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Extreme Treatment Is Not "An Outrage Upon Personal Dignity" If We Urgently Need the Information (More Deceptive Legal Reasoning from the DoJ)

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Once again, the Bush Administration and the Justice Department have argued that whether an interrogation technique violates the Geneva Convention (as an "outrage upon personal dignity") depends upon how badly we need the information (by our own assessment). The New York Times quotes the pertinent assertion:

> "The fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purposes of humiliation or abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act," said Brian A. Benczkowski, a deputy assistant attorney general, in the letter, which had not previously been made public."

Benczkowski's recent letter (thanks to How Appealing for the links) was the latest response in an exchange with Senator Ron Wyden, who has valiantly tried to pin down the Administration's position on this question: "Are there instances in which the identity of a detainee, or the type of information that the detainee is assessed to possess, can help determine what sort of treatment would be considered human?"

The short answer Benczkowski gives (after much maneuvering) is "Yes" and "No." (His most elaborate discussion is here). The "No" part is that, regardless of the justification, the interrogators may not engage in "forcing an individual to perform sexual acts, threatening an individual with sexual mutilation, or using an individual as a human shield." (set forth in Executive Order 13440). These are per se violations. They are described as "illustrations" of strictly prohibited actions, suggesting that more techniques might fall in this "No" category, but the real effect of this language is to leave everything else on the table.

Beyond those examples, the answer is "Yes"--the (perceived) need for the information is a factor in determining whether the interrogation technique is an "outrage upon the personal dignity" of the victim.

Accordingly, it might *not be* an "outrage upon the personal dignity" of a prisoner—for example, subjected to extreme cold, extreme periods of standing, or water boarding—when we have an urgent need for the information, while those same actions might *well be* a violation if we don't have an urgent need for the information.

What's odd about this is that the provision protects the "*personal* dignity" of victims, and from the victim's standpoint the violation is not reduced by the felt urgency of the violator (not to mention that interrogators and their higher-ups will always feel, or at least *claim*, such urgency when resorting to extreme measures).

So how does the question get flipped around in this way? Here's where Benczkowski's argument gets desperate, and deceptive.

The desperate part is that Benczkowski's *only* support for his argument on this point comes out of a 1999 trial court opinion issued in an obscure case, *Prosecutor v. Aleksovski*, by the International Criminal Tribunal for Yugoslavia.

A good rule of thumb is that any lawyer who cites an obscure trial court opinion is really stretching to find some supportive authority. That rule is softened here because Common Article 3 of the Geneva Convention has not been interpreted many times, but there are other interpretations of this provision (cited in the court's opinion).

A second rule of thumb is that when you see citations to an obscure trial court opinion, you had better go read it because chances are the (desperate) lawyer lifted the language from the opinion in a way that twisted what the court said. (It can be found on the ICTY website).

That's precisely what Mr. Benczkowski did.

He cites the case for this pivotal proposition: "To rise to the level of an outrage, the conduct must be 'animated by contempt for the human dignity of another person' and it must be so deplorable that the reasonable observer would recognize it as something that should be universally condemned." (citing Sections 55-57 of opinion) And he relies upon the case for this additional point: Common Article 3 reflects "the common sense notion that a reasonable observer, in determining whether conduct should be deemed outrageous and particularly revolting, would take into account the circumstances surrounding the conduct, including what justifications might exist." (citing Section 53.)

Purportedly relying upon the court's opinion, Benczkowski thus established two crucial standards in determining whether the conduct is an "outrage upon personal dignity." The first standard is that issue must be decided from the perspective of a "reasonable observer." The second standard is that when asking this question one must consider "all the circumstances of the case" (including justifications for the action).

Benczkowski distorted what the court held on both points.

1. Benczkowski was right that the court imposed an "objective" "reasonable person" test, but it did not operate the way he claims.

There is a subjective component to this violation which requires that the victim actually feel humiliated. The court worried that extra-sensitive individuals might feel such humiliation for relatively minor conduct, which would not be fair to the accused. The court was concerned that "culpability would depend not upon the gravity of the act but wholly on the sensitivity of the victim." So the court added this as a check: "an objective component to the actus reus is apposite: the humiliation of the victim must be so intense that the reasonable person would be outraged." (Section 56).

The difference is subtle, but important. The test the Court formulated specifically looks at the humiliation of the *victim* to ask whether a reasonable person under those circumstances would be outraged—another way of formulating this is whether "a reasonable victim subjected to that conduct would have been outraged."

But the test Benczkowski comes up with turns away from the victim entirely, and forgets about the humiliation. Instead, he focuses exclusively on the conduct, and escalates the test to this (extremely high standard): the conduct must be "so deplorable that the reasonable observer would recognize it as something that should be universally condemned."

Although Benczkowski cites the Court for this proposition (he drops the quote marks when he injects his own special heightened test, but cites the Court at the end), the opinion says nothing even remotely close to this--with no mention of "universally condemned". Benczkowski *might* have been confused about how to formulate the "reasonable person" standard (it is a bit tricky), but there is no question that he deliberately altered what the court required to state a much higher standard.

His treatment of the second standard is even more deceptive.

2. Benczkowski is right that a judgment about the "degrading" nature of the treatment must take into consideration "all the circumstances of the case." This is *the* key point in his argument. He asserts that the "reasonable observer…would take into account the circumstances surrounding the conduct, *including what justifications might exist*." That final clause--what justifications might exist--is what makes the (claimed) *urgent need* for the information a relevant factor in evaluating the conduct.

Benczkowski cites Section 53 of the Court's opinion for this proposition. Here is the entire paragraph 53, so judge for yourself:

> It is also instructive to recount the general definition of the term "inhuman treatment" propounded by the ECHR, which to date is the only human rights monitoring body that defined the term:

> "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (ECHR). The assessment of this minimum is, in the nature of things, relative: it depends upon all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of the heath of the victim, etc." The test offered by this definition is the level of suffering endured by the victim.

The court makes it absolutely clear that the phrase "all the circumstances" relates entirely to (and is bounded by) the "level of suffering endured by the victim."

For Benczkowski to claim that this language in any way includes consideration of "what justifications might exist" for the ill-treatment is an *outrageous* distortion.

It is disgraceful that Justice Department lawyers would supply such deceptive legal analysis to a Senator.

The bottom line: whether an act is "torture" or an "outrage on personal dignity" has nothing to do with (is not in the least diminished by) how urgently we feel we need the information.