybee 2.

Nadler: So the answer is "no"?

Bybee: That's right. (Page 104)

A full understanding of the Bullet Point documents, if the prosecutors didn't already have one, would be one new factor making it possible to charge for water dousing and the subsequent death. But Bybee's testimony would confirm that water dousing was not included in the Bybee Memos.

There's some more, which I'll get to in a subsequent post or three.

But for now, it looks like Durham has a few new details, a changed legal framework (because of Hamdan and, in Rahman's case, possibly because of Passaro), and Jay Bybee's testimony making it clear that the stress position and the water dousing that led to these detainees' deaths had not been approved by OLC.