IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Appeal No. 06-15838

ADAM SNYDER and JADE SANTORO
Plaintiff-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellees.

APPELLANT SANTORO'S MOTION TO RECUSE JAY S. BYBEE

<u>TIME IS OF THE ESSENCE</u>: ORAL ARGUMENT IS SPECIALLY SET FOR FEBRUARY 13, 2008, AT BOALT HALL

On Appeal From The United States District Court
Northern District of California, Case No. C-03-4927-JSW
Honorable Jeffrey S. White

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MOTION FOR RECUSAL OR DISQUALIFICATION

Appellant Jade Santoro, by his undersigned attorney, moves for disqualification and recusal of Jay S. Bybee from any participation in the consideration or decision of the within appeal, involving the charge that the San Francisco Police Department had a custom and practice of toleration and indulgence of wrongful use of force by its officers against civilians, on grounds that, as a lawyer in the U.S. Justice Department before he took the bench, Judge Bybee was deeply and knowingly involved in the then-secret formulation and promulgation of corrupt and illicit purported legal justification and rationale for the systematic wrongful use of force in its worst, most reprehensible form: torture, carried on and to be carried on by sworn officers of the United States Government and members of the U.S. Military, in flagrant violation of the Constitution, solemn treaties, and the Laws of the United States.

In so doing, Judge Bybee knowingly and deliberately violated the Constitution and the Laws of the United States, including but not limited to well-known, <u>non-derogable</u> provisions of those pertinent international covenants and treaties which are part of Our Law under the Supremacy Clause. He thereby also traduced his sworn oaths as an attorney, and as a member of the Justice Department, to defend and uphold the Constitution and the Laws. In proposing,

affirming and justifying some purported authority on the part of the Executive Branch and its officers to abrogate those sacred principles as they see fit, in order to punish and coerce captured individuals and intimidate others in violation of fundamental human rights, he showed an utter lack of respect for, belief in, and willingness to abide by the bedrock moral and legal principles which forbid the unnecessary and wrongful use of force against human beings. Such a mind-set clearly negates any possible pretense of impartiality in judging any claim of wrongful force, let alone a policy and practice, as alleged in this case, which systematically indulges, ratifies and covers up police brutality. Accordingly, he should be disqualified in such a case.

BACKGROUND

Before he was elevated to the bench ― and well before the shocking photographic and other revelations of heinous but evidently routine practices of torture and degradation of prisoners at Abu Ghraib, Guantanamo, “Camp X-Ray” and un-numbered other known and secret U.S. prisons and 'detention facilities' in the Middle East and elsewhere ― Jay S. Bybee was an Assistant Attorney General in the U.S. Department of Justice working in the Office of Legal Counsel. In this position, as revealed after his confirmation for appointment to his present eminence, he participated in extensive, intellectually strenuous, and morally

depraved efforts by the Office to provide the President of the United States, through his then Counsel, later U.S. Attorney General, Alberto Gonzalez, with legal opinions which would further the military and political implementation of what "POTUS", immediately after the 'Attacks on America' on September 11, 2001, had feverishly declared as a "Global War on Terror" (GWOT).

These efforts had two main objectives, embodied, *inter alia,* in a series of very substantial memoranda signed by Mr. Bybee, in January and February, and then in August, 2002.[1] These purport, first, to justify unilateral U.S. abrogation of the protections of the Third Geneva Convention on the Treatment of Prisoners of

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[1] We are aware of three Memos, the first two about (purported non-) application of the Geneva Convention and the more relevant third, about the definition of torture. Time and space constraints preclude their attachment here, along with voluminous additional materials, notably including the sterling volume "Torture and Truth, America, Abu Ghraib and The War On Terror", by Mark Danner, New York Review of Books, 2004, in which the shattering photographs and numerous pertinent documents are gathered, along with Mr. Danner's series of articles describing and narrating the history of the scandal, published in the Review that year. All this material is highly commended to the Court's attention.

We only learned of the assignment of Judge Bybee to this case three days ago (On Monday, Feb.4, 2008), and have worked with all possible haste in preparing this motion. The Court can be assured that Appellant regrets any disruption of the special setting of the argument of the cause at the Berkeley law school which could result from the time factor here. The concerns expressed in this motion however, plainly override any logistical cavil, in the circumstances.

The Bybee memos can be found online at: http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf, and http://news.findlaw.com/wp/docs/torture/bybee20702mem.html for the earlier items regarding supposed non-coverage by the Geneva Conventions, and http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_2002080

War as it would have and should have applied to fighters captured by U.S. and other invading military forces in Afghanistan, who were designated (by the captors) as members of “Al Qaeda” or “The Taliban”; and, second, to rationalize and excuse ― and provide an outline for defense of anticipated criminal charges for perpetration of ― the harsh treatments and deprivations, i.e. the tortures, the president and his minions down the chain of command were so clearly spoiling to visit upon those generally hapless and defenseless captives, for obvious purposes of revenge, and intimidation of the whole world, where it has long been proven and accepted by rational practitioners that “intelligence” information extracted by torture, and torturers, is basically unreliable and useless.

Mr. Bybee's memos for Mr. Gonzalez ― who it will be recalled had already memorably advised the president that the GWOT had given rise to a “new paradigm” of warfare, which by his pronouncement had rendered the strict limitations of the Geneva Convention on the questioning of prisoners “obsolete”― were part of a much larger, astonishing body of work from the Bush-(Cheney-Rumsfeld-Rice-Powell-Ashcroft)-Gonzalez regime, which remained secret until after the Abu Ghraib photographs broke upon a scandalized world ― and became such enormously effective propaganda fodder for those who would teach and persuade the world that the U.S. is a malevolent enemy of humanity, a “Great

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1_JD_%20Gonz_.pdf for the torture memo.

Satan", etc.— when a series of authenticated documents were leaked to the Press and Public by one or more true patriots whose identities are apparently still publicly unknown. A larger compendium of these documents is found online at: http://www.humanrightsfirst.org/us_law/etn/gov_rep/gov_memo_intlaw.html.

ARGUMENT

> Any justice, judge or magistrate of the United States shall disqualify himself (or herself) in any proceeding where his (or her) impartiality might reasonably be questioned.. Title 28 U.S.C. #455(a)

Since anything worthy of the name civilization began, the most fundamental questions of its character and meaning have arisen from or revolved around people with power killing, maiming and otherwise inflicting pain and suffering on other people who were in their physical control, and helpless or defenseless in the face of their power. As time wore on and actual laws evolved, questions involving the authority or right of the powerful to seize and hold persons they would subject to such treatments emerged, as an obvious corollary, ultimately evolving by the time of the Magna Carta into the principle and rules of *habeas corpus*. To be sure, the laws, such as they were, during much of this time and on into our own American era, did not forbid — or were ambiguous about — such killing and maiming and other forms of torment, which came to be denominated as Torture, under various circumstances supposedly sanctioned by laws.

More recently, however, beginning generally in the Eighteenth Century, the various forms of physical torment and abuse which gather under the Torture rubric came to be disapproved, and finally supposedly prohibited, in the supposedly civilized countries of the "West" at least, including the United States. In particular, after enactment of the Fourth Amendment in our Bill of Rights, with its prohibition against "unreasonable seizure", subsequent constitutional jurisprudence, and those "evolving standards of decency that mark the (moral) progress of a maturing society"[2] — to quote one cogent judicial reference — led eventually (if only quite recently, in our own day) to the judicial articulation of a standard which prohibits (or should prohibit) any use of force, by officers against 'subjects', which is not necessary to self-defense or the defense of others, overcoming resistance to lawful arrest or detention, or preventing or terminating unlawful flight. See *Graham v. Connor*, 490 U.S. 382, 109 S.Ct 1865 (1989), and its progeny. As one felicitous statement by this Court has it, "[W]hen there is no need for force, *any* force used is constitutionally unreasonable." *Headwaters Defense Coalition v. Humboldt County, et al.* 240 F.3d 1185, 1199 (9th Cir. 2000)("*Headwaters I*") (Emphasis by the Court).

Additionally, and on a much broader compass, evolving standards of

[2] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

decency articulated and struggled for over years in the (evolving) law of nations, and embodied in international conventions and covenants the United States has agreed to and ratified and is bound by as part of the Supreme Law of the Land under our Constitution, Torture ― which could reasonably also be defined as the same unnecessary use of force prohibited by the Fourth Amendment under the *Graham* rule ― has been prohibited all over the world. Thus, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, unequivocally provides that "No one shall be subjected to cruel, inhuman or degrading treatment or punishment," (Article 5). The International Covenant on Civil and Political Rights, adopted in 1966, said the same thing (Article 7); and led on to the later adoption of the explicit Convention Against Torture and Other Cruel Inhuman or Degrading Treatment Or Punishment, in 1984. The latter begins:

> PART 1
> *Article 1*
>
> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him *(sic)* or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, of for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article us without prejudice to any international instrument or national legislation which does or may contain

provisions of wider application.

The Convention also provides:

> *Article 4*
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> 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture *and to an act by any person which constitutes complicity* or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Convention Against Torture and other Cruel Inhuman or Degrading Treatment Or Punishment, 1984 (emphasis added).[3] Clearly, the complicity provision in the Convention, like the rules of accountability in the criminal law, must be extended to those who constructed the false legal rationale which purports to justify ignoring the "non-derogable" provisions of the treaties.[4]

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[3] Thus, besides the prohibition implicit in the Fourth Amendment and now explicit in the decisional law, the mandate in Article 4 led to adoption of Secs. 2340 and 2340A of the U.S. Criminal Code (Title 18 U.S.C. # 2340, 2340A), which unambiguously declare that torture is a crime; and indeed, much of the substance of the Bybee torture memo is occupied with theorizing for a split-hair defense to criminal charges under Sec. 2340A.

[4] Article 4, (2) of the Covenant provides, "No derogation from articles 6, 7, 8 (pars. 1 and 2), 11, 15, 16 and 18 may be made..." under the article's provisions for emergency exceptions to the rules of the Covenant. The Convention Against Torture states, much more explicitly, that, "*No exceptional circumstances whatsoever*, whether a state of war or a threat of war, internal political instability or *any other public emergency*, may be invoked as a justification of torture." (Id. Art.2, Sec.2; emphasis added). This, by the Supremacy Clause, is the law of the U.S. Land...

In his torture memo of 8/1/02, Mr. Bybee — again, before he was elevated to the Bench, and where his participation in these machinations was kept from the Senate in its review of his qualifications for the appointment — was at pains to create from whole cloth a purported legal distinction between torture and worse torture, leading, among other ghastly averments, to the now-infamous assertion that, to qualify as actual torture under U.S. law, the pain inflicted "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." See Memo of 8/1/02, Introduction. This stunning work should be read carefully, to appreciate its full horror in relation to the principles of human decency — and the reality and great danger of human cruelty, vengefulness and sadism — in the context of what one used to assume was the full dedication of all Americans to universal principles of human rights.

How then, possibly, can an attitude which sought thus to rationalize, justify and excuse (and defend) the heinous Use of Force practices which were planned and used — and are apparently still much used, even after being so infamously exposed, to the great disgrace of the United States and the everlasting shame of each of its citizens, whether he or she knows or acknowledges it or not — be squared with the impartiality, and civic, intellectual and moral fortitude, needed for

fair consideration of the alleged existence and necessary implications of such a closely analogous policy and practice of police administration, that turns a blind eye to, indulges, routinely covers up and thereby inevitably encourages and condones the more familiar, quicker, everyday domestic forms of torture — unnecessary, and gratuitous, and so often 'malicious and sadistic', uses of force — which the case at bar is all about? It cannot, and the contradiction must be faced by the Court.

WHEREFORE, the Undersigned respectfully but earnestly moves for an Order that disqualifies judge Jay S. Bybee from participation in the consideration and decision of this appeal, and for such other and further relief as may be just and appropriate in the premises of this important case.

Respectfully submitted,

DATED: February 7, 2008
(Corrected Feb.8, 2008)

Dennis Cunningham
Attorney for Appellant Jade Santoro

CERTIFICATE

I certify that I served the within Motion for Disqualification, etc. on Appellees by fax and mailing a copy to Sean Connolly and David Newdorf, DCAs, at the City Attorney's Office in San Francisco, on February 7, 2008.

Dennis Cunningham