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A Detailed Journey Through the Bybee Memo - Part 1

by: Daniel De Groot

Sun Apr 19, 2009 at 17:30

Digby and DDay have been covering the growing calls for the impeachment of 9th Circuit Court Judge Jay Bybee, the author of [this OLC memorandum](#) endorsing the legality of the CIA's proposed interrogation tactics on Abu Zubaydah.

I'd like to make my own run at this horrendous document. Many particular passages have been repeatedly quoted, but I don't want to lose the burning forest for the fetid, rotting trees on this one. The thesis of the document is deeply flawed, resting on numerous obviously ridiculous unstated assumptions.

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The document could be broken into four sections. Pages 1-6 recap what OLC understands CIA is asking, and some information and background on the techniques CIA has already dug up. This is where the 10 infamous techniques are spelt out. Pages 7-9 have a profile of Zubaydah, making him out to be some kind of counter-intelligence superman, his iron self-esteem and mental acuity apparently so daunting that (this is unstated) torture is simply the only way to break him. Pages 9-11 quickly dismiss any idea that the techniques could be considered so physically painful as to construe torture, and then from the bottom of 11 to the end of the document on page 18 is an examination on whether these techniques separately or in combination could cause enough psychological harm as to constitute torture under section 2340, the portion of the US code which implements the Convention Against Torture in domestic US law.

The flaws fall roughly into these categories:

- egregious flawed assertions that would be laughable if not about a subject so terrible
- legal sophistry and warping of commonly understood word definitions
- flawed thesis #1 - that the use of these techniques within military training or on other volunteers proves they are not torture
- flawed thesis #2 - a fixation on the *mens rea* aspect of this crime arguing essentially that merely by asking to ensure the techniques aren't torture, CIA proves it doesn't mean to torture and therefore is not torturing under the legal definition, since they didn't mean it. I wrote about [that here](#).

Flawed Assertions

Thus, although the subject may experience the fear or panic associated with the feeling of drowning, **the waterboard does not inflict physical pain.** (p11)

Any pain associated with muscle fatigue is not of the intensity sufficient to amount to "severe physical pain or suffering" under the statute, nor, despite its discomfort, **can it be said to be difficult to endure.** (p10)

As for sleep deprivation, **it is clear** that depriving someone of sleep does not involve severe physical pain within the meaning of the statute. (p10)

There are many more like that, but I think these examples cover the sense of what he's doing here. He just states things like this as fact. Is waterboarding not "painful"? Of course, he's relying on a very limited definition of "pain" that is the literal physical sensation of say, having an arm ripped off or getting punched. Not being able to breathe is not merely "uncomfortable" though, it does hurt, and so does having liquid in your lungs. When you try and hold your breath under water, the "discomfort" of needing to breathe will easily drive most anyone back to the surface long before you either pass out, or your physiological reaction forces you to inhale water. If that's not "difficult to endure" what is? Humans literally cannot endure it.

Dumbing down stress positions and wall sitting to "muscle fatigue" (which falls also under "legal sophistry" above) is how he attempts the second one. But focusing on his "difficult to endure" line is where he fails the assertion test. Anyone can go lean against a wall with their back straight, and legs bent. If you're reasonably fit, you might be able to maintain this for a few minutes. Then you will either get off the wall or collapse from the muscle fatigue becoming simply too "difficult to endure." This is all without the element of compulsion in being forced to do this, probably hooded with various threats being made. How painful does it really get under such circumstances? I don't know, but neither can Bybee and that's why this sort of bland claim is so dangerous.



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The last one is similar to the first, by trying to make a (false) distinction between physical pain and the discomfort associated with denial of a basic survival need. On p3, we learn CIA has told Bybee they would deprive Zubaydah of sleep for not more than 11 days. Has Bybee gone 11 days without sleep? I certainly haven't. I have voluntarily gone more than 48 hours without it a few times when I was in the military, and it is pretty awful. Some people respond better than others and might not flinch at even 72 hours, but how about after almost 3 times that? I don't think Bybee has any basis to make this claim and if I thought I was going to have to go 4 days without sleep involuntarily for some reason, I would be dreading the prospect.

Like the facial hold and the attention grasp, the use of the slap is not accompanied by a specific verbal threat of further escalating violence. Additionally, you have informed us that in one use this technique will typically involve at most two slaps. Certainly, the use of the slap may dislodge any expectation that Zubaydah had that he would not be touched in a physically aggressive manner. Nonetheless, this alteration in his expectations **could hardly be construed by a reasonable person in his situation to be tantamount to a threat of severe physical pain or suffering.** (p12)

This is from the psychological harm assessment section. That section is littered with variations on the assertion that "no reasonable person" could possibly infer a threat to their life or of severe pain from the techniques. Note the weasel wording that says the slap is not accompanied by a "specific" threat of further violence. So in Bybee's opinion, the CIA can slap the subject, and say "you're going to get much worse if you don't cooperate" and from this, he claims that no reasonable person could infer worse was coming. If that weren't enough, Bybee weakens this claim, by the admission that the point of slapping Zubaydah is to "alter his expectation" that he won't be dealt with in a physically aggressive manner. They were obviously trying to scare him, and make him think worse is coming. That's the whole point, so that he will conclude exactly what Bybee claims no reasonable person would conclude. How's that for absurd?

Legal Sophistry

Simply asserting night is day over and over only takes Bybee so far in the effort to bridge the chasm between torture and legally defensible behaviour.

We will consider physical pain and mental pain separately. (p9)

Why is this justified? The victim will experience them together. I can see a certain amount of sense from an analytical standpoint, but you do need to eventually combine their effects.

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, (pp9-10)

Here he has narrowed the definitions of the terms used in the statutes enough to squeeze by CIA's program. As we saw above, he still needs to make plainly wrong statements about things not being difficult to endure despite the fact that normal people can't, in fact, endure them.

As we understand it, when the waterboard is used, the subject's body responds as if the subject were drowning-even though the subject may be well aware that he is in fact not drowning. (p11)

"as if the subject were drowning" - well yes, when you can't breathe oxygen because you're strapped to a table and someone is pouring water on your face, you are, in fact, *drowning*. Even if you're Christopher Hitchens and you know you can stop the treatment with a hand gesture, or a Navy SEAL who knows they won't literally drown you to death, you are at that instant, technically suffocating, which is really all drowning is. There is no reason given either to assume, as Bybee does that the subject will be "well aware" that the CIA won't actually kill him.

As we explained in the Section 2340A Memorandum, "pain and suffering" as used in Section 2340 is best understood as a single concept, not distinct concepts of "pain" as distinguished from "suffering" (p11)

Here he's relying on a previous pile of nonsense, on the premise that by citing his own previous bad work, he can build an edifice of claptrap where it all somehow makes sense. I haven't read that particular memo, but the conclusion that pain and suffering should be amalgamated together for the purpose of legal analysis defies common sense and comes off quite specious.

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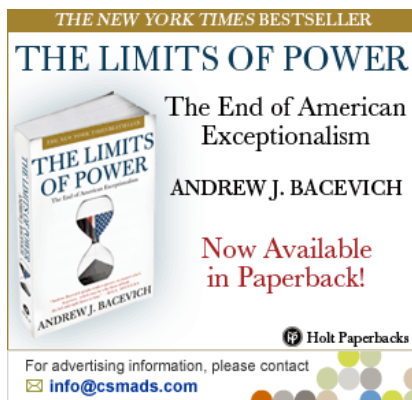
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He knows this because he follows with:

The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict "severe pain or suffering." **Even if one were to parse the statute more finely to attempt to treat "suffering" as a distinct concept**, the waterboard could not be said to inflict severe suffering. The waterboard is simply a **controlled acute episode**, lacking the connotation of a protracted period of time generally given to suffering. (p11)

The banality of evil. "Controlled acute episode" could describe any number of horrendous practices. Hell, someone tell Digby tasing is ok, it's simply a controlled acute episode. At the top, what he does is to pretend that his reasoning which makes "pain and suffering" legally inseparable is so self-evident that to describe the alternate, one must be engaging in a kind of legal sophistry by *finely parsing* the statute in a ridiculous manner. Then of course we have the novel idea that suffering requires some defined time period. Torture isn't torture if delivered in short enough doses apparently.

Ok, rather long enough for one go, I will deal with the latter two categories of impeachable lawyering by Bybee in another instalment.



Tags: jay bybee, torture, waterboarding, OLC, DOJ, impeachment, (All Tags)

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This Is Great! (4.00 / 2)

My next diary will be about the growing grassroots movement to get Bybee impeached, which is off to great start with a unanimous resolution passed by the LA County Democratic Club, and set to go before the state convention next weekend. So I can just skip over talking about the memo itself, thanks to this discussion.

Read up, people!

"Senate passes expanded GI bill despite Bush, McCain opposition"

by: Paul Rosenberg @ Sun Apr 19, 2009 at 16:47:55 PM CDT

I guess we owe the Japanese (4.00 / 3)

prison camp operators an apology. When they imposed controlled acute episodes on American prisoners, we hanged them for it.

If you liked Bush, you'll love McCain

by: Sadie Baker @ Sun Apr 19, 2009 at 17:04:53 PM CDT

And Now We Know Why! (4.00 / 2)

We didn't want them suing us for patent infringement.

"Senate passes expanded GI bill despite Bush, McCain opposition"

by: Paul Rosenberg @ Sun Apr 19, 2009 at 17:50:50 PM CDT

[Parent]

I wonder what their reaction is (4.00 / 2)

Knowing that we've reverse engineered their ideas without even crediting them for all their hard work.

So they reverse engineered our manufacturing processes and we reverse engineered their torture techniques.

I'm gonna go crank up the old Be Bop Deluxe tune, "Fair Exchange."

Frank Zappa: Government is the Entertainment Division of the Military-Industrial Complex.

by: *Emocrat @ Sun Apr 19, 2009 at 18:04:45 PM CDT*
[Parent]

"Only a lost war is a crime." (0.00 / 0)

The words of Rabinahod Pal, a dissenting justice at the Tokyo prosecutions of Japanese wartime leaders.

More true now than ever.

by: *John Halle @ Sun Apr 19, 2009 at 21:44:14 PM CDT*
[Parent]

Well done, Daniel! (4.00 / 3)

Nice work. My bias is that I had a lot of the same reactions, although I must confess also a deep sense of dread while reading 1 and 2. I haven't gotten to the other ones yet.

You laid this one out very nicely.

Frank Zappa: Government is the Entertainment Division of the Military-Industrial Complex.

by: *Emocrat @ Sun Apr 19, 2009 at 18:00:56 PM CDT*

I just found this: (4.00 / 1)

<http://www.democrats.com/no-am...>

It's a "No Amnesty for Torturers" petition put up by Democrats.com.

If you liked Bush, you'll love McCain

by: *Sadie Baker @ Sun Apr 19, 2009 at 18:36:22 PM CDT*

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