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THE WRONGHEADED AND DANGEROUS CAMPAIGN TO CRIMINALIZE GOOD FAITH LEGAL ADVICE

*Julian Ku**

I argue in this brief essay that the increasingly fervent insistence on criminal punishment of the Bush administration lawyers for their legal advice on interrogation policy is both wrong-headed and dangerous. It is wrong-headed because the insistence on criminal prosecution of attorneys based solely upon their good faith interpretation of the law is highly unlikely to succeed as a matter of both U.S. and international law. It is dangerous because, at least with respect to U.S. law, prosecuting good faith legal advice is (and should be) a violation of those attorneys' constitutional rights under the U.S. Constitution's First Amendment and broader norms of free expression. Insisting on prosecuting lawyers for their good-faith legal advice, or even threatening prosecution, will chill the ability of future government lawyers to give legal advice on complex and important questions implicating U.S. national security.

I. INTRODUCTION

It is hardly unusual for a U.S. President or for a U.S. administration to be charged with committing war crimes. President Franklin Roosevelt was accused of violating the Neutrality Act in order to incite a war with Germany.¹ President Harry Truman's decision to use the atomic bomb in Japan has been called a war crime so many times it is hardly worth documenting.² Presidents Johnson and Nixon were pilloried over their Vietnam War and Cambodia military plans.³ More recently, critics have brought out the "war crime" accusation against President Bush's military action in the

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¹ See, e.g., Elizabeth L. Hillman, *Franklin D. Roosevelt, Commander in Chief*, 29 CARDOZO L. REV. 1037, 1043 (2008) (committing U.S. resources to help the British in World War Two violated the official U.S. stance of neutrality).

² See, e.g., Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1, 29 (2002) (holding in a Japanese court that deploying the atomic bomb was a violation of international humanitarian laws of war).

³ See, e.g., EDWARD R. DRACHMAN & ALAN SHANK, *PRESIDENTS AND FOREIGN POLICY COUNTDOWN TO 10 CONTROVERSIAL DECISIONS* 123, 151–52 (1997) (describing the war protestors and congressional backlash for both war strategies).

Gulf War and Panama,⁴ and President Clinton's bombings of Kosovo.⁵ One only has to review the list of charges drawn up by former U.S. Attorney General Ramsey Clark over the years to get a flavor of these types of charges.⁶

The most recent wave of war crimes accusations against the George W. Bush administration is different. But the difference lies mostly in the near obsessive focus of the accusers on the legal advice of Bush Administration lawyers.⁷ As the papers to this symposium demonstrate, it is likely that a majority of international lawyers and scholars reject the legal interpretations adopted by the Bush Administration in the pursuit of the war on terrorism, most especially the widely condemned "torture memos."⁸ But many have gone farther than simply arguing that the legal advice was wrong. A number of scholars and advocates have argued for, indeed demanded, a criminal prosecution of such lawyers for giving their legal advice.⁹

I agree that the so-called "torture memos" drew a standard that was too loose, and I believe (with the benefit of hindsight) that I would have written an opinion more limiting of interrogation techniques than the one that was written. But to me, my disagreement with the legal analysis of the memos on interrogation policy is very different from stating that I believe the lawyers who gave that advice should be held criminally liable solely for their legal advice.

⁴ See, e.g., Francis Boyle, *US War Crimes During the Gulf War*, COUNTERPUNCH, Sept. 2, 2002, <http://www.counterpunch.org/boyle0902.html> (last visited Nov. 16, 2009) (claiming President Bush was responsible for multiple counts of war crimes in Panama and during the Persian Gulf War including genocide).

⁵ See, e.g., *Hero or Villain? Bill Clinton Statue in Kosovo Angers Serbs*, RUSSIA TODAY, Oct. 9, 2009, http://russiatoday.com/Top_News/2009-10-09/bill-clinton-statue-kosovo.html/print (last visited Nov. 16, 2009) (quoting the brother of Radovan Karadzic that the bombings initiated by President Clinton and NATO forces may have been the worst since World War II).

⁶ See Press Release, The Wisdom Fund, International Commission of Inquiry on Economic Sanctions, Former US Attorney General Charges US, British and UN Leaders (Nov. 20, 1996), available at <http://www.twf.org/News/Y1997/Ramsey.html> (last visited Nov. 16, 2009).

⁷ See, e.g., PHILLIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

⁸ See, e.g., *Previously Secret Torture Memo Released*, CNN, July 24, 2008, <http://edition.cnn.com/2008/POLITICS/07/24/cia.torture/?iref=hpmostpop> (last visited Nov. 16, 2009) (providing links to the "torture memos"). See also 37 CASE W. RES. J. INT'L L. 615 (2006) (print version of the "torture memos").

⁹ See, e.g., Milan Milanovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 349 (2007); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actuality of Criminality of OLC During the Bush Administration*, 62 MAINE L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474940 (last visited Nov. 16, 2009).

Indeed, in this short essay, I will argue that this increasingly fervent insistence on *criminal punishment* of the Bush lawyers for their legal advice is both wrong-headed and dangerous. It is wrong-headed because the insistence on criminal prosecution of attorneys based solely upon their good faith interpretation of the law is highly unlikely to succeed as a matter of both U.S. and international law. It is dangerous because, at least with respect to U.S. law, prosecuting good faith legal advice is (and should be) violations of those attorneys' constitutional rights under the U.S. Constitution's First Amendment and broader norms of free expression. Insisting on prosecuting lawyers for their good-faith legal advice, even threatening prosecution, will chill the ability of future government lawyers to give legal advice on complex and important questions implicating U.S. national security.

II. THE EXTREMELY WEAK CASE FOR PROSECUTING THE BUSH LAWYERS

It is not surprising that legal academics are generally critical of attempts to prosecute attorneys, especially for giving legal advice. In contexts other than U.S. government interrogation policies, scholars have generally criticized overzealous prosecutions of criminal defense lawyers and securities lawyers on the grounds that such prosecutions chill the ability to give legal advice and legal advocacy more generally.¹⁰

What is surprising is the willingness of many scholars to entertain, or advocate for, criminal prosecution of the Bush lawyers. Legal scholars have relentlessly criticized the "torture memos," not to mention the legal advice undergirding the Bush Administration's policies on the war on terrorism more generally. But the attention on the legal advice is almost unprecedented.

There is only one plausible theory by which the Bush attorneys may be criminally liable for their legal advice: aiding and abetting the act of torture as defined under U.S. law and under international law.¹¹ There is no evidence that the Bush lawyers in any way participated in the alleged interrogations, so there can be no question of actually punishing them directly under the statute or international treaties prohibiting torture.

There are two relevant sets of laws that might be invoked to prosecute the Bush lawyers. First, under U.S. law, torture is a federal crime prohibited by 18 U.S.C. § 2430A, which itself implements U.S. obligations

¹⁰ See, e.g., Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 675 (2005) ("Efforts to enforce criminal law, which make legal advice a target of prosecution and an indicator of guilt, are a sure sign of overcriminalization.").

¹¹ 18 U.S.C. § 2340A (2006).

under the Convention Against Torture.¹² A person may then be held liable for aiding and abetting any federal crime under 18 U.S.C. § 2430A. Second, international law also directly criminalizes torture. The Rome Statute of the International Criminal Court, for instance, permits prosecution for crimes against humanity and war crimes, both of which have been understood to include torture.¹³ Accomplices to a crime may be held liable for aiding, abetting or assisting in a crime “[f]or the purpose of facilitating the commission of such a crime”¹⁴ In my view, neither U.S. law nor the ICC Statute would permit criminal punishment of the Bush lawyers as accomplices in committing torture. At the very least, the case for criminal punishment under these laws is so extremely weak that initiating a prosecution of the Bush lawyers would be little more than political theater without any hope of actual success.

In order to attribute liability for aiding and abetting a crime under federal law, the government “must establish that the “defendant associated with the criminal venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed.””¹⁵ An aider and abettor is liable for criminal acts that are the “natural or probable consequence of the crime” that he counseled, commanded, or otherwise encouraged.¹⁶ Similarly, under the ICC Statute, accomplices can be held liable if they aid for the “purpose of facilitating the commission of such a crime”¹⁷ The federal law criminalizing torture punishes the infliction of “severe physical or mental pain”¹⁸

Therefore, in order to be held liable for aiding and abetting the torture under federal law, the Bush lawyers must have intended, through their legal advice, to purposefully bring about “severe physical or mental pain” as defined in the statute. Moreover, it is likely that the individuals would have to be found to specifically intend to inflict severe physical or mental pain for some illicit purpose in order to be liable under the federal anti-torture statute.

¹² *Id.* See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

¹³ See Rome Statute of the International Criminal Court art. 5, July 1, 2002, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter ICC Statute].

¹⁴ *Id.* art. 25(3)(c).

¹⁵ *United States v. Tullos*, 868 F.2d 689, 694 (5th Cir. 1989), *cert. denied*, 490 U.S. 1112 (1989) (quoting *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978) (quoting *United States v. Martinez*, 555 F.2d 1269, 1272 (5th Cir. 1977))).

¹⁶ *United States v. Fagan*, 821 F.2d 1002, 1012 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988) (quoting *Russell v. United States*, 222 F.2d 197, 199 (5th Cir. 1955)). See also *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

¹⁷ ICC Statute, *supra* note 13, art. 25(3)(c).

¹⁸ 18 U.S.C. § 2340(1) (2006).

As the U.S. Court of Appeals for the Third Circuit recently held,¹⁹ criminal liability for torture requires proof of the intent to inflict severe and mental pain for some illicit purpose. Infliction of severe physical or mental pain, and even knowing such pain would be inflicted, such as by housing individuals in dangerous prisons, would not be torture unless the intent by putting someone in the dangerous prison was to inflict severe mental or physical pain for some illicit purpose. Similarly, an individual could not be held liable as an accomplice unless they had knowledge and the purpose of assisting in the infliction of severe physical or mental pain for an illicit purpose.

Under these standards, I respectfully suggest that it is nearly inconceivable that a court in the U.S., or the ICC, could successfully prosecute any of the attorneys in the Bush administration for their legal advice. It is therefore not surprising to me that the Obama Justice Department has not even bothered to open a criminal inquiry into the Bush attorneys, preferring to leave it to state bar ethics reviews.²⁰ There has never been any evidence that the memos were given without good faith or without a sincere belief that their advice was correct. In this factual context, it is hard to imagine how the necessary intent for criminal liability could be proven.

In other words, under the view of the Bush lawyers, none of the techniques they approved qualified as “severe physical or mental pain” within the meaning of the anti-torture statute. In their now-famous formulation, the torture statute does not criminalize an act of severe pain unless the pain is significant enough to cause permanent physical damage or organ failure.²¹ As subsequent memos demonstrated, the Bush attorneys faithfully hewed to this formulation by approving certain techniques (e.g., waterboarding) only after concluding that these techniques did not violate this standard. They also ruled out certain procedures as violating these standards, by for instance, limiting the number of times an individual could be waterboarded and requiring pads to be used behind an individual’s neck so that any pushing would not cause injury, and requiring an insect used to frighten a detainee be clearly identified as non-deadly.²²

¹⁹ *Pierre v. Att’y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008).

²⁰ See, e.g., Terry Frieden, *Early Report Doesn’t Recommend Charges for Torture Memos*, CNN, May. 5, 2009, <http://www.cnn.com/2009/POLITICS/05/05/torture.memos/index.html> (last visited Nov. 16, 2009).

²¹ See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 46 (Aug. 1, 2002), 37 CASE W. RES. J. INT’L L. 615 (2006).

²² See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice to John A. Rizzo, Acting Gen. Counsel, Central Intelligence Agency, Re: Interrogation of al Qaeda Operative (Aug. 1, 2002).

This is not to say that the memos' legal analysis was correct. Rather, the point is that as long as the attorneys believed such advice was correct, they could not have the intent necessary to violate the torture statute. Similarly, the Bush attorneys would also lack the necessary "knowledge" that they were aiding and abetting a criminal act since they genuinely believed that there was no criminal act being committed. Without such intent, in my view, there is absolutely no chance of criminal liability.

Thus, critics of the Bush attorneys' advice must establish more than that their advice was wrong or even unethical. They must establish that it was unreasonable and that it was not given in good faith. This seems to be an impossible standard to meet in this case. In attacking the advice, critics have focused on three main arguments.

First, they have argued that the Bush attorneys' analysis of specific intent was incorrect and unduly narrow. Whatever one thinks of this argument, the idea that there is no specific intent requirement for the Torture Convention cannot be said to be unreasonable, especially in light of a recent Third Circuit en banc opinion adopting a similar theory.²³

Second, critics have argued that the Commander in Chief argument is unduly broad and gives the President the right to override congressional statutes. While there are some valid criticisms of this argument, it is again hard to maintain that this argument is, in general terms, unreasonable. After all, the argument has a long pedigree and was most recently embraced by Walter Dellinger, President Clinton's Office of Legal Counsel (OLC) chief in arguing that Congress could not restrict U.S. military cooperation with the U.N. or by President Obama himself, when he issued signing statements declaring that he would treat certain federal statutes as non-binding since they would otherwise interfere with his constitutional powers.²⁴

Third, the most controversial and difficult part of the legal opinions is their definition of severe physical or mental pain. It is here that most of the critics have concentrated their fire. But given the complete lack of U.S. precedent interpreting this phrase and the uncertainty over the U.S. government's willingness to fully incorporate international definitions of "severe" pain, I cannot say that the standard drawn by the Bush lawyers is objectively unreasonable. At the very least, it is clear that the standard is not a sham standard without any actual practical limits. As later legal opinions released by President Obama demonstrated, the standard was applied in almost ex-

²³ *Pierre v. Att'y Gen.*, 528 F.3d 180 (3d Cir. 2008).

²⁴ See Memorandum from Walter Dellinger, Assistant Attorney Gen., to the Honorable Abner J. Mikva, Counsel to the President, Re: Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm>. See also President Barack Obama, Statement Upon Signing HR 2346 on June 24, 2009 (June 26, 2009), available at http://www.whitehouse.gov/the_press_office/Statement-from-the-President-upon-signing-HR-2346/.

cruciating detail to limit the scope and nature of the interrogation techniques. For instance, a detainee who feared stinging insects could be threatened with such an insect so long as the insect was actually harmless.²⁵ One may still think the techniques that were authorized constitute severe pain and therefore “torture” but such a disagreement does not necessarily make the Bush lawyer opinions unreasonable.

I should, at this point, mention the only major international law precedent where attorneys were arguably punished for the content of their legal advice. In the famous Justice Case arising out of the prosecution of Nazi officials after World War II, one of the international tribunals convicted a number of high-ranking judges and legal advisors to the Nazi regime.²⁶

Although superficially analogous, it is hard to see those WWII cases as providing adequate precedent for the prosecution of the Bush lawyers here. The judges convicted in the Justice Case had been part of the regime for a number of years and had participated in the formulation of legal reforms in the judicial system that resulted in discriminatory treatment and greater discretion for the Nazi regime. Such constant and longstanding participation, the tribunals found in a number of cases, was enough to establish the necessary motive and intent for criminal liability.

The most important difference is the pattern of longstanding cooperation with the Nazi regime rather than one or two legal opinions on a single issue of legal policy. Moreover, almost all of the defendants were judges, rather than executive branch attorneys, and they were chastised for violating their duties of independence in order to collaborate with the Nazi regime.²⁷ Their long standing cooperation on a number of issues over a series of years provides a much stronger evidence of intent. In any event, the cases did not involve any serious attempt to analyze legal opinions on a particular issue, but a pattern of conduct over a number of years of which legal advice constituted one part.

There is another legal opinion from that era that seems more analogous to the Bush legal opinions. Former U.S. President Franklin Delano Roosevelt’s Attorney General, Robert Jackson (later of Nuremberg fame), wrote a legal opinion that authorized the lease of destroyers to Great Britain despite the operation of the Neutrality Act of 1917 that seemed to prohibit such leases.²⁸ As Yale Law School Professor Edwin Borchard pointed out at

²⁵ See Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency from Assistant Attorney General Jay Bybee, at 3 (Aug. 1, 2002).

²⁶ See 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081–82 (1951).

²⁷ See, e.g., *id.*

²⁸ See generally Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att’y Gen. 484 (1940). See also Edwin Borchard, *The Attorney General’s Opi-*

the time, the opinion relied at least in part on a serious typographical error in the Attorney General's version of the Neutrality Act that may have affected the plausibility of the legal advice.²⁹ Borchard, and later Daniel Patrick Moynihan, concluded that Jackson's advice was simply wrong.³⁰ Moynihan even hinted that Jackson may have known the advice was wrong.³¹ In many ways, Jackson's advice was just as controversial and difficult as the Bush lawyers' advice. But, rightly, this advice has never been thought to constitute a crime even though it arguably had the consequence of breaking U.S. neutrality law and committing the U.S. to a war with Germany even before the attack on Pearl Harbor.

III. THE DANGERS OF EVEN UNFOUNDED CRIMINAL PROSECUTION OF THE BUSH LAWYERS

Even if, as I believe, any serious attempt to prosecute the Bush lawyers would fail, there are dangerous or at least undesirable consequences to even threatened criminal prosecutions of good faith legal advice. In a number of cases, the good faith legal advice of attorneys has been held to constitute speech that is protected by the First Amendment.³² Attorneys have invoked such free speech protections in the context of legal malpractice proceedings, challenges to ethics determinations, and criminal prosecution.

In a recent case arising in New York, defense attorneys were prosecuted for advising their nurse-clients that it would be legal for them to resign their jobs despite the fact that they were health care workers.³³ In fact, there was a substantial dispute as to whether such mass resignations were in fact legal, but in a subsequent prosecution the New York Appellate Division held that such advice is protected by the First Amendment even if the advice was incorrect.³⁴

More importantly, regardless of whether [the defendant-attorney's] legal assessment was accurate, it was objectively reasonable. We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal, loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect

nion on the Exchange of Destroyers for Naval Bases, 34 AM. J. INT'L L. 690, 690-97 (1940); DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 71-72 (1990) (arguing for a return to the conventions of international behavior set out by Woodrow Wilson and the U.N.).

²⁹ Borchard, *supra* note 28, at 693-94.

³⁰ *Id.* See also MOYNIHAN, *supra* note 28, at 71-72.

³¹ See generally MOYNIHAN, *supra* note 28, at 71.

³² See, e.g., *Vinluan v. Doyle*, 60 A.D.3d 237, 250-51, 873 N.Y.S.2d 72, 82-83 (A.D.2d 2009).

³³ *Vinluan*, 60 A.D.3d at 239.

³⁴ *Id.*

to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice.³⁵

Although the First Amendment argument has been invoked in a number of cases, there has been little analysis of the quality or reasonableness of the legal advice necessary to win First Amendment protection. In this case, the court required reasonable good faith legal advice and assumed the existence of such conditions for the purposes of the opinion.³⁶ As a practical matter, this makes sense since it is hard to see how attorneys could have an unrestricted First Amendment right to give legal advice. But the value and purposes of the First Amendment are obviously enhanced by shielding reasonable legal advice given in good faith. As I argued above, there is no evidence of such a lack of good faith regarding the Bush attorneys' legal advice.

There is one other consequence of the campaign to criminalize good faith legal advice: a chilling effect on attempts to analyze the law prohibiting torture, cruel and inhuman and degrading treatment, and other interrogation techniques. Frankly speaking, any government lawyer who offers advice allowing any sort of coercive interrogation is likely to be branded a criminal, threatened with disbarment, and sued vigorously and repeatedly in civil actions. Thus, although the initial controversial advice provided by Jay Bybee and John Yoo was withdrawn and replaced by an entirely new set of attorneys, both the old and new attorneys alike have been accused of criminal activity for reaching their controversial conclusions. It is no wonder that the Obama Justice Department has not, as far as I know, issued legal advice on the meaning of the Torture Statute or Torture Convention.

The result, of course, is that the government now operates in the assumption that any sort of deviation from the Army Field Manual is ipso facto torture. This seems implausible, as a legal matter. And even if the policy to stick with the Manual were a good one, it is a bad sign that lawyers are too afraid to even to consider alternatives. Such fears should not be limited to advice on interrogations. There are many issues over which substantial legal controversy exists, and which current government lawyers recommend at their peril. For instance, the U.S. is currently engaged in the use of Predator drone strikes in Pakistan, Afghanistan, and other areas of the world. The legality of such strikes is uncertain under international law, especially outside of states where tacit consent has been given.³⁷

³⁵ *Id.* at 251.

³⁶ *See id.*

³⁷ *See, e.g.,* Michelle Nichols, *U.N. Envoy Slams U.S. for Unanswered Drone Questions*, REUTERS, Oct. 27, 2009, <http://in.reuters.com/article/worldNews/idINIndia-43478820091028> (last visited Nov. 16, 2009).

IV. CONCLUSION

In sum, I believe that there is no chance, based on the current facts, that any of the Bush attorneys could be subject to criminal liability for their good faith reasonable legal advice. The good faith nature of the advice makes it nearly impossible to establish the necessary intent for direct or accomplice liability. This appears to be true under either U.S. or international criminal law standards since both require either purposeful assistance or knowledge that their acts would assist in the commission of a crime.

But there is something larger at stake here. Government lawyers are called upon, sometimes, to give difficult and potentially controversial legal advice under situations of high stress and with enormous stakes. Prosecuting (or demanding prosecution of) government lawyers who have provided good faith legal advice can only make this difficult task nearly impossible.