

Friedmann Award Essay:

A World Without Torture

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I am deeply honored to receive the Wolfgang Friedmann Award from the *Columbia Journal of Transnational Law*. Every aspect of this honor touches me. I am proud to be associated with your illustrious past winners, especially with one of the world's finest human rights advocates, Michael Posner of Human Rights First (the 1993 Friedmann Award winner), on whose board I sit.

I am particularly moved to receive an award named after the great Wolfgang Friedmann. Although I never met him, Professor Friedmann was a legendary figure in my own household. My late father, Dr. Kwang Lim Koh, was an international lawyer and diplomat from Korea. In 1958, when I was just four years old, my father wrote not one, not two, but three chapters in Wolfgang Friedmann's edited volume with Richard Pugh on *Legal Aspects of*

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I thank Dora Gruner and the editors of Volume 41 of the *Journal* for according me this recognition. I am also deeply grateful to my beloved friends and devoted colleagues, Columbia's brilliant Professor Gerry Neuman and his wife Carol, for their three decades of friendship and for Gerry's characteristically generous introduction at the Friedmann Banquet. My longtime friends and comrades-in-arms, Lou Henkin and Lori Fisler Damrosch, also graciously welcomed me to Columbia Law School and supported me warmly in receiving this award.

Finally, the Friedmann Award banquet marked my last occasion to see the great and gentle Oscar Schachter, a remarkable man and international lawyer. See *infra* note 2. Oscar Schachter believed in a world without torture. It is to his memory that I dedicate this Essay.

*Foreign Investment.*¹ As a boy growing up in a home that revered international law, I thought of the real “New York Giants” not as the revered baseball trio of Mickey Mantle, Willie Mays, and Duke Snider, but as Wolfgang Friedmann and past Friedmann Award winners Louis Henkin (1986) and Oscar Schachter (1983),² the three international law giants of the Columbia Law School Faculty. I still remember how distraught my father was on the day he heard Wolfgang Friedmann had died. If my father and Professor Friedmann were together today—and perhaps somewhere they are—I know that they would be marveling at how this remarkable country, the United States of America, fosters a reverence for international law and commitment to human rights within its newest immigrants.

It is to the lifelong passion of Oscar Schachter, Wolfgang Friedmann, my father, and myself—the United States’ relationship with international law and human rights—that I address this Essay. In particular, I propose to address two issues on which I have both legal expertise and government experience: the illegality of torture and cruel, inhuman and degrading treatment, and the scope of the U.S. President’s constitutional powers to authorize torture and cruel treatment by U.S. officials.

With respect to both issues, I had long thought that United States law and policy are both clear and unambiguous. Torture and cruel, inhuman, and degrading treatment are both illegal and totally abhorrent to our values and constitutional traditions. And no constitutional authority licenses the President to authorize the torture and cruel treatment of prisoners, even when he acts as Commander-in-Chief.

These are legal principles of the highest significance in American life. The right to be free from torture is an indelible part of the American experience. It is recognized by the unequivocal words

1. See Kwang Lim Koh, chapters 9, 22, and 33, in *LEGAL ASPECTS OF FOREIGN INVESTMENT* (WOLFGANG C. FRIEDMANN & RICHARD C. PUGH eds., 1959) (discussing foreign investment in the Republic of China, Korea, and Thailand).

2. See *supra* note *. Professor Schachter’s important article (Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 307–08 (1968)), marked one of the first scholarly efforts to provide a process-based approach to international obligation, a precursor of my own later work on transnational legal process as an explanation of why nations obey international law. One element of Schachter’s theory—the requirement that a domestic audience accept that an international rule is authoritative—represents a nascent effort to understand how international law norms can be internalized into domestic legal systems, a critical element of the concept of “norm-internalization” that has undergirded my own work on transnational legal process. See generally OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 190–204 (2005) (describing legal process theories of international law).

of the Eighth Amendment of the Bill of Rights: “nor [shall] cruel and unusual punishments [be] inflicted.”³ It is also clear from the jurisprudence of the Fifth Amendment’s Due Process Clause, which flatly forbids interrogation techniques that “shock the conscience.”⁴

Article 5 of the Universal Declaration of Human Rights states unequivocally that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵ In 1994, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states in Article 2 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.”⁶

As the Second Circuit recognized twenty-five years ago in the landmark case of *Filartiga v. Pena-Irala*, the torturer, “like the pirate and slave trader before him,” is “*hostis humanis generis*, an enemy of all mankind.”⁷ Article 17 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War (hereinafter Third Geneva Convention), which is incorporated into the U.S. Army Field Manual 27-10, *The Law of Land Warfare*, states that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” Article 32 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (hereinafter Fourth Geneva Convention), also incorporated in Field Manual 27-10, prohibits the torture of civilians. Article 3 Common to all Four Geneva Conventions expressly prohibits “violence to life and person, . . . murder of all kinds, mutilation, cruel treatment and torture. . . .”⁸ Finally, the U.S. Supreme Court reaffirmed in June

3. U.S. CONST. amend. VIII. A key function of the Eighth Amendment is “to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

4. *See Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring) (“it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”); *Rochin v. California*, 342 U.S. 165, 172–73 (1952).

5. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

6. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force June 26, 1987). *See also* International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, art.7 (entered into force March 23, 1976) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

7. *Filartiga v. Pena-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980).

8. 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, *adopted*

2004 that torture ranks among the most severe violations of the law of nations.⁹

While serving as Assistant Secretary of State for Democracy, Human Rights, and Labor in 2000, I told the Committee Against Torture in Geneva, upon presenting the United States' first report on its compliance with the Convention Against Torture, that "as a country we are unalterably committed to a world without torture."¹⁰ With the concurrence of all interested agencies of the United States government, I told the Committee:

Our country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights. As our report today notes, 'Torture is [now] prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture.'¹¹

This unequivocal position remains the announced policy of the Bush Administration. Indeed, in June 2004, President George W. Bush reiterated, in equally absolutist language:

Today . . . the United States reaffirms its commitment to the worldwide elimination of torture. . . . Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are

Aug. 12, 1949, art. 17, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in a Time of War, *adopted* Aug. 12, 1949, art. 32, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention]. See also Common Article 3 to the Third and Fourth Geneva Conventions.

9. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004); *id.* at 2783 (Breyer, J., concurring).

10. Statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, *On-the-Record Briefing on the Initial Report of the United States of America to the UN Committee Against Torture*, Washington, DC, October 15, 1999, available at http://www.state.gov/www/policy_remarks/1999/991015_koh_rpt_torture.html.

11. *Id.*

respected and protected by the rule of law.

...

To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees.¹²

But these strong words notwithstanding, a strikingly different view was recently set forth in a now infamous August 1, 2002 memorandum opinion sent from then-Assistant Attorney General Jay S. Bybee of the Office of Legal Counsel (OLC) to then-Counsel to the President Alberto R. Gonzales regarding coercive interrogation tactics ("Bybee Opinion").¹³ The OLC of the United States Department of Justice is the most important legal office in the United States government, for it authoritatively determines the executive branch's legal position on matters not in litigation.¹⁴ The Bybee Opinion, which was apparently requested in early summer 2002 by Mr. Gonzales as White House Counsel, explores the question whether U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held liable under a federal statute that criminalizes torture.¹⁵

12. President George W. Bush, *Statement on the U.N. International Day in Support of Victims of Torture*, June 26, 2004, available at <http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html>.

13. Memorandum of August 1, 2002 from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Opinion].

14. For a discussion of the appropriate role of the Office of Legal Counsel, see Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993).

15. See 18 U.S.C. §§ 2340–40A (person who commits torture is eligible for a fine or imprisonment for up to 20 years, or both, and if the victim should die from the torture, the torturer may be sentenced to life imprisonment or death). Furthermore, the USA PATRIOT

The Bybee Opinion effectively answers that question “yes.” It reasons in three parts: first, by defining “torture” so narrowly as to require that the interrogator have the precise objective of inflicting “[p]hysical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹⁶ Second, the opinion takes a broad view of the President’s constitutional power to order torture, asserting that criminal prohibitions against torture do “not appl[y] to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority”¹⁷ and that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”¹⁸ Third, the Opinion suggests that executive officials can escape prosecution for torture on the ground that “they were carrying out the President’s Commander-in-Chief powers,” reasoning that such orders would preclude the application of a valid federal criminal statute “to punish officials for aiding the President in exercising his exclusive constitutional authorities.”¹⁹

After being leaked to the press shortly after the revelation of atrocities at Abu Ghraib, the Bybee Opinion sparked a firestorm of criticism. After months of public debate, it was finally rescinded on December 30, 2004, less than a week before its addressee, Alberto Gonzales, appeared before the Senate for his confirmation hearings as Attorney General of the United States.²⁰ Thus, for two years, the Bybee Opinion acted as the official executive branch legal interpretation of the obligations of federal officials under the federal criminal torture statute.

Having worked in both Democratic and Republican administrations, and for more than two years as an attorney in the Office of Legal Counsel itself, I am familiar with the conditions under

Act makes conspiracy to commit torture a crime. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (amending generally 18 U.S.C. §§ 3121-3127).

16. Bybee Opinion, *supra* note 13, at 1.

17. *Id.* at 35.

18. *Id.* at 39. *See id.* at 39 (“Congress can no more interfere with the President’s conduct of interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”).

19. *Id.* at 35.

20. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* <http://www.justice.gov/olc/dagmemo.pdf> [hereinafter Levin Opinion].

which legal opinions like this are sought and drafted.²¹ I further sympathize with the tremendous pressures of time and crisis that government lawyers face while drafting such opinions.

Nevertheless, in my professional opinion, the Bybee Opinion is perhaps the most clearly erroneous legal opinion I have ever read. The opinion has five obvious failures. First, and most obviously, the opinion begins without a word about the legal and historical context in which it is being written. The opinion effectively asks which coercive interrogation tactics are permissible, without ever mentioning what President Bush correctly called every person's "inalienable human right" to be free from torture.²² Although the governing policy at the time the Opinion was written was ostensibly a "zero-tolerance" policy with respect to torture, the Opinion essentially asks, "how close can we get to torturing people without crossing the line?" Indeed, shortly after its release, the Bybee Opinion was apparently transmitted to the Defense Department, where its key conclusions run through a Defense Department Working Group Report.²³ That report outlined a series of permissible interrogation tactics which U.S. officials could use against detainees as part of the general conduct on a war against terror.

A second problem is that the opinion defines "torture" so narrowly that it flies in the face of the plain meaning of the term. For example, the Opinion would require that the interrogator have the precise objective of inflicting "[p]hysical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."²⁴ Yet before the Bush Administration invaded Iraq to oust Saddam Hussein, it pointed out that his security services had used such "torture techniques [as] branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small

21. I have twice served in the United States government: during the Reagan Administration between 1983–85, as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice, and during the Clinton Administration between 1998–2001, as Assistant Secretary of State for Democracy, Human Rights, and Labor.

22. See *supra* note 12 and accompanying text.

23. U.S. DEP'T OF DEFENSE WORKING GROUP, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003), *available at* http://wikisource.org/wiki/Working_Group_Report [hereinafter DOD DETAINEE REPORT].

24. Bybee Opinion, *supra* note 13, at 1.

compartments, and threats to rape or otherwise harm family members and relatives.”²⁵ Yet under the absurdly narrow legal definition in the Bybee Opinion, many of these heinous acts would not constitute torture!

Third, the Bybee Opinion grossly misinterprets the inherent power of the President under the Commander-in-Chief power in Article II of the Constitution. The Opinion claims that criminal prohibitions against torture do “not appl[y] to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority.”²⁶ Yet the Eighth Amendment does not say “nor [shall] cruel and unusual punishments [be] inflicted” *except when the Commander-in-Chief orders*. Nor does any part of the Fifth Amendment’s Due Process Clause jurisprudence sanction torture by executive officials.²⁷

As remarkably, the Bybee Opinion declares that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”²⁸ But if that were true, key parts of the Uniform Code of Military Justice would also be unconstitutional,²⁹ and core directives of the Army Field Manual would interfere with the President’s Commander-in-Chief power.³⁰

25. See Saddam Hussein’s Repression of the Iraqi People, *available at* <http://www.whitehouse.gov/infocus/iraq/decade/sect4.html> (emphasis added).

26. *Id.* at 35.

27. See *Chavez v. Martinez*, 538 U.S. 760 (2003).

28. Bybee Opinion, *supra* note 13, at 39. See *id.* (“Congress can no more interfere with the President’s conduct of interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”).

29. In 1950, Congress passed the Uniform Code of Military Justice (UCMJ) in order to ensure fairness and openness in the trials and treatment of military defendants. The unambiguous text of Articles 49 and 50 applies not just to defendants in courts-martial, but also to defendants before military commissions. 10 U.S.C. § 849(d) (explicitly covering “any military court *or commission*”) (emphasis added); 10 U.S.C. § 850(a) (explicitly referring to “a court-martial *or military commission*”) (emphasis added). Article 31 of the UCMJ, 10 U.S.C. § 831(a), further requires that “[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”

30. The U.S. Army Field Manual 34–52, which describes the legal standards governing interrogations by U.S. military personnel, directs that treaties and “U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. . . . Such illegal acts are not authorized and will not be condoned by the U.S. Army.” The Manual specifically defines “physical torture” to include “infliction of pain through chemicals or bondage,” “forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time,” “food deprivation,” and “any form of beating.” U.S. DEP’T OF ARMY, FIELD MANUAL 34–52 (1992), at 1–8, *available at* <http://www.fas.org/irp/doddir/army/fm34-52.pdf>

If the President has the sole constitutional authority to sanction torture, and Congress has no power to interfere, why should the President not also have unfettered authority to license genocide or other violations of fundamental human rights? And if the U.S. President has authority, as Commander-in-Chief, to authorize torture in the name of war, then why did Saddam Hussein not have similar constitutional authority to authorize torture under his parallel Commander-in-Chief power?

Remarkably, in a stunning failure of lawyerly craft, the Bybee Opinion nowhere even mentions the landmark Supreme Court decision in *Youngstown Sheet & Tube Co. v. Sawyer*, the controlling opinion on the limits of the President's claimed Commander-in-Chief powers.³¹ Justice Jackson's famous concurrence in that case made clear that

Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . . When the President takes measures incompatible with the express or implied will of Congress, his *power is at its lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.³²

In this case, Congress has power under Article I, section 8 to "define and punish . . . offences against the law of nations" such as torture, and to "make Rules for the Government and Regulation of the land and naval Forces."³³ It has exercised those powers to forbid executive torture in such statutes as the criminal prohibition against torture in 18 U.S.C. §§ 2340–40A, or to flout the recent Defense Authorization Act, which states that "[i]t is the policy of the United States to— (1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States."³⁴ Indeed, if the President's inherent constitutional powers in wartime were as sweeping as the Bybee Opinion suggests, it is not

31. In *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), the entire Supreme Court embraced Justice Jackson's view as "bring[ing] together as much combination of analysis and common sense as there is in this area."

32. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (emphasis added).

33. U.S. CONST. art. I, § 8.

34. See *Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, Pub. L. No. 108-375, § 1091(b)(1), 118 Stat. 1811, 2069 (2004).

clear why other longstanding statutes regulating the use of the military—for example, the Posse Comitatus Act, which bars the President from using the armed forces to “execute the laws,” for domestic civilian law enforcement—should not also be unconstitutional.³⁵

What makes these sweeping views of the President’s inherent powers to conduct the war on terror even more disturbing is that they have not been confined to presidential authorization of torture. In a recently unearthed OLC memorandum, dated two weeks after September 11, then-Deputy Assistant Attorney General John C. Yoo asserted that “[t]he historical record demonstrates that the power to initiate military hostilities, particularly in response to the threat of an armed attack, rests exclusively with the President.”³⁶ This remarkably overbroad assertion not only ignores Congress’s power “to declare War,”³⁷ but also suggests that several centuries of Congressional participation in initiating war—including the declarations of war in the War of 1812 and the two World Wars, the authorizing statutes in the two Gulf Wars, the Korean War, the Indochina conflict, and after September 11—were all constitutionally unnecessary.³⁸ Moreover, in claims that have now been largely rejected by the United States Supreme Court, former White House Counsel (now Attorney General) Alberto Gonzales has asserted the President’s broad power as Commander-in-Chief to label detainees as enemy combatants and to detain them indefinitely and incommunicado without judicial oversight or express Congressional authorization.³⁹ In a 2004 speech, Mr. Gonzales suggested that when detaining so-called “enemy combatants,” “there is no rigid process for making such determinations—and certainly no particular mechanism required by law,” claiming that in making such decisions, the President is constrained less by the rule of law than “as a matter of prudence and

35. See Posse Comitatus Act, 18 USC § 1385 (2004). I am grateful to Professor Kim Lane Scheppele for this observation.

36. See Memorandum Opinion for the Deputy Counsel to the President re: The President’s Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them (Sept. 25, 2001), *available at* <http://www.justice.gov/olc/warpowers925.htm>

37. U.S. CONST. art. I, § 8, cl. 11.

38. See *generally* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993) (citing historical examples).

39. See *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (ruling that alien “enemy combatants” on Guantanamo are entitled to raise their claims on writs of habeas corpus); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (ruling that U.S. citizens held as “enemy combatants” in military custody are constitutionally entitled to an opportunity to be heard before an independent tribunal).

policy.”⁴⁰

My fourth objection to the Bybee Opinion goes to its discussion of executive immunity: the suggestion that lower executive officials can escape prosecution for illegal torture on the ground that “they were carrying out the President’s Commander-in-Chief powers.”⁴¹ The opinion asserts that this would preclude the application of a valid federal statute which criminalizes torture “to punish officials for aiding the President in exercising his exclusive constitutional authorities.”⁴² By adopting the doctrine of “just following orders” as a valid defense, the opinion undermines the very underpinnings of individual criminal responsibility, principles set forth in the landmark judgments at Nuremberg.⁴³

Nuremberg changed the valence of personal responsibility. Before the Nuremberg trials, lax rules of responsibility had created conditions under which gross atrocities could be committed and yet nobody would be held responsible. Street-level officials who had committed torture and genocide could claim that they were “just following orders.” Yet at the same time, their commanders could claim that they were so high in the chain of command that they did not know what was going on, and therefore should not bear command responsibility for illegal acts committed by their subordinates. After Nuremberg, the law recognized that commanders had a responsibility to know what atrocities their subordinates were committing in their name, and that street-level officials could not escape accountability by saying that they were “just following orders.”⁴⁴ These principles are now embodied in the basic instruments of international criminal law.⁴⁵

40. Remarks by Alberto R. Gonzales, Counsel to the President, American Bar Association Standing Committee on Law and National Security, Washington, D.C. (Feb. 24, 2004), at 7, 12, *available at* <http://www.fas.org/irp/news/2004/02/gonzales.pdf>.

41. Bybee Opinion, *supra* note 13, at 35.

42. *Id.*

43. *Report of the International Law Commission to the General Assembly on the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 5 U.N. GAOR, Supp. No. 12, at 11–14, U.N. Doc. A/1316 (1950) (Principle IV provides that “[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”).

44. In *In re Yamashita*, 327 U.S. 1 (1946), the U.S. Supreme Court recognized the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture and other mistreatment of detainees in violation of the law of nations or knew or had reason to know of their subordinates’ unlawful conduct but failed to take reasonable measures to prevent their subordinates’ conduct.

45. See, e.g., Statute of the International Tribunal, *Report of the Secretary-General*

Yet the Bybee Opinion sought to reverse half a century of history by declaring the “superior orders” defense presumptively legal.

The fifth problem with the Bybee Opinion: it suggests that, for American officials, the International Convention *Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* somehow *allows* cruel, inhuman, or degrading treatment as permissible U.S. government interrogation tactics. While conceding that torture (defined in an absurdly narrow manner) is criminal behavior, the Opinion nevertheless suggests that there is some zone of cruel, inhuman or degrading treatment that is permissible in interrogation.⁴⁶ The Bybee Opinion nowhere mentions the Fifth

Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex, U.N. Doc S/25704 (1993), available at <http://www.un.org/icty/legal/doc/index.htm> (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility . . .”). *Id.* art. 7(4).

46. This may still be the Bush Administration’s position. As former Justice Department lawyer Marty Lederman asserts after analyzing Alberto Gonzales’ January 2005 responses to Senate Judiciary questioning:

The Administration has concluded that the CIA, when it interrogates suspected al Qaeda detainees overseas, *may* lawfully engage in “cruel, inhuman and degrading” treatment—*i.e.*, treatment that would “shock the conscience,” and thus be *unconstitutional*, within the United States—as long as that treatment does not constitute “torture” under the very narrow meaning of that term in the federal criminal law. Judge Gonzales confirms that the CIA, *unlike* the Armed Forces, is not bound by the UCMJ (including the prohibition on cruelty and maltreatment of prisoners), and is not subject to the President’s February 2002 directive that detainees be treated “humanely.” Moreover, according to Judge Gonzales, “the Department of Justice has concluded” (in documents we have not seen) that the prohibition on cruel, inhuman and degrading treatment in Article 16 of the Convention Against Torture does *not* apply to aliens overseas because Article 16 merely incorporates what the Due Process Clause forbids—and the Due Process Clause does not, in the Administration’s view, apply to aliens outside the U.S. (This last assumption, about the absence of any extraterritorial application of the Due Process Clause, is the subject of current dispute in litigation involving Guantanamo detainees.) The responses do not expressly reveal whether Article 16 protects detainees at U.S. facilities overseas, such as at GTMO and in Iraq; but if the Administration’s previous views about the geographic reach of the Constitution are any indication, its answer will be that Article 16 is inapplicable in those locations, as well.

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.... In response to questions concerning the legality of a series of specified techniques—including waterboarding, use of dogs to induce stress, forced nudity, hooding, sensory deprivation, food and sleep deprivation, exposure to extreme temperatures, a face or stomach slap, the forcible injection of mood-altering drugs, mock executions, and threatening to send detainees to countries where they would be tortured—Judge Gonzales allows that “[s]ome of these activities, at least under certain factual assumptions, *might* very well be prohibited,” even if “[s]ome might likewise be permissible in specific circumstances, if appropriately limited, depending on the nature of the precise conduct under consideration. . . . [Yet] Judge Gonzales concedes that 18 U.S.C. 113 prohibits intelligence agents from committing assault within the special maritime and territorial jurisdiction of the U.S.’

Amendment's rejection of government acts that shock the conscience or the Eighth Amendment's rejection of any "cruel and unusual punishments." In effect, the Opinion gives executive officials a license to dehumanize, degrade, and act cruelly.

It is easy to see why, left unchallenged, such dangerous reasoning could be used to justify the atrocities at Abu Ghraib.⁴⁷ For if U.S. and international law do not forbid cruel, inhuman, and degrading treatment, then lower executive officials would have a license to degrade and dehumanize detainees in their custody, without regard to whether those detainees hold any information of value in the war against terror.

Granting executive officials a license to be cruel to their prisoners misunderstands the entire legal prohibition against cruel, inhuman, or degrading treatment. To be sure, there is abundant evidence that torture is not effective either as an interrogation tactic or as an information-extracting device.⁴⁸ But the ban against cruel inhuman and degrading treatment is not designed just to prevent acts to extract information. More broadly, the prohibition functions to prevent people from dehumanizing detainees in their custody simply because they can. Those of us who have visited torture dens around the world have learned through sad experience that only in the rarest case is torture and degrading treatment used for the dramatic purpose of extracting information about "a ticking time-bomb" from a committed terrorist. Far more typical is the "banality of torture" found at Abu Ghraib, where the captors came to feel that they had broad license to degrade and dehumanize their prisoners, because they could.⁴⁹ Permitting captors to degrade their prisoners denies those

Marty Lederman, *Judge Gonzales' Senate Responses* (Tuesday, Jan. 18, 2005), available at http://balkin.blogspot.com/2005_01_16_balkin_archive.html

47. See generally MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); KAREN GREENBERG & JOSHUA DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005); SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); STEVEN STRASSER, *THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORT OF THE INDEPENDENT PANEL AND PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ* (2004).

48. See, e.g., Testimony of Douglas A. Johnson, Executive Director, The Center for Victims of Torture, before Judiciary Hearing on the Nomination of The Honorable Alberto R. Gonzales, to be the Attorney General of the United States (Jan. 6, 2005), available at http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3939.

Torture does not yield reliable information. Well-trained interrogators, within the military, the FBI, and the police have testified that torture does not work, is unreliable and distracting from the hard work of interrogation. Nearly every client at the Center for Victims of Torture, when subjected to torture, confessed to a crime they did not commit, gave up extraneous information, or supplied names of innocent friends or colleagues to their torturers.

49. Cf. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF*

prisoners their humanity, their identity as rights-bearing individuals. And once that is permitted, it is only a short step toward the haunting images of Abu Ghraib: prisoners being led around on leashes, piled on top of one another like cordwood, and forced to commit feigned sexual acts.

So how can law prevent torture and cruel treatment? Through many techniques, including external sanctions, such as criminal liability, civil liability, transparency, shame, judicial oversight, or rules internalized into individual behavior, such as the Geneva Convention rules. Yet when captors are freed of all of these constraints, it is no surprise that they feel empowered to do whatever they see fit, even if what they see fit to do is sadistic. In short, the Bybee Opinion had the effect not of permitting noble acts of torture to prevent “ticking time-bombs,” but of lifting accountability, thereby permitting torture and cruel treatment to become the norm, rather than the exception. This marks a sad return to the days before Nuremberg and a backward step for our civilization.

In sum, the August 1, 2002 Bybee Opinion is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described—as my predecessor, Dean Eugene Rostow of Yale Law School, described the Japanese internment cases—as a “disaster.”⁵⁰

Some have tried to defend the Bybee Opinion as just another example of lawyers doing their job and setting out options for their client. But if a client asks a lawyer how to break the law and escape liability, a good lawyer should not say, “Here’s how.” The lawyer’s ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act. As Geoffrey Hazard and William Hodes have written, Model Rule of Professional Conduct 2.1 prohibits a lawyer from “play[ing] sycophant” to his client first by requiring that a lawyer’s advice be candid; and second, by requiring the lawyer to exercise judgment that is both independent and professional.⁵¹ Moreover, Model Rule 1.4(b) requires a lawyer to

EVIL (1964) (asking whether radical evil is simply a function of banality).

50. Cf. Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 YALE L.J. 489 (1945) (noting that the U.S. treatment of Japanese allies and citizens of Japanese descent was “hasty, unnecessary, and mistaken”).

51. See GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT WITH SUPPLEMENT 1*, § 2.1, at

adequately inform his client of the state of the law, including contrary authority, so that the client can make an intelligent and informed decision.⁵² The worst kind of legal opinions are those that tell the client what he wants to hear, not what the law says. For government lawyers, in particular, an important part of their legal role is saying “no.” As an officer of the court, a government lawyer’s prime obligation is not to her boss, but as her oath says, to uphold the Constitution and laws of the United States of America. When I worked in the Justice Department, I was often told that we should act as if every opinion might be some day be on the front page of the *The New York Times*. Almost as soon as the Bybee Opinion made it to the front page of *The New York Times*, the Administration repudiated it, demonstrating how obviously wrong the opinion was.

Given these obvious failings, one would have expected the Counsel to the President to have immediately repudiated such an opinion. Yet remarkably, Mr. Gonzales did not. Nor did he send the Bybee Opinion back to the Office of Legal Counsel to take account of the unambiguous views of the State Department—expressed in the official U.S. Report on the Convention Against Torture (1999) discussed above—to incorporate the President’s unambiguous policy against torture. Instead, the Bybee Opinion was apparently transmitted to the Department of Defense, where its key conclusions appear to run through the Defense Department’s April 4, 2003 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations.⁵³

In a June 22, 2004 press conference, Mr. Gonzales did not repudiate the opinion, but instead stated that

[u]nnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers *are under review, and may be replaced, if appropriate*, with more concrete guidance addressing only those issues necessary for

303 (1985 & Supp. 1989).

52. *Id.* § 1.4(b), at 66 (“If a client is to make turning-point decisions about his legal affairs, he must be armed with sufficient information for intelligent decision-making.”). I am grateful to Professor Kathleen Clark for pointing me to these ethical rules. See Kathleen Clark, *Torture Memos and Lawyers’ Ethics*, Presented at the Annual Meeting of the Association of American Law Schools in San Francisco, Jan. 8, 2005 (copy on file with author).

53. See DOD DETAINEE REPORT, *supra* note 23.

the legal analysis of actual practices.⁵⁴

Another six months then passed before the Office of Legal Counsel, on December 30, 2004, finally repudiated its earlier opinion's overly narrow definition of torture.⁵⁵ Thus, the OLC opinion apparently remained the controlling executive branch legal interpretation for nearly two-and-one-half years! Even at this writing, the Office of Legal Counsel has not yet clearly and specifically renounced the parts of the August 1, 2002 OLC opinion concerning the Commander-in-Chief power, stating only that "[c]onsideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."⁵⁶ Yet this reading simply begs the question of whether OLC believes that the President and his subordinates have legal authority to commit torture and cruel treatment, but have chosen not to exercise it—or whether, as I believe, the Constitution, treaties and laws of the United States deny the President and his subordinates that power. Although the new OLC Opinion marks a welcome, if long-delayed, repudiation of the August 1, 2002 OLC Opinion, it still leaves unclear what legal rules constrain U.S. interrogators. Nor is it clear from the written record what Mr. Gonzales's own current views are, now that he has become Attorney General.⁵⁷

The failings of the Bybee Opinion are much larger than simple omissions or embarrassing errors of craft. The opinion is quite detailed, and obviously took some time to prepare. So, the saddest part is not just how the lawyers failed, but how they failed to see how they failed. In our life and in our literature, we often see hard cases, in which lawyers are forced to choose between law and morality—the drumhead court in Herman Melville's *Billy Budd*, or the judges who were asked to enforce the fugitive slave laws in Robert Cover's unforgettable *Justice Accused*, or the German judges who chose to enforce the Nazi Laws in Stanley Kramer's film *Judgment At Nuremberg*.⁵⁸ In each case, the moral dilemma was whether the legal

54. Press Briefing by White House Counsel Judge Alberto Gonzales et al., June 22, 2004, available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (emphasis added).

55. See Levin Opinion, *supra* note 20 (rescinding Bybee Opinion).

56. *Id.* at 2.

57. According to several press accounts, Mr. Gonzales reportedly asked his subordinates with respect to the use of coercive interrogation tactics in the war on terror: "Are we forward-leaning enough?" See Michael Isikoff et al., *Torture's Path*, NEWSWEEK, Dec. 27, 2004, at 54; R. Jeffrey Smith and Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1.

58. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1984); *JUDGMENT AT NUREMBERG* (1961); HERMAN MELVILLE, *BILLY BUDD* (1924).

actor should choose law or morality. In these hard cases, we usually urge decision-makers to choose morality.

But sadly, this was not one of those hard cases. The question presented to the Office of Legal Counsel of the Justice Department was “do you uphold just laws, or do you aggressively twist them to give your clients maximum freedom to break laws that protect values at the very heart of our national identity?” The lawyers in this case chose the latter course, and this is where they failed.

Even more shocking, press accounts suggest that the Bybee Opinion came about as a result of the CIA’s frustration with the unsuccessful interrogation of Abu Zubaydah, an al Qaeda member.⁵⁹ The CIA sought permission from the Justice Department to use harsher interrogation techniques against Zubaydah, to ensure that they would not be held criminally liable under the federal anti-torture statute. In December 2002, the *Washington Post* reported on regular, systemic abuses at the U.S. Air Base at Bagram, including the use of “stress and duress” techniques that constitute torture or other cruel, inhuman or degrading treatment. When asked about interrogation of detainees at the military base by agents of the CIA, the article quoted a U.S. government official as saying, “[i]f you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”⁶⁰

Now imagine that you were the Chief Executive Officer of a company, and you read that one of your employees had said, “if you’re not violating someone’s civil rights some of the time, you probably aren’t doing your job.” Presumably, as CEO, you would have an obligation to get to the bottom of the story and to discipline or fire that employee. But clearly, that has not happened. Since the Bybee Opinion, there has been a flurry of stories of abuse and torture, and even multiple deaths of detainees held by United States officials, under suspicious circumstances. Torture, which was to have been forbidden, seems now almost routinely permitted.⁶¹ And

59. See, e.g., Michael Hirsh et al., *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50, 52.

60. Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1, A14.

61. See generally DANNER, *supra* note 47 (collecting the various accounts of torture or cruel, inhuman, and degrading treatment); Mark Danner, *We Are All Torturers Now*, N.Y. TIMES, Jan. 6, 2005, at A27.

Shortly after the 9/11 attacks, Americans began torturing prisoners, and they have never really stopped. However much these words have about them the ring of accusation, they must by now be accepted as fact. From Red Cross reports, Maj. Gen. Antonio M. Taguba’s inquiry, James R. Schlesinger’s

so it seems likely that the Bybee Opinion was less about preauthorizing actions being contemplated, than it was about justifying official actions that were already happening.

So how to avoid future disasters like the Bybee Opinion? A number of former OLC attorneys have suggested a thoughtful and principled set of guidelines designed to guide OLC away from inappropriate advocacy and toward honest appraisal of legal authority in the future.⁶² As two former OLC attorneys have recently suggested:

OLC ordinarily should publish its written legal opinions. . . . Rarely is the government justified in acting pursuant to secretly promulgated law. The [Bybee] torture memorandum, repudiated only after it was in effect for almost two years and then finally leaked, underscores the value of transparency. Would Abu Ghraib have occurred if OLC had voluntarily and promptly published the memorandum in 2002?

We also believe that OLC should consult other government agencies with relevant knowledge and expertise. . . . Again, consider the torture example: OLC apparently wrote its first memorandum without input from lawyers elsewhere in the executive branch who actually knew something about interrogation practices and the law of torture, and OLC failed to cite, much less distinguish, directly relevant regulations and policies (not to mention the leading Supreme Court opinion) at odds with its initial conclusions. The new OLC analysis does not share this fault and by all appearances was tested in the crucible of interagency

Pentagon-sanctioned commission and other government and independent investigations, we have in our possession hundreds of accounts of "cruel, inhuman and degrading" treatment—to use a phrase of the Red Cross—"tantamount to torture." So far as we know, American intelligence officers, determined after Sept. 11 to "take the gloves off," began by torturing Qaeda prisoners. They used a number of techniques: "water-boarding," in which a prisoner is stripped, shackled and submerged in water until he begins to lose consciousness, and other forms of near suffocation; sleep and sensory deprivation; heat and light and dietary manipulation; and "stress positions." Eventually, these practices "migrated," in the words of the Schlesinger report, to Abu Ghraib prison in Iraq, where for a time last spring the marvel of digital technology allowed Americans to see what their soldiers were doing to prisoners in their name.

Id.

62. See Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004), available at <http://www.acslaw.org/OLCGuidelinesMemo.pdf>.

vetting, with dramatically improved results.⁶³

There are many in this country who would seek to justify torture as a necessary policy in a war against terrorism. Those who favor leaving the door open for torture usually argue that the more torture, the more truthful information will be gained, the more attacks will be avoided, and the more American lives will be saved. Yet this chain of proof is not established at all. As I have noted above, one reason that the United States favors an absolute prohibition against torture is that torture does not yield valuable information.⁶⁴ Those being tortured say things in order to stop the torture, not because it is the truth. In addition, the more we tolerate torture, the more we leave the door open for American soldiers to be tortured by foreign captors. If the question is how to get more information lawfully, then we should more aggressively seek interrogation techniques that are not torture, yet still might produce useful results.⁶⁵

Some have even proposed legal approaches, such as “torture warrants,” whereby torture could be generally forbidden, but permitted in extraordinary cases.⁶⁶ During the confirmation hearing of Attorney General Gonzales, the Chair of the Senate Judiciary Committee asked me whether hypothetically, the President should have constitutional authority to torture a suspect to get information about a ticking time-bomb. My answer, in effect, was that the law should never preauthorize such a presidential decision. If the President felt morally compelled to order torture in an extreme case,

63. Dawn Johnsen & Neil Kinkopf, *Letter to the Editor: How to Prevent Another 'Torture' Memo*, WALL ST. J., Jan. 21, 2005, at A9.

64. See Johnson, *supra* note 48.

65. As Douglas Johnson points out:

Inherent in all of the scenario building is the assumption that we know, with great reliability, that we have the appropriate party who possesses knowledge that could save lives. But our clients are living testimony that once used, torture becomes a fishing expedition to find information. It perverts the system which, seeking shortcuts to the hard work of investigation, relies increasingly on torture. The estimate from the Red Cross was that at least 80 percent of those imprisoned at Abu Ghraib, for example, should never have been arrested, but were there because it was easier to arrest persons than to let them go (people feared letting go a terrorist more than protecting the innocent). The Israeli security system claimed to use its stress and duress techniques only where they had the most reliable information about the detainee's guilt. Yet human rights monitors estimate that they were used on over 8000 detainees. It is not credible to believe they had this precise information about so many.

Johnson, *supra* note 48.

66. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002) 156–63 (supporting an outright ban on torture, but arguing that Congress should pass a statute requiring interrogators to apply to a court for a “torture warrant” that would set limits to the practice).

she should do so with full awareness that she was facing potential criminal liability. A prosecutor would then have to decide after the fact whether the circumstances that led to the decision were so dire that the President should not, as a matter of prosecutorial discretion, be prosecuted.

In a recent impressive book, Martti Koskenniemi describes a pivotal moment in the history of international law in the United States.⁶⁷ In April 1965, President Lyndon Johnson disclosed that he had sent several hundred U.S. troops to the Dominican Republic, based on the legal claim that the United States had a “general right to use military force . . . in the Western Hemisphere against ‘foreign ideologies.’”⁶⁸ Rising to speak against the Dominican intervention at a discussion organized by the Association of the Bar of the City of New York in May 1966, an international law professor said:

The Legal Adviser’s argument is one of policy, not of law, and it seeks to justify what is patently, by standards of international law, an illegal action, in terms of the ultimate policy objectives of the United States. . . . [But s]urely, the legal as well as the political style of the United States should remain unmistakably different from that of its totalitarian opponents.⁶⁹

That lawyer was Wolfgang Friedmann. He continued:

We all know that many legal situations are open and subject to different interpretations, but law is ultimately a matter of black and white, or we should have no business to sit here and profess to be lawyers I submit we must find an answer in terms of right and wrong.⁷⁰

. . .

[T]here are norms of international law. If we wish to ignore them, then let us say frankly that international law is of no concern to us. But don’t let us pretend that we argue in terms of international law, when in

67. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

68. *Id.* at 413.

69. *Id.*

70. *Id.* at 498.

fact we argue in terms of power or of ideology.⁷¹

As I accept this award in the name of Wolfgang Friedmann, let me say again that torture and cruel, inhuman, and degrading treatment are wrong and illegal, even in a time of terror. To fight a war against terrorism, we need to argue in the language not of power alone, but of devotion to law. The United States can retain its soul as a people and its moral leadership as a nation, but only if it remains unalterably committed to a world without torture.

71. *Id.* at 499.