

Personal Torture Laws: Your Tax Dollars at Work

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Theme: [Crimes against Humanity](#), [Law and Justice](#)

On August 1, 2002, then-Assistant Attorney General of the United States Jay Bybee sent an 18-page official memorandum from the Office of Legal Counsel to the Acting General Counsel of the CIA John Rizzo. Such memos are treated as laws within our government, not opinions, not theories, not briefings, but laws. They are secret laws, but in many cases there's not much risk of us ordinary schmucks who don't know the laws violating them, at least not without also violating public laws that are tougher and more comprehensive. These secret laws tend to consist of permissions to violate the public laws in particular ways. They are crazy laws, because they advise violating the real laws and purport to serve as protection for the claim that the violator did so in "good faith." Nonetheless, they are as much laws as anything passed by Congress, if not more so, since they do not come with presidential signing statements but at most a snide remark scribbled by Donald Rumsfeld.

The secret law that Bybee sent to Rizzo was unusual in that it was a law for one particular person. It was even more specific than that. It claimed to apply to the treatment of one particular person under an elaborate set of circumstances. If the situation was altered, the law would not apply. The individual who received this personal legislative treatment may not have considered himself a lucky man, since it was 18 pages of descriptions of torture techniques that it would be "legal" to use on him. (Can't wait to get your own, right?) Curiously, the memo begins by citing the actual, real, normal, public law: "Section 2340A of title 18 of the United States Code." This is curious because for the following six years both the White House and Congress pretended there was no such law and engaged in an elaborate mating dance designed around the mythical need to create such a law anew. You'll recall Congress "banning" torture and Bush signing statementing himself the supposed right to torture anyway. All of that was theater. And during all of that theater, the people doing the torturing were concerned that they be protected, down the road, from prosecution for their violations of the actual law.

Section 2340A of title 18 of the U.S. Code says this: "Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

And 2340C adds this for the benefit of the people writing the "legal" permissions to violate it: "A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy."

And what is torture? According to 2340 it is "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody

or physical control.”

And then there is Section 2441, which prescribes a fine or prison or death to any American who commits or conspires to commit a war crime, including torture or cruel or inhuman treatment. This was the section of law that caused then White House counsel Alberto Gonzales to warn Bush and others that they should deny prisoners in Afghanistan the Geneva Conventions as the best defense of their own necks, advice Obama seems to have taken to heart.

Then there’s the Convention Against Torture which requires criminal prosecution of “an act by any person which constitutes complicity or participation in torture” or in “cruel, inhuman or degrading treatment or punishment.” And the Geneva Conventions which ban “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”

Bybee had already written some personal laws for Jose Padilla, one of which included his indictment, trial, conviction, and punishment all personally performed by Bybee in the course of the memo. But this August 1, 2002, memo was a personal law for Abu Zubaydah. And part of the circumstances that made this law “legal” was a ticking time bomb:

“The interrogation team is certain he has additional information that he refuses to divulge. ... Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently a level of ‘chatter’ equal to that which preceded the September 11 attacks.”

So, under these circumstances, it turned out — after Jay Bybee checked with the mountain top and declared his new commandments — that you could legally slam Zubaydah against a wall. Or deprive him of sleep. Or waterboard him. You would need to soften the wall and be careful not to break his neck. You would need to have doctors on hand. You couldn’t keep him from sleeping for any more than 11 days at a time. If you slapped him in the face you should be careful not to poke him in the eye. The precautions and limitations are extensive. But so are the torture techniques and the cruel, inhuman, and degrading treatments, which would all seem to be just as degrading even if bruising and death are avoided and therefore the “law” complied with.

However, according to Bybee any torturer would be in the clear legally if they did not “expressly intend to inflict severe pain or suffering.” And this could be done by “honestly believing” that there would not be severe pain or suffering, which you would have to if you believed this memo which asserted as much. An honest belief, Bybee assured the CIA, need not be reasonable. In fact “good faith may be established by, among other things, the reliance on the advice of experts.” In case anyone missed the point, Bybee went on to simply state that people following his torture manual would not have the intent to inflict severe physical pain or suffering.

But here’s where it gets sticky. First, the techniques authorized by this custom-made designer law, and others not authorized, were used BEFORE the law was written as well as after. So the reliance on experts wouldn’t cover everybody, and therefore the group of people that Obama just promised amnesty does not include everybody. Second, according

to the account that Zubaydah gave the Red Cross, the guidelines given by Bybee were followed only very loosely, with the alterations tending toward the more forceful and punishing. Third, Zubaydah apparently suffered serious injury, suggesting that he experienced severe physical pain and suffering.

(In fact he told the Red Cross — and we have no other witnesses since the CIA destroyed the video tapes and isn't talking: "I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled without success to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.")

If that was indeed severe pain and not just a mild case of bodily collapse, was the expert relied upon not an expert and the advice therefore not a legal shield? Or is this just a case of violating the secret law, in which case is that just a case of violating the public law? Fourth, the ticking time bomb was a crock and we know now that our government obtained more useful information from its victim before torturing him than after. Does that alter the circumstances and therefore eliminate the specially designed law? Or is the bomb still magically ticking away very slowly, year after year, until we develop the patriotic courage to crush Mr. Zubaydah's testicles and finally learn the truth and save the television actress?

Sadly, Mr. Bybee may be too busy to rush to our rescue or to draft you your own personal torture law at the moment. That's because, even though his own crazy laws were discarded by Bush's Justice Department, even though Spain has been trying to indict him, even though he approved sticking Zubaydah in a small box with an insect, slamming him against a wall, and water-torturing him, Jay Bybee is serving as a federal appeals court judge in the Ninth Circuit. If we had a justice system he would be standing trial. If we had a Congress, he would be impeached.

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David Swanson is the author of the upcoming book "Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union" by Seven Stories Press and of the introduction to "The 35 Articles of Impeachment and the Case for Prosecuting George W. Bush" published by Feral House and available at Amazon.com. Swanson holds a master's degree in philosophy from the University of Virginia. He has worked as a newspaper reporter and as a communications director, with jobs including press secretary for Dennis Kucinich's 2004 presidential campaign, media coordinator for the International Labor Communications Association, and three years as communications coordinator for ACORN, the Association of Community Organizations for Reform Now. Swanson is Co-Founder of AfterDowningStreet.org, creator of ProsecuteBushCheney.org and Washington Director of Democrats.com, a board member of Progressive Democrats of America, the Backbone

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