

Why should a suspected war criminal serve as a federal judge?

By Bruce Ackerman

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Jay Bybee is currently sitting on the 9th U.S. Circuit Court of Appeals in San Francisco. As assistant attorney general in President George W. Bush's Justice Department, he was

[responsible](#)

for the notorious

[torture memos](#)

that enabled the excesses at Abu Ghraib, Guantanamo, and other places. While John Yoo did most of the staff work for Bybee, Yoo was barely 35 years old—and his memos showed it. They not only took extreme positions; they were legally incompetent, failing to consider many of the most obvious counterarguments.

Bybee was 49. He was the grown-up, the seasoned jurist. He had been a law professor and had served as associate counsel to President Bush. When he was promoted to head the Justice Department's Office of Legal Counsel, he became the final judge of legal matters within the executive branch. Yet his opinion on torture was so poorly reasoned that it was repudiated by his very conservative successor, [Jack Goldsmith](#).

Bybee has never been held accountable for his distortions of the law. At the time of his confirmation hearing, news of the torture memos had not yet leaked to the public. When asked about his role in national security matters at his Senate hearing, Bybee stonewalled: "As an attorney at the Department of Justice, I am obliged to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice."

If the Senate had known the truth, it would have rejected him. The story of William Haynes offers a cautionary tale. As general counsel of the Department of Defense, Haynes also played a key role in authorizing torture; and he was also rewarded by a nomination to a leading appellate court. But before he could be confirmed, the Bush administration's involvement in torture became a matter of public record, and the Senate refused its consent to the nomination. Bybee is a judge today only because of timing and the administration's assertions of executive privilege.

This is unacceptable. The president can rightly claim privilege for his conversations with his confidential advisers. He needs their candid opinions and won't get them if they aren't assured of confidentiality. But Bybee wasn't a presidential confidant. He was the head of a division of the Justice Department that gives authoritative legal guidance to the entire bureaucracy. It goes too far to suggest that the opinions he issued in this role are privileged. This would permit the creation of a world worthy of Franz Kafka—in which the bureaucracy operated under secret rules that bore no obvious relationship to the statutes passed by Congress. Bybee's refusal to reveal his role at his Senate hearing should not insulate his actions from further scrutiny.

Under the Constitution, impeachment requires a finding of "high crimes and misdemeanors." This is a high standard. Although Bybee's opinion fails minimum tests of legal competence, he may have acted in good faith. This should protect him from conviction. But his legal distortions might also be evidence of the abdication of his fundamental legal responsibilities. Instead of engaging in a good-faith interpretation of the War Crimes Act and the Geneva Conventions, he may have merely been responding to political pressures from the White House to liberate the CIA and the military from the rule of law.

Bybee should, of course, be given a full opportunity to clarify this matter at the impeachment proceedings. But at present, his only public explanation is his extravagant appeal to executive privilege. This cannot suffice. He should be required to take personal responsibility for his actions and explain why they don't make him into a systematic enabler of the war crimes that have disgraced America.

Impeachment should not be confused with criminal prosecution. The Constitution does not permit the Senate to throw Bybee in jail. If it convicts him, the Senate can only remove Bybee from office and disqualify him from future service in "any office of honor, trust, or profit under the United States." His impeachment is not a prelude to a sweeping political vendetta. It focuses on a very particular problem: Jay Bybee may serve for decades on one of the highest courts in the land. Is his continued service consistent with his role in the systematic perpetration of war crimes?

This is an issue for Congress, not President-elect Barack Obama. The presidency plays no role in impeachments. Indeed, the Constitution explicitly prohibits presidents from issuing pardons in these cases.

The House should open an impeachment inquiry that moves beyond Bybee's invocation of

executive privilege and explores the facts in a comprehensive fashion. Depending on the outcome of this investigation, it will be up to the full House to consider soberly whether an impeachment trial by the Senate should follow.

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