SANGER SWYSEN & DUNKLE

Torturing the Law of Torture

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By Robert Sanger

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Introduction

The Torture memos of John Yoo and, now Judge, Jay Bybee have become infamous. You will recall that they were written in 2002 for the Justice Department and have been roundly criticized as disingenuous interpretations of the Geneva Convention's prohibition of torture (Convention Against Torture) and the criminal provisions of title 18 U.S.C. Sections 2340-2340A. Beyond that, they have been seen as a part of the ultraconservative theory of the "unitary executive" which gives primacy to the presidency contends that the legislature and judiciary are subordinate.

Recently, the conservative *National Review* published an article claiming that Attorney General Holder, in a federal case in April of this year, took the same position that Yoo and Bybee had taken. People like Rush Limbaugh and conservative bloggers cited this article uncritically. An urban legend was born.

In this month's *Criminal Justice* column, we will look at the fascinating story behind the federal case and at the actual legal argument made by the DOJ. We will also revisit the actual arguments in the Yoo and Bybee memos and to determine if there is any truth to this urban legend.

The Cases of John Demjanjuk

John Demjanjuk was deported to Germany May 12, 2009 to stand trial for Nazi war crimes. He is accused of being an accessory to murder of 29,000 Jews as a guard at the Sobibor concentration camp. Other than the fact that he is 89 and that he will be one of the last people charged and tried for Nazi war crimes arising out of World War II, the case would not be particularly remarkable. Following the Nuremburg trials, several jurisdictions captured and prosecuted numerous people for doing the sorts of things of which Demjanjuk is accused. The prosecution of a concentration camp guard who allegedly aided in killing that many people is not that unusual.

Of course trial is one thing and conviction may be another. The prosecutor's case against Demjanjuk poses many problems and questions. There is documentary evidence suggesting that John Demjanjuk is the same Demjanjuk who participated in these murderous decisions but he claims that it was someone else. The witnesses are either dead or very old. The star eyewitness, who claimed to have been Demjanjuk's roommate after the war, is now 92 years old.

Incredibly, Demjanjuk has already been tried, wrongfully convicted and eventually exonerated in Israel. In 1977 he was identified as being "Ivan the Terrible" who was allegedly a guard at the Treblinka death camp on Poland. He was found guilty in 1988 of crimes against humanity and war crimes based on the testimony of 10 eyewitnesses. But his conviction was overturned by the Israeli Supreme Court in 1993, when evidence surfaced that another man was, in fact, Ivan the Terrible. Demjanjuk returned to America.

But then, in 2002, troubles for Demjanjuk started again when evidence came to light that he was a guard at Sobibor. He has fought extradition from the United States to Germany on an number of grounds before the Board of Immigration Appeals and, eventually, I federal district court and the Sixth Circuit Court of Appeals.

In a last ditch effort to avoid extradition, Demjanjuk filed a new petition in the federal district court seeking a stay of removal. Apparently for the first time, he alleged that allowing removal to Germany would violate the Convention against Torture. His argument was not that he would be singled out for torture or for any special treatment but that, due to his age and infirmity, imprisonment in Germany would be equivalent to torture. The district court denied his petition and he appealed to the Sixth Circuit. There the Attorney General filed a Respondent's Brief taking the fairly obvious position that simply alleging that a person is elderly and will be in custody in another country where there is no evidence of abusive conditions does not amount to torture.

The Ultraconservative Spin

In the May 6, 2009, issue ofWilliam F. Buckley's old magazine, *The National Review*, an article by Andrew McCarthy claimed that Attorney General Eric Holder had now taken the same position that John Yoo and Jay Bybee had taken in their torture memos. With the requisite amount of sarcasm, he suggested that Holder's commitment "to follow the law" in the investigation of alleged illegal activities of the Bush administration was somehow hypocritical and that this brief now vindicated Yoo and Bybee.

The article misrepresented what the Respondent's Brief actually said and put a gloss on the Yoo and Bybee memos. Nevertheless, it was uncritically taken up by the conservative commentators and bloggers as proof positive that Bush/Cheney/Yoo/Bybee were right all along.

In essence, the article incorrectly claimed that Yoo and Bybee had merely taken the position that the Convention Against Torture required specific intent to torture and nothing more. It then equated that position to the position taken by the current Attorney General in the Demjanjuk case.

Specific Intent and the Convention Against Torture

The Convention Against Torture requires that torture be "intentionally inflicted." That could be interpreted as general intent, however, the federal courts, albeit subsequent to the memos, interpreted the treaty to require specific intent. The United States Code, on the other hand, appears to require specific intent to torture on its face. This is not controversial and is the position taken by Yoo and Bybee as well as the Attorney General in *Demjanjuk*.

The Attorney General simply restated now settled law on intent to support the proposition that more is required than an allegation that a person may be uncomfortable in prison. He cited a case, *Pierre v. Attorney* General 528 F.3d 180 (3d Circuit 2008) which had been argued by the prior administration after the Justice Department memos of Yoo and Bybee. The facts of *Pierre* went far beyond the situation at bar where, instead of Germany, the petitioner was being extradited to Haiti. *Pierre* itself was based on yet another Third Circuit decision, *Auguste v.* Ridge 395 F.3d 123 (2005), holding that the CAT required specific intent. Hence, the current Attorney General's was simply citing precedent.

The fallacy is to equate the statement that the courts have required specific intent to the essence of the Yoo or Bybee interpretation. The Yoo memo to White House Counsel, and later Attorney General, Alberto Gonzales, dated August 1. 2002, argued the specific intent interpretation of the CAT. Later, the Bush Administration's Justice Department prevailed on this interpretation in the two Third Circuit cases referred to above. But Yoo claimed that President Bush had already determined that neither the Taliban nor al Qaeda were entitled to *any* protection under the Geneva Conventions. Therefore, whether CAT or the federal statutes required specific or general intent was irrelevant.

The Bybee memo, also to Gonzales, dated October 2, 2002, was much longer than Yoo's earlier memo and addressed both the CAT and the Title 18 enactments. Bybee incorporated Yoo's analysis of specific intent but somewhat infamously decided that certain tortures were not tortures and that the Convention and the Code were designed to address "only extreme pain and suffering" and not all acts which were "cruel, inhumane or degrading."

However, Bybee's big contributions to the President and Vice President's approval of torture was that first, the treaty and the statute would infringe on the President's

ability to conduct war on al Qaeda and, second, that "self-defense" and "necessity" would be viable defenses to a criminal prosecution. In other words, this had nothing to do with specific intent. It simply placed the Bush Administration above the law and above the legislature and the courts. This was an application of the "unitary executive" principle developed by the Heritage Foundation and the Federalist Society.

Conclusion

So, the Convention Against Torture is still a meaningful document as are the provisions of Title 18 and they do not have a big loophole allowing leaders of nations (or, maybe, just this nation) to do whatever they want if they deem it in the national interest. And, the invocation of the treaty by someone seeking to avoid prosecution does not invoke a big loophole allowing someone who may have committed mass murder to claim he will be uncomfortable in a German jail awaiting charges. The Attorney General's position on the later has nothing to do with vindicating those who sought to excuse the President and Vice President from obeying the law. The urban legend is false.