

December 28, 2005

THE QUESTION OF TORTURE

The Judge Must Resign

The Legal and Ethical Implications of the Torture Opinion of Jay S. Bybee

1. Introduction and Summary

On August 1, 2002, Jay S. Bybee, currently a Federal Judge, issued and signed an opinion that advised the Government, then his client, that it was legally permissible to torture human beings. The Government wanted to begin or to continue to torture its prisoners, but it needed Bybee's opinion in order to protect military and intelligence personnel who feared they would be prosecuted for violation of the Anti-Torture Statute (as defined below). Bybee gave the opinion. It enabled the Government's torturers to engage, and in all likelihood to continue to engage, in their criminal conduct under the false color of law.

The torture Bybee advised was permissible included the breaking of bones, beatings with blunt objects, bleedings, water-boarding, hanging by the limbs, the placing of needles under fingernails, and other criminal acts. Bybee also concluded that the President had the power to order the piercing of eyeballs, the gouging out of eyes, the crippling of prisoners and the destruction of their organs while they were alive. That this lawless advice was actually given by a lawyer to, and followed by, the Government, is an extraordinary event in a civilized society. Bybee's opinion is the illicit genesis of the

policy and practice of torture by our Government for the first time in our history. It was implemented at Bagram and other centers in Afghanistan, at Abu Ghraib, Basra, Ramadi and Tikrit in Iraq, and elsewhere. Though much has been written about Bybee's opinion, there has been little analysis of the critical legal and ethical issues it raises.

That analysis, and its inescapable conclusion, is presented here. Six months after giving his opinion, Bybee was appointed to the United States Court of Appeals for the Ninth Circuit. In light of his lawless and unethical advice, and the immense suffering and harm it has caused, the next step is clear: Bybee must step down from the Federal bench.

2. The Opinion

Bybee's advice was set forth in his legal memorandum and opinion (hereinafter the "Opinion") entitled "Standards of Conduct for Interrogation" under the Anti-Torture Statute. He signed the Opinion and delivered it to Alberto Gonzales, who is currently the Attorney General but was then serving as Counsel to the President.¹ In giving the Opinion, Bybee was counseling the Government, then his client,² that it may engage in criminal conduct. A great number of jurists, including law teachers, former judges and leading lawyers, have vigorously condemned the Opinion as lawless, as advice on how to engage in criminal conduct, as incompatible with the rule of law, and as undermining the very underpinnings of individual criminal responsibility. All agree that Bybee's Opinion gives rise to a grave ethical crisis.

¹ Memorandum from Jay S. Bybee, then Assistant Attorney General and head of the Office of Legal Counsel of the Department of Justice, for Alberto R. Gonzales, Counsel to the President, dated August 1, 2002, available at <http://news.findlaw.com/nytimes/docs/doj/bybee801fd02mem.pdf>.

² The Government (the executive branch of the Federal government) was clearly Bybee's client. The Opinion was addressed to and given in response to a request from the President's counsel: "You [Alberto Gonzales] have asked for our Office's views regarding the standards of conduct under the Convention against Torture . . . as implemented by [the Anti-Torture Statute]. Opinion, p. 1. It was Bybee's responsibility, as Assistant Attorney General in charge of the Office of Legal Counsel, "to assist . . . the Attorney General in his function as legal advisor to the President and all the executive branch agencies. . . . The Office also is responsible for providing legal advice to the executive branch on all constitutional questions . . ." U.S. Department of Justice, Office of Legal Counsel, available at <http://www.usdoj.gov/olc/index.html>. The Convention against Torture is fully cited in n. 26 below.

3. The Anti-Torture Statute

Federal law prohibits the torture of any person outside the United States.³

“Torture” is defined as--

“an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”⁴

In giving the Opinion, Bybee advised his client that the intentional infliction of physical pain upon prisoners in the course of their interrogation would not constitute torture unless it was—

“. . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁵

The Opinion thus counsels the Government that prisoners may be submitted to a variety of forms of grave and violent physical harm without being deemed to have been tortured in violation of Federal law. Bybee’s Opinion appears to mean that prisoners are not being tortured so long as they do not suffer, for example, liver or lung (organ) failure, an impairment of the ability to swallow or urinate (bodily functions), or “even” death,⁶ or pain equivalent to the pain generated by those events.⁷

³ Congress has not enacted a criminal statute specifically outlawing torture *inside* the United States out of deference to Federal-state relations and because it has regarded existing Federal and state criminal law as sufficient. See American Bar Association, Report to the House of Delegates from The Association of the Bar of the City of New York (the “N.Y. City Bar Association”) et al., dated August 9, 2004, p. 6, available at <http://www.abanet.org/leadership/2004/annual/dailyjournal/ABAFinalTortureReport081704.pdf>.

⁴ 18 U.S.C. §§2340(1), 2340A (the “Anti-Torture Statute”).

⁵ Opinion, p. 1.

⁶ The meaning of “even” is unclear, and the “death” test is not found in the Emergency Medical Care Statutes Bybee adapts as establishing his threshold for torture (see n. 19).

⁷ The pain-equivalency test is illusory, since it would appear virtually impossible for a prosecutor to meet the test in the absence of the event itself.

Bybee’s sources for his Opinion are his selective shopping for definitions of “severe” in an assortment of dictionaries⁸ and, far more importantly, the use of the term “severe pain” in a group of Federal laws whose common purpose is wholly antithetical to that for which Bybee seeks to use them.⁹

4. The Emergency Medical Care Statutes

To establish the degree of pain American interrogators may willfully inflict on prisoners, Bybee relies upon statutes (the “Emergency Medical Care Statutes”) that (a) provide for payment by the Federal government for “emergency medical services” for indigent illegal aliens,¹⁰ (b) mandate the coverage of such services for other individuals under their medicare plans and medicaid managed care plans regardless of prior authorization or the absence of a contract with the emergency care provider,¹¹ (c) provide an exemption from Federal “reasonable limits” ceilings for emergency medical services performed by hospitals,¹² and (d) generally require hospitals to treat any individual suffering from an emergency medical condition.¹³

Each of these Statutes provides for payment of or coverage for the treatment of an “emergency medical condition”, generally defined as follows:

“. . . the term ‘emergency medical condition’ means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of

⁸ Webster’s Third College Edition (1988) defines “severe” as “keen; extreme; intense (*severe* pain)”. The Opinion’s medley of dictionary definitions includes “violent”, “extremely violent”, extremely “grievous”, and concludes, in paraphrasing one common definition, that “the adjective ‘severe’ conveys that the suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.” The dictionary definitions really lead us nowhere, however, since most violent physical beatings of bound or otherwise helpless prisoners that we can imagine will inflict severe pain, as that term is commonly understood, without resulting in organ failure, impairment of bodily function, or “even” death. See the examples of techniques used by American interrogators over the past three years or so on p. 11.

⁹ There have apparently been no prosecutions, and thus there is no case law, under the Anti-Torture Statute. See the Lawyers’ Statement (n. 37 below), at p. 6.

¹⁰ 8 U.S.C. §1369 and 42 U.S.C. §1396b (v)(2) and (3).

¹¹ 42 U.S.C. §1395w-22(d)(1)(E) and (d)(3) and 42 U.S.C. §1396u-2(b)(2)(A),(B) and (C).

¹² 42 U.S.C. §1395x (v)(1)(K)(i) and (ii).

¹³ 42 U.S.C. §1395dd (a) and (e)(1).

sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

- (A) placing the patient’s health in serious jeopardy,
- (B) serious impairment to bodily functions, or
- (C) serious dysfunction of any bodily organ or part.”¹⁴

These Statutes, which Bybee describes as “providing health benefits”¹⁵ are designed to assure free medical and hospital care to gravely ill or injured people. They were crafted to help the afflicted, including indigent illegal aliens, and not, of course, as guidelines for beating alien prisoners within an inch of their lives, limbs, organ failure, or serious bodily dysfunction. While he notes that they “address a substantially different purpose” from the Anti-Torture Statute, Bybee turns the Emergency Medical Care Statutes on their head, corrupting their purpose by inverting their enumeration of symptoms indicating a need for emergency medical assistance, and using them instead as a prescription for the willful torture of captive human beings.

As to the determination of the gravity of the emergency patient’s symptoms under the Emergency Medical Care Statutes, certain of the Statutes posit the judgment of the “prudent layperson, who possesses an average knowledge of health and medicine”.¹⁶ In the case of the prisoner under the Anti-Torture Statute, the Opinion leaves the judgment as to whether the severity of his pain is mortal, or close to mortal, to the physical tormentor looking for information.¹⁷

The Opinion goes further still. Drawing upon no cited authority whatsoever, Bybee constructs an expanded version of the Emergency Medical Care Statutes and imports that version into the Anti-Torture Statute. As a result, the torture

¹⁴ 18 U.S.C. §1396b(v)(3).

¹⁵ Opinion, p. 5.

¹⁶ 18 U.S.C. §§1396u-2(b)(2)(C), 1396w-22(d)(3)(B).

¹⁷ The potential consequences can obviously be horrendous. In December 2002, for example, a 22 year old Afghan farmer died of “blunt force injuries to lower extremities complicating coronary artery disease”. Another Afghan prisoner died of a pulmonary embolism one day after being confined in the U.S. detention center in Bagram. American Bar Association, Report to the House of Delegates (n. 3 above), at p. 3.

threshold is raised even higher than that of the unacceptable test he has established based on his use of the Emergency Medical Care Statutes themselves. Bybee thus writes that these Statutes “treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage” of the nature set out in the second column below. The actual language of the Statutes is set forth in the first column for purposes of comparison.--

<u>Statutory Threshold for Free Emergency Medical Assistance</u>	<u>Bybee’s Version of the Medical Threshold, Using it as the Torture Threshold¹⁸</u>
<u>serious</u> impairment to bodily functions	<u>permanent</u> impairment of a <u>significant</u> body function
serious <u>dysfunction</u> of any bodily organ <u>or part</u>	organ <u>failure</u>
placing the patient’s <u>health</u> in serious jeopardy ¹⁹	<u>death</u>

It therefore appears, for example, that if after being subjected to physical beatings a prisoner has difficulty swallowing or urinating, or has blood in his urine, or after the injection of needles under his fingernails his fingers are bleeding, he will not have been tortured unless his pain is equivalent to that generated by a “permanent” functional impairment. Or if he suffers a broken limb he will not have been tortured either because the pain is not equivalent to that of a permanent bodily dysfunction (he will be able to walk or write when the bone heals), or because a limb (the bone generally recovers) may be said not to be an organ, or both.

¹⁸ Opinion, pp. 6, 13.

¹⁹ These Statutes do not mean that a patient whose health is in serious jeopardy must be in danger of death in order to qualify for free medical assistance. The Emergency Medical Care Statute quoted in part in the Opinion reads in its entirety as follows: “(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy”. [Emphasis supplied.] 18 U.S.C. 1395w-22(d)(3)(B). It is not necessary that the individual, or the pregnant woman or her unborn child, appear to be likely to die in its absence in order for him or her or the unborn child to be eligible for emergency medical assistance.

If he suffers from tachycardia or can breathe only with difficulty, for example in the case of water-boarding, he will not have been tortured because he has not suffered the pain of organ failure. Or if neither test is met and yet a captive becomes otherwise critically ill, he will not have been tortured if the pain inflicted does not “rise to [that of] the level of death” (Opinion, p. 6).

It is hard to imagine why Bybee extended the misapplication of the language of the Emergency Medical Care Statutes, beyond even its own terms, into the realm of permanence, failure and death.²⁰ The likely explanation is that the Opinion was prepared not just as guidance for the Government’s future conduct, but in an effort to legitimize the practices of American interrogators prior to August 1, 2002, the date of the Opinion. Current and former government officials have reported that the Opinion served as an “after-the-fact legal basis for harsh procedures used by the CIA on its prisoners.”²¹ As reported in the Times—

“the [prior interrogation] methods provoked controversy within the CIA and prompted concerns about whether agency employees might be held liable for violating the Federal torture law, which makes it a crime for an American operating overseas under governmental authority to torture anyone.”²²

5. A Lawless and Unconscionable Test

The Anti-Torture Statute provides that if a person, acting under the color

²⁰ In reviewing the legislative history of the Convention against Torture (see note 26), which the Anti-Torture Statute implements under United States domestic law, Bybee notes that the Reagan administration had originally issued an understanding that in order to constitute torture an act had to be intended to inflict “excruciating and agonizing physical . . . pain”. S. Treaty Doc. 100-20 at pp. 4-5 (May 28, 1988); Prepared Statement of Mark Richard, S. Hrg. 101-718 at p. 16 (January 30, 1990); Superseding Opinion (n. 33 below), at p. 8. What the Opinion does not say, however, as is made clear in the Superseding Opinion, is that the Reagan test “was criticized for setting too high a threshold of pain for an act to constitute torture” and “was not adopted.” S. Exec. Report 101-30 at p. 9 (August 30, 1990); Superseding Opinion, p. 8. Even the rejected Reagan test would have covered, as torture, “tying up [a prisoner] . . . in positions that cause extreme pain.” S. Treaty Doc. 100-20 at p. 4. The rejected test was not Bybee’s formula of permanent dysfunction, organ failure and death, nor was there, of course, any discussion of such a formula in the legislative history of the Convention or the Statute, or indeed anywhere else, except in the Opinion.

²¹ *Aides Say Memo Backed Coercion for Qaeda Cases*, The New York Times, June 27, 2004.

²² *Ibid.* The Lawyers’ Statement (n. 37 below), at p. 1, also refers to these reported prior interrogations.

of law, intentionally inflicts severe physical pain upon a prisoner, that person is guilty of torture, a felony generally punishable by 20 years in prison. As the Dean of Yale Law School put it in his statement to the Senate Judiciary Committee early this year, “the [O]pinion defines ‘torture’ so [absurdly] narrowly that it flies in the face of the plain meaning of the term.”²³ Scores of leading lawyers have condemned the Opinion’s “lawless character.”²⁴

It hardly requires a lawyer to understand what the language of the Statute means. The threshold for “severe pain” counseled in the Opinion is so reprehensible that no more than its assertion serves as its own daunting rebuttal. Virtually every rational person, lawyer or not, would recognize the absurdity of holding that a person may not be said to have been tortured unless he has been subjected to suffering equivalent to that which will leave him permanently dysfunctional, crippled, or dead.²⁵

6. Inventing the President’s Constitutional Power to Torture

The Opinion also reaches the astonishing conclusion that the President has the constitutional power to override the provisions of the Anti-Torture Statute. Bybee writes, at pages 34-5, that the Anti-Torture Statute:

“ . . . must be construed as not applying to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority. . . . [His] power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. A construction of [the Anti-Torture Statute] that applied the provision to regulate the President’s authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise

²³ Statement of Harold Koh (n. 38 below), at p. 4.

²⁴ Lawyers’ Statement, p. 2.

²⁵ In the middle of the Opinion Bybee refers to an attached Appendix which briefly describes a number of cases involving torture that have arisen under the Torture Victims Protection Act, 28 U.S.C. 1350 note, a statute which provides a civil remedy for torture victims. That Act’s definition of physical torture is similar to the definition in the Anti-Torture Statute. There is no reference in this portion of the Opinion to any requirement that the victim’s physical pain be equivalent to that of bodily dysfunction, organ failure or death, for, of course, no such rule is adopted in any of the cases. Undaunted, Bybee later reaffirms that “where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure.” Opinion, p. 46.

serious constitutional questions. . . . Accordingly, we . . . conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority."

In other words, the President has the constitutional power to ignore the criminal prohibition in the Anti-Torture Statute and order the torture of human beings, or to "determine [their] interrogation and treatment" as the Opinion obliquely phrases it, even if such treatment results in pain equivalent to that generated by permanent impairment of significant bodily function, organ failure, or death.²⁶ The acts of torture that American interrogators may practice (in the event of such an order) would include, for example (as the Opinion describes torture elsewhere), the piercing of eyeballs and the gouging out of eyes.²⁷ The Opinion states that—

"if executive officials were . . . [to torture while] conducting interrogations when they were carrying out the President's Commander-in-Chief powers constitutional principles [would] preclude an application of [the Anti-Torture Statute] to punish [them] for aiding the President in exercising his exclusive constitutional authorities."²⁸

As noted by the former Chairman of the Committee on International Human Rights of the N.Y. City Bar Association, any argument that the President is constitutionally endowed with such a power is "preposterous".²⁹ The extent to which prisoners may have been rendered dysfunctional, maimed or killed by American interrogators as a result of the unlawful exercise of this "constitutional" torture power, we do not yet know.³⁰

²⁶ The Opinion argues that the need for the President's exercise of such a power is "especially pronounced in the middle of a war in which the nation has already suffered a direct attack." Opinion, p. 31. The Anti-Torture Statute, of course, makes no exception for the torture of enemies, which would render it wholly meaningless. The Convention against Torture itself expressly provides that "[n]o 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." Article 2(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature by United Nations General Assembly Resolution 39/46 of December 10, 1984, entered into force on June 26, 1987, and ratified by the United States on October 21, 1994.

²⁷ Opinion, pp. 19-20 and note 10, p. 20.

²⁸ Opinion, p. 35.

²⁹ Interview of Scott Horton, June 9, 2004, available at <http://www.abc.net.au/worldtoday/content/2004/s1128053.htm>.

³⁰ President Bush has been said to have issued an "unequivocal directive" against torture. See the Superseding Opinion, p. 2. However, what the President actually said was that "[w]e will investigate and

7. A Pattern of Suffering

But many of the horrors that prisoners in American custody have generally suffered since the writing of the Opinion are widely known. They have been inflicted in Iraq, in Afghanistan and elsewhere. Military sources indicated that, as of August of last year, over 30 prisoners had died in U.S. custody.³¹ Senior legal advisors to the President are reported to have said, after the torture of prisoners at Abu Ghraib became publicly known last year, that the Opinion would be reviewed and revised because it created the “false impression that torture could be legally defensible.”³² The Opinion was not formally withdrawn until December 30, 2004, almost two and a half years after it was given.³³

As reported by The New York Times—

“What’s notable about the incidents of torture . . . is first, their common features, and second, their geographical reach. No one has any reason to believe

prosecute all acts of torture . . . in all territory under our jurisdiction.” [Emphasis supplied.] Superseding Opinion, p. 2, n. 7. As noted above, the Anti-Torture Statute applies to acts of torture committed “outside the United States”. The United States means “all areas under the jurisdiction of the United States”. 18 U.S.C. §§ 2340(3), 2340A(a). Thus, alleged acts of torture committed by American interrogators in areas not in our territory are precisely the ones that *need* to be investigated and prosecuted. Condoleezza Rice was equally disingenuous in early December when she said, in Europe, that “U.S. personnel” would adhere to the Convention on Torture on foreign soil, leaving violation open to independent contractors, consultants and agents of foreign countries receiving prisoners under our practice of rendition. On December 13 she appeared to modify even this position by implying that her words were announcing only current (and changeable) policy, since “we should be prepared to do anything that is “legal” to prevent another terrorist attack.” N.Y. Times, December 14, 2005 [quotation marks added]. Recent legislative discussions are likely to have little practical effect given the Opinion’s (and thus the Administration’s) unconscionable view of the President’s untrammelled constitutional power to torture as commander in chief. As to rendition, if the responsible U.S. officials know or should know that the prisoners involved may be tortured, and they are, the officials will themselves of course be guilty of torture under the Anti-Torture Statute which prohibits any “conspiracy” with others to torture prisoners on foreign soil. 18 U.S.C. §2340A(c).

³¹ American Bar Association, Report to the House of Delegates (n. 3 above), at p. 3. If a prisoner actually dies, of course, the Bybee test may be met and the torturer brought to justice, except that “the infliction of such pain [in this case pain equivalent to that of death] must be the defendant’s precise objective.” Opinion, p. 3.

³² The New York Times, June 27, 2004, *supra*, n. 21.

³³ Memorandum and opinion (the “Superseding Opinion”) of Daniel Levin, Acting Assistant Attorney General, for James B. Comey, Deputy Attorney General, dated December 30, 2004, available at <http://www.usdoj.gov/olc/dagmemo.pdf>. The Superseding Opinion was issued eight days before the Senate hearings on the nomination of Mr. Gonzales as Attorney General.

any longer that these incidents were restricted to one prison near Baghdad. They were everywhere . . . Afghanistan, Baghdad, Basra, Ramadi and Tikrit”³⁴

The pattern includes attacks with dogs; choking; leaping upon supine prisoners who are bound and blindfolded; urinating upon and kicking in the lower back, head and groin; beating with a chair until the chair is broken; “beating on my heart” (“I thought I was going to die”) [he did not]; and on and on in a list as boundless as the imaginations of the American torturers. Whether these acts, inflicted upon prisoners either for the purpose of extracting information or for the sadistic pleasure of the jailkeep, constitute torture, depends not one whit upon whether or not the resulting pain or suffering is equal to that produced by the impairment of bodily function, organ failure, or death.³⁵ The practices condoned continue to this day (see Bush’s exception for torture in foreign territory in note 30), and are clearly the Opinion’s progeny. As recently as a few weeks ago an American captain reporting acts of torture inflicted upon prisoners in Iraq described the applicable standard as not doing “anything that is going to cost you [the prisoner] permanent physical damage”,³⁶ Bybee’s words virtually verbatim.

8. Widespread Condemnation by the Bar and Allegations of Unethical Conduct

Leading members of the Bar have condemned the Opinion. In their statement of August 8, 2004 (the “Lawyers’ Statement”), more than 100 lawyers, judges and law teachers throughout the United States declared that:

“The belated repudiation of the August 2002 memorandum (which had been signed by Jay S. Bybee, then Assistant Attorney General, Office of Legal Counsel and now a Federal Judge) is welcome, but the repudiation does not undo the abuses that this memorandum may have sanctioned or encouraged during the

³⁴ *Atrocities in Plain Sight*, The New York Times, January 13, 2005.

³⁵ For a description of acts of torture performed by U.S. interrogators, see also, e.g., *Atrocities in Plain Sight, ibid.*; *Detainees describe abuse at Iraqi prison*, International Herald Tribune, January 12, 2005; American Bar Association, Report to the House of Delegates, *supra*, n. 4.

³⁶ Human Rights Watch, *Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army’s 82nd Airborne Division*, September 2005.

nearly two years that it was in effect. The subsequent repudiation, coming after public outcry, confirms its original lawless character.”³⁷

In his testimony before the Senate last January, Harold Koh testified that the Opinion--

“ . . . cannot be justified as a case of lawyers doing their job and setting out options for their client. If a client asks a lawyer how to break the law and escape liability, the lawyer’s ethical duty is to say no.”³⁸

9. Bybee’s Ethical Transgressions

Never before in our history, except possibly during the eras of displacement (of native Americans) and slavery, which we have all long since held abhorrent,³⁹ has an American lawyer counseled our Government, in this case by establishing a lawless standard and by invoking a nonexistent Presidential power, that torture was a lawful act under Federal law. The gravely unethical character of Bybee’s advice is perhaps best illustrated by considering how that advice is treated under the Model Rules of Professional Conduct adopted by the American Bar Association. The Model Rules have served to guide the several states in adopting their own current rules.

a. Model Rule 1.2(d). Counseling or Assisting in Criminal Conduct

Rule 1.2(d) provides that—

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal”.

³⁷ Lawyers’ Statement on Bush Administration’s Torture Memos, released August 4, 2004 and addressed to the President, the Vice President, the Secretary of Defense, the Attorney General and Members of Congress, p. 2, available at <http://www.afj.org/spotlight/0804statement.pdf>.

³⁸ Statement of Harold Hongju Koh before the Senate Judiciary Committee regarding the Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States, January 7, 2005, p. 5, available at http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3938.

³⁹ As stated by Judge Kaufman in *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), “The torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.” Quoted also by Lord Bingham in *A and Others v. Secretary of State for the Home Department*, *infra*, n. 43.

The Opinion raises three principal issues under Rule 1.2(d). First, Bybee’s advice to the Government that it or its agents may willfully inflict physical harm and injury on captive human beings, so long as the pain inflicted upon them is not equivalent in intensity to that accompanying organ failure, impairment of bodily function, or death, advises the Government, his client, that it may torture prisoners without violating the Anti-Torture Statute. The Opinion thus counsels the Government, in violation of Rule 1.2(d), that the commission of criminal acts is permissible.

It does not appear necessary to prove that the Government or its agents actually engaged in that criminal conduct in order for its counseling to be a violation of the Rule, although here they undoubtedly did. Bybee must have been aware that the Government had the power, the means and the disposition to do so. And he knew or should have known that the conduct he was counseling as permissible was criminal, given the brutal and unprecedented character of the advice he was giving.

As provided in Rule 1.2(d), a lawyer may always counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. But the Opinion does not constitute such an effort, given the lawless character of the advice. This is not a case, as Koh has put it, of lawyers doing their job and setting out options for their client.

Second, as noted above on page 7, the Opinion appears to have established its unconscionable threshold for torture in part in order to sanction prior American interrogation practices amounting to torture,⁴⁰ and therefore to constitute “assisting in” both prior and continuing criminal conduct within the meaning of Rule 1.2(d) and the notes thereto. As provided in notes 9 and 10 to Rule 1.2:

⁴⁰ It is important to note that the Opinion itself is suggestive but ambiguous about whether it is addressing prior as well as prospective conduct. In paraphrasing the question presented to the Office of Legal Counsel by Gonzales, Bybee states that “[a]s we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States.” [Emphasis supplied.]

“. . . [Rule 1.2(d)] prohibits a lawyer from knowingly counseling or assisting a client to commit a crime When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate.”

Third, the Opinion counsels the Government that the President has the constitutional power to ignore the criminal prohibition in the Anti-Torture Statute and order the torture of prisoners. It holds that the commission of torturous acts, *even if* they inflict pain equivalent to that generated by permanent impairment of significant bodily function, organ failure, or death, is permissible if authorized by the President. Any such act is also a Federal crime under the Anti-Torture Statute, and this advice is thus also a violation of Rule 1.2(d). As stated in the Lawyers’ Statement, the claim—

“that the Executive Branch is a law unto itself is incompatible with the rule of law and the principle that no one is above the law.”⁴¹

Or, to use Koh’s words,

“By adopting the doctrine of ‘just following orders’ as a valid defense, the [O]pinion undermines the very underpinnings of individual criminal responsibility.”⁴²

b. Model Rule 8.4. Conduct Prejudicial to the Administration of Justice

Rules 8.1 through 8.5 of the Model Rules are canons devoted to “maintaining the integrity of the profession”. Rule 8.4(d) provides that it is professional misconduct “for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice”. While this Rule has normally been narrowly construed to cover such matters as a failure to obey court orders and analogous behavior, the argument for applying the Rule to the Opinion is particularly compelling. The treatment of prisoners held by the Government is part and parcel of the administration of justice. And the torture of prisoners who, after all, are entitled to the protection of the Anti-Torture Statute, flies in the face of the administration of justice. As stated by Lord Bingham in

⁴¹ Lawyers’ Statement (n. 37 above), at p. 2.

⁴² Statement of Harold Koh, (n. 38 above), at p. 4.

the most recent leading common law case on the subject of torture, the extraction of evidence—

“by the infliction of torture is so grave a breach of international law, human rights and the rule of law that any court degrades itself and the administration of justice by admitting it.”⁴³

Similarly, it would “dishonor . . . the administration of justice”, as Lord Hoffman put it in the same case,⁴⁴ for a court to entertain proceedings based on evidence obtained by acts of torture. It is an even greater dishonor for a lawyer, who as a member of the bar is an officer of the court, to counsel the permissibility of the commission of such acts. As stated in a leading article on the subject in the *Columbia Law Review* published a few weeks ago,

“[Bybee’s] defense of torture is . . . shocking as a jurisprudential matter [and] . . . is a matter of dishonor for our profession.”⁴⁵

To advise the Government, by establishing a lawless standard, that it may in effect torture without violating the Anti-Torture Statute, is an act which undermines the integrity of our profession. Advising the Government that it also has the power wholly to ignore the criminal prohibition on torture in that Statute if the President so directs and to torture without even the nominal constraints the Opinion would otherwise impose, is not only prejudicial to the administration of justice, but unsettles the very foundations of the rule of law in our society. The Opinion “is a stain upon our law and our national reputation”.⁴⁶ It counsels as permissible the administration of *injustice*, and squarely places the United States in the company of lawless nations.

⁴³ *A and Others v. Secretary of State for the Home Department*, House of Lords, 2005 UKHL 71 (December 8, 2005), paragraph 18.

⁴⁴ *Ibid*, paragraph 87.

⁴⁵ Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *Columbia L. Rev.* 1681 (October 2005).

⁴⁶ Statement of Harold Koh, at p. 5.

10. Conclusion

The Opinion sanctions practices which we all have been raised, and carefully taught, to abhor. Its appearance evokes in many minds the time-worn but telling utterance of the butcher to his accomplices in *Henry VI*, who would undo the structure of a civil society: “The first thing we do, let’s kill all the lawyers.”⁴⁷ But those in the Government who would dismantle the rule of law appear to have embarked upon a course far more calamitous than killing our lawyers. They have enlisted us. That the lawyer who delivered the Opinion was appointed to the United States Court of Appeals six months later, and still sits on that Court, is a national disgrace.

He must resign.

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⁴⁷ *Henry VI*, Part 2, Act IV, Scene 2, line 71.