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The Half-Life of Torture

The Recorder
 By **Dan Levine**
 April 8, 2009

SAN FRANCISCO — Six weeks before Gen. Augusto Pinochet overthrew the Chilean government in 1973, Jay Bybee, a 19-year-old Mormon missionary, disembarked in windswept **Punta Arenas**, nearly 2,000 miles south of Santiago.

"It was a place where you lean on a 45-degree angle to walk around the corner, and then if you don't change your angle, you fall flat," then-mission-president Roland Glade remembers. "It was a place you send somebody who knows what they're doing."

Bybee wasn't afraid to practice his Spanish, and he entertained by imitating Chicago, New York and "New Joisey" accents, fellow missionary David Magnusson said. After the coup, the missionaries learned to allow enough time to proselytize and make it home before the military curfew.

Talking politics with Chileans was verboten. Though Bybee, now a Bush-appointed Ninth Circuit U.S. Court of Appeals judge, liked high school debating, he passed at Brigham Young University, telling **Magnusson** it was "too contentious."

In the decades to come, Bybee's easy personality would help him recover from life's setbacks — and serve him well for most of his legal career. But it is also one clue into understanding why Bybee is among the former Bush administration lawyers under review for war crimes by **Baltasar Garzon**, the same Spanish judge who once ordered Pinochet's arrest.

Bybee has retained Latham & Watkins' Maureen Mahoney to negotiate the European inquiry and other probes of his role at the Justice Department, where he signed off on the so-called torture memos in 2002. During President Bush's war on terror, those legal opinions paved the way for such treatment as wrapping a towel around a detainee's neck and smashing his head against a wall, according to an International Red Cross **report made public** this week in the New York Review of Books.

Bybee declined to talk about his work at the Office of Legal Counsel. But when he gathered former clerks last year at a Las Vegas steak house for a five-year reunion, he was more revealing.

"He said our work has been well-researched, carefully written, and that he was very proud of the work that we've done and the opinions his chambers has issued," said **Tuan Samahon**, who was Bybee's first judicial clerk and is now a UNLV professor.

According to Samahon, the judge then added: "I wish I could say that of the prior job I had."

Such sentiments contrast with public comments from John Yoo, Bybee's former deputy at the OLC, who maintains that all of his legal memos were fully vetted by management. That could foreshadow potential finger pointing as the legal process plays out. But whatever the outcome of various probes into his role, Bybee has become a study into how a person behaves when he knows his name will be forever linked with a dark historical episode.

"You can either stew about it and drown in bitterness, or move on and do the best you can. That's what Jay is trying to do," said one longtime friend. "Some people get over it and have a good life. Some people don't."

THE MAKING OF THE MEMOS



Judge Jay Bybee, Ninth Circuit U.S. Court of Appeals
 Image: Jason Doiy/The Recorder



John Yoo, professor at Boalt School of Law
 image: Jason Doiy/ The Recorder

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Bybee wasn't supposed to run the OLC. In the spring of 2001, Attorney General John Ashcroft and the White House couldn't agree on a candidate. They finally settled on a then-Columbia Law School professor, [John Manning](#), but he pulled out.

Then stationed at UNLV's law school, Bybee had established conservative academic credentials. He also had a friend in the White House: Timothy Flanigan, a fellow BYU grad who was Alberto Gonzales' deputy and who knew Bybee from their time as summer associates at Shearman & Sterling, said [Steven Guynn](#), a mutual friend who is now a deals lawyer at Gibson, Dunn & Crutcher.

Bush nominated Bybee to head the OLC in July, but the professor stayed in Las Vegas to finish a teaching commitment, Samahon said. When the Twin Towers fell, the Senate hadn't yet held a hearing on his nomination. By the time Bybee arrived in November, Yoo, a national security expert, had already issued at least three legal memos broadening the White House's power at its behest.

Even as Bybee settled into the OLC job, a new one beckoned: Procter Hug Jr., a longtime Ninth Circuit judge from Nevada, took senior status on Jan. 1, 2002, creating a vacancy in Bybee's home state. In his [confirmation documents](#), Bybee said the White House approached him about the seat that winter, and Bush nominated him in May.

That Bybee would be ready to leave the Justice Department so quickly didn't surprise some Justice Department observers: the OLC had been a traditional launching pad to the federal judiciary's upper reaches. But Bybee's Ninth Circuit confirmation took time, and it was the period after his nomination — but before his Senate vote — when the most controversial events of his career would transpire.

On Aug. 1, 2002, Bybee signed two memos, both drafted by Yoo. [One of them](#), which has since been publicly released, said interrogation techniques could be cruel, inhumane or degrading and still not rise to the level of impermissible torture. Another memo, which hasn't been made public but has been the subject of news accounts, approved a list of techniques the CIA sought to use.

As the CIA sought legal cover that summer, lawyers advising other national security principals say Yoo was their primary OLC liaison — a fact which jibes with descriptions of Bybee's management style ("a delegator," Samahon said). A high-level council of lawyers driving the administration's bid for increased authority included Yoo — and Bybee's friend, Flanigan — but not Bybee, [according to a book](#) by Bybee's successor, Jack Goldsmith.

Flanigan, now at Wilmer Cutler Pickering Hale and Dorr, declined to talk about the judge.

Despite Yoo's heavy involvement, though, the judge's signature on the torture memos weren't perfunctory. According to information Bybee submitted to the Armed Services Committee last fall, as his office prepared the memos, Bybee saw a CIA assessment of the "psychological effects of military resistance training."

The assessment came to him in a meeting with Yoo and two other OLC attorneys in July, and Bybee told the committee that it informed the Aug. 1 memo, which is believed to have approved specific interrogation techniques, such as waterboarding. The Obama administration is reportedly split on the question of whether to make that opinion public.

News of the torture memos [broke](#) in 2004, toward the end of Bybee's first year on the Ninth Circuit. Samahon, his clerk, remembers gathering for the weekly staff meeting.

"He condemned the policy choice to use torture as a tool of interrogation," he said. "It was quite eloquent, something like, 'When the republic would countenance the use of torture as an instrument of forging policy, truly the spirit of liberty has gone out of us.'"

Samahon said he didn't interpret Bybee's use of the word "torture" as a legal term of art. And he acknowledges that in Bybee's approach to the law, a policy choice could be ill-advised, or even abhorrent — but still constitutional.

Yet Yoo has often gone further, arguing that the administration's aggressive tactics saved American lives. He also points to Bybee in his book, where Yoo describes a standard practice at the OLC in which lawyers submitted their drafts to at least two colleagues, or the chief, for review before being issued.

Neither Yoo nor his lawyer, Gibson, Dunn partner [Miguel Estrada](#), returned messages.

Unlike Yoo, Bybee wasn't a national security expert; as an academic, he'd developed a bit of a specialty in the Establishment Clause. And according to one former lawyer at the OLC, he continued to pursue that interest there.

The former OLC lawyer wouldn't discuss specifics, but shortly after Bybee left, the OLC opined that the Parks Service could give historic preservation grants to the Old North Church in Boston without violating the First Amendment, even though religious ceremonies still took place there.

UNDER A MUSHROOM CLOUD

The judge keeps his chambers in Las Vegas, where his father worked on the Nevada **nuclear test site** in the 1950s, and the young Bybee witnessed a mushroom cloud from a distance. While he was in his 20s, his father died suddenly from cancer believed to be brought on by the nuclear work, sister Karen Bybee said, adding that her brother immediately stepped in to lead the family.

The judge could have gone to Duke University School of Law, but he stayed at BYU for a girlfriend, said Bybee's friend Guynn. Then, she ended the relationship during Bybee's first semester at law school.

"I still have this image talking to him on the phone, with him sort of lamenting the fact he gave up Duke for a girl, and now he doesn't even have the girl," said Frederick Gedicks, another friend who is now a BYU law school professor himself.

Bybee eventually married a teacher, and they have four children.

"Jay picks himself up and moves on. I would not describe him as stoic, just solid," Gedicks said. "He's not an emoter, but certainly not a stone, either."

The judge worked on appeals for the Justice Department in the 1980s, and then in the White House Counsel's office under George H.W. Bush. His moral barometer sometimes made life complicated, remembers **Randall Guynn**, a Davis Polk & Wardwell partner who is Steven Guynn's younger brother.

Randall Guynn once prepared a European itinerary for an upcoming trip he and Bybee planned. "He wouldn't allow me to fax it, because he wasn't sure it was appropriate to use government ink and paper for a personal trip," said Guynn, who lived in Paris at the time.

The Davis Polk lawyer instead faxed the document to his firm's Washington, D.C., office, which then messengered it to Bybee.

After Bybee left the Justice Department, his successors withdrew some of the controversial torture memos. Though Bybee acknowledged reviewing CIA briefing material, he didn't provide details for the Armed Services Committee. Some members of Congress have criticized the intelligence agency for downplaying its interrogation program, according to **Jane Mayer's** account in "The Dark Side."

When it came time for one of Bybee's successors, Daniel Levin, to craft new torture guidelines, Levin arranged to be waterboarded to gain firsthand knowledge, Mayer wrote.

In addition to the Spanish inquiry, the Justice Department's Office of Professional Responsibility has been prepping a much-anticipated dissection of the OLC's legal memos. That report could recommend sanctions against lawyers who were involved; media outlets like **Newsweek** have reported that the preliminary findings are critical of Yoo and Bybee.

As a judge, Bybee is not regulated by the Nevada Bar Association. And the U.S. Judicial Conference can only bring disciplinary actions for conduct that occurred on the bench, said Arthur Hellman, a University of Pittsburgh School of Law professor.

Thus, short of criminal charges, impeachment is likely the only available domestic remedy for Bybee's critics, and the political will for Congress to undertake that process is far from certain.

What is certain is that Bybee's work for the OLC will follow him.

"I have not talked to other judges about his memo on torture," said Ninth Circuit Judge Betty Fletcher, his ideological opposite, "but to me it seems completely out of character and inexplicable that he would have signed such a document."

Last summer, the Ninth Circuit convened for a few days of law and golf at its annual conference in Sun Valley, Idaho. One morning, liberal attorneys like Kathleen Sullivan and Seth Waxman ripped the Bush administration at a discussion about executive power. Yoo was supposed to be on the panel, but didn't show — an organizer joked that he'd been "detained."

One lawyer asked the panelists whether former administration officials should be prosecuted. Sullivan said it would be difficult, suggesting reparations for the victims as an alternative. Throughout, Bybee sat quietly in an aisle seat, listening.