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Dissecting the torture memos

By Galen Barnett, The Oregonian

As a result of a lawsuit filed by the ACLU, the Obama administration recently released four legal memoranda issued by the Justice Department's Office of Legal Council, which authorized a number of coercive interrogation techniques. Writing in The New York Times, David B. Rivkin, a lawyer who worked for the Bush administration, said the memos "are well-written, and feature careful and nuanced legal analysis." Their conclusions, added Rivkin, "definitively establish that the Bush administration did not engage in torture." Rivkin's claims, like those in the memos, are laughable. The memos are an outrageous amalgam of distortions, word plays, non sequiturs, and self-contradictions that read like a parody on legal reasoning. One of the memos, addressed to the acting general counsel of the CIA and signed by Jay S. Bybee, then-assistant attorney general (and now a federal judge), concluded it was perfectly legal to slam subjects against walls, deprive them of sleep for 11 straight days, confine them to dark boxes so small they could only sit, place them in various stress positions and subjecting them to waterboarding. A federal statute, 18 U.S.C. SS 2340, makes torture a crime. The statute defines torture as "an act ... specifically intended to inflict severe physical or mental pain or suffering ...." The memo explains why that statute is not violated by the above-mentioned interrogation techniques. "With respect to physical pain," declare the authors, "we previously concluded that 'severe pain' ... is pain ... of an intensity akin to pain accompanying serious physical injury ... [E]xamples of acts inflicting severe pain ... are, among other things, severe beatings with weapons such as clubs, and the burning of prisoners." This definition associates severe pain with severe physical injury. But why? Can't "severe pain" accompany minor injuries - like pulled nails, a broken finger, or a drilled tooth? What justifies this apparent redefinition? The justification appears in a companion memo, also signed by Bybee and released that same day. That second memo defines the term "severe pain" by relying, believe it or not, on "statutes defining an emergency medical condition for the purpose of providing [Medicare] benefits." "Although these statutes address a substantially different subject from Section 2340," says the memo, "they are nonetheless helpful for understanding what constitutes severe physical pain." Why they are helpful - beyond allowing the authors to manipulate that term - we are never told. The memo continues: "[The] statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person ... could reasonably expect the absence of immediate medical attention to result in ... placing the health of the individual ... (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." This is an awkwardly worded statute. Thus, one should be attentive in examining the authors' alleged inferences from this statutory language: "[The statutes] treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage .... Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that 'severe pain,' as used in Section 2340, 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 body functions - in order to constitute torture." The claim is complete nonsense. First, the statute does not "suggest" any level to which "severe pain ... must rise." The statute simply specifies that, to the extent severe pain is accompanied by a reasonable expectation of

serious risk to one's health in the absence of immediate medical care, this constitutes a reimbursable emergency medical condition. The possibility of "severe pain" that is not accompanied by such reasonable expectation is nowhere ruled out by the statute. The statute is not concerned with defining "severe pain," but with defining "an emergency condition" of which "severe pain" is one possible symptom. And where did the terms "death" and "organ failure" come from? Certainly not from the cited statute - though they are presented as if they derive from it. But the authors' conclusion is in any case misleading. After all, the statute speaks of "severe pain" as pain that may be accompanied by a reasonable expectation that some serious injury or impairment is imminent; the statute does not speak of "severe pain" as pain accompanied by an actual serious injury or impairment. (Indeed the heading of that statutory provision is "(B) Emergency medical condition based on prudent layperson.") Yet, as already noted, the authors conclude that, based on this statute, "severe pain" is "pain ... of an intensity akin to pain accompanying serious physical injury" (and not, to repeat, of an intensity akin to pain accompanying a reasonable expectation that serious physical injury is imminent). It is through this sleight of hand that the memo arrives at its definition of "severe pain," which it then applies to the enumerated interrogation techniques - concluding "that none of the proposed techniques inflict such pain." Of course, once "severe pain" is defined as "pain ... of an intensity akin to pain accompanying serious physical injury," it is easy to dismiss any pain not accompanying by serious physical injury as not sufficiently "severe." Which is exactly what the authors do. Stress positions, say the authors, meant to produce "muscle fatigues"; but "[a]ny pain associated with muscle fatigue is not of the intensity sufficient to amount to 'severe physical pain and suffering' under the statute, nor, despite its discomfort, can it be said to be difficult to endure." "[T]he confinement boxes," continues the memo, "are physically uncomfortable," but also cannot "be said to cause pain that is of the intensity associated with serious physical injury." The same goes for sleep deprivation, and for slamming subjects against walls. As for waterboarding, "although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain." And what about "suffering"? After all, the statute criminalizes the infliction of "severe pain or suffering," not just the infliction of pain; and it is reasonable to suppose that it does so precisely in order to make sure that practices like waterboarding or drowning or freezing or raping or locking someone up in a tiny dark box are within its scope. And yet the authors also conclude that "The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view, inflict 'severe pain or suffering'." How so? One might argue that because the statute uses "or" rather than "and" in the phrase "pain or suffering," that "severe physical suffering" is a concept distinct from "severe physical pain." The better view of the statutory text is, however, that they are not distinct concepts. This is so, say the authors, because the statute itself simply refers to "pain or suffering" as one phrase; and because dictionary definitions define those concepts in terms of each other. Moreover, says the memo, "even if we were to read ... severe physical suffering as distinct from severe physical pain, it is difficult to conceive of such suffering that would not involve severe physical pain. Accordingly, we conclude that "pain or suffering" is a single concept ...." But isn't drowning a form of physical suffering that - at least according to the authors - does not also involve physical pain (precisely the sort of suffering they find so "difficult to conceive"?) To this the memo offers a second response: "Even if one were ... 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." "Suffering," as used in a federal statute criminalizing torture, is, in the opinion of the authors, a "protracted" condition - perhaps some sort of existential misery. This preposterous interpretation of the term means, of course, that at least stress positions or the dark box may inflict "physical suffering"

(since these are protracted conditions); but the memo analyzes these techniques by treating "pain and suffering" as one concept only. Enough! One could go on and on dissecting the falsehoods, self-contradictions, logical fallacies, and groundless claims that constitute these memos. But the exercise gets increasingly annoying, and also dull, and the temptation to discard these memos in disgust becomes overwhelming. This sample should suffice to demonstrate the utter ridiculousness of Rivkin's assertions. "Well-written, and feature careful and nuanced legal analysis"? The claim is dishonest, or foolish, or both. Responding to the release of the memos, Dennis C. Blair, the director of national intelligence, said the described methods of interrogation may look different "on a bright, sunny, safe day in April 2009" (the two memos date August 2002). "[W]e will absolutely defend those who relied on these memos," he added. The issue raised by Blair is altogether different from the one I am discussing. The desirability of such methods, their morality, efficiency, or necessity, and the culpability of those who executed them, are distinct from the question of these memos' legal merit and validity. Bybee and his co-author were not asked to opine on the desirability of these methods, but on whether they were prohibited by federal law. Sometimes it may be necessary to violate the law. Lincoln, who had famously suspended the writ of habeas corpus during the Civil War, despite a judicial decision that the action was illegal, declared before Congress: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" Perhaps it was justified to use these interrogation techniques; and perhaps it was even justified to do so in violation of federal law. But that latter question was never presented to President Bush. Instead, what Bush and his officials got were worthless legal shenanigans. Of course, if illegality is involved, the calculus may be very different. Which is why the president, like the CIA operatives who conducted these interrogations, had the right - and the duty - to know the legal status of their proposed actions. But they were denied those rights and duties by the professional failures of the lawyers who wrote these legal memoranda. Last week, President Obama declared he was open to the possibility of legal action against the lawyers who wrote these memoranda. That is the way to go. America cannot simply change course and pretend nothing has happened: Given the severity of what came to pass (including the cost to our national security), some heads must roll - beyond the heads of the foot soldiers of Abu Ghraib. At an absolute minimum, these memos constitute a clear lack of minimal professional competence. At the very least, their authors should never be allowed to teach new generations of lawyers (as John Yoo now does), or sit on the federal bench (as Jay Bybee does).

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