

Criminal prosecution and incarceration of Bush and Cheney. Impeach Bybee

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I'm fairly sure that the step that would most strongly deter future crimes by high officials in Washington would be criminal prosecution and incarceration of Bush and Cheney. At the federal level, that means [asking](#) the attorney general to appoint an independent prosecutor. And, of course, Bush and Cheney did not act alone — others on their team should be in prison too.

But what role does this leave for Congress? How can any separation of powers be restored? How can the people's representatives reclaim our right to the rule of law? Well, probably not by impeaching Bush and Cheney. Whatever it was that [prevented](#) Congress from impeaching Bush and Cheney while they were in office has probably not changed, and now added to it is the additional problem that most Americans [falsely](#) believe you cannot impeach someone who is out of office.

Congress is pursuing at least a couple of the many [outstanding subpoenas](#) that were laughed off during the past two years. But thus far there is little reason to hope that Congress will use [its own power](#) to enforce the subpoenas, preferring as before to defer to what we still call the "executive" branch.

Having lost the power of the purse to repeated misspending by Bush and now the banker bailout, having given up the power to declare war — most recently to a three-year war treaty with Iraq created without Senate consent, having surrendered the power to legislate to the routine abuse of "signing statements," and so on, Congress is in dire need of reclaiming some remnant of power, some indication that it still exists as something other than a debate society.

Impeaching Jay Bybee would not just put Congress back on the map. It would also derail a potentially very lengthy career as a powerful appeals judge for a man whose work was central to facilitating the crimes of the past eight years. And that might help move the criminal prosecutions along as well.

Bruce Ackerman made the case very well a couple of weeks ago in a [Slate article](#) called "Impeach Jay Bybee: Why should a suspected war criminal serve as a federal judge?" Ackerman wrote:

"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."

Ackerman points out that when Bybee was confirmed by the Senate, his role in promoting the use of torture and other criminal acts was not known, and he absurdly claimed the right to keep his work secret. When torture teammate William Haynes was later considered for a similar appointment, the widespread use of torture had become known, and the Senate rejected him. That's the same Senate, although slightly improved by recent elections, that would have to convict Bybee in an impeachment trial.

A lot of Americans have probably never heard of Bybee, but that may help Congress members find the nerve to impeach him. Everyone in the world had heard of Bush and Cheney. And everyone SHOULD hear about Jay Bybee. PBS's Frontline echoes a common view when it [reports](#):

"The most notorious document among the memos drafted by President Bush's legal advisers as they analyzed how far the U.S. could go to extract intelligence from those captured in the war on terror is known as the 'Bybee memo.' ([PDF File](#)) Some call it the 'torture memo.' The Aug. 1, 2002, memo, sent from Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales, counsel to the president, parsed the language of a 1994 statute that ratified the United Nations Convention against Torture and made the commitment of torture a crime. To be torture, the memo concluded, physical pain must be 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.' And inflicting that severe pain, according to the memo, must have been the 'specific intent' of the defendant to amount to a violation of the statute."

That's the part that some people have heard about. But Frontline goes on to explain:

"This very narrow definition of torture was only one part of the memo, which largely was written by Assistant Attorney General John Yoo. It also asserted that the U.S. ratification of the 1994 torture statute could be considered unconstitutional because it would interfere with the president's power as commander in chief."

Just as that memo is called the Bybee memo (there were actually two such "Bybee memos" that same August day) and Yoo may have played a role, Bybee almost certainly had a hand in various "Yoo memos" as well. The first was a September 25, 2001, memo declaring that the president has the power to make war all by himself if he's so inclined. To get the full picture of how Bybee and Yoo and their colleagues twisted our system of government beyond all recognition requires reviewing a large stack of memos. Fortunately, [ProPublica has posted](#) them all in chronological order, including what is known of memos that have not yet been released (but which President Obama could release in accord with his professed policy of openness if he chooses).

Just take a look at the memos officially attributed to Bybee, and consider whether we can maintain any sort of legitimate government without impeaching him, and whether we want him overruling decent honest judges for the next 30 years. Bybee gave President Bush, upon request, “legal opinions” that a president can ignore international laws, that laws do not apply to various groups of people, that a president can kidnap, detain, and ship off to other lands human beings with no due process, and that Congress has no power to interfere with anything a president does.

Congress has pretty well accepted that last point. But perhaps it is not too late for Congress to start down a path of rehabilitation by daring to interfere with the actions of a desk-chair war criminal like Jay Bybee.

The Senate Armed Services Committee has already released [a report](#) that discusses a number of Bybee’s memos at length, including the two from August 1, 2002. The committee pieces together the story well enough to make clear that these memos were requested as cover by those engaged in crimes, and that the memos were used to justify criminality. When the full Senate tries Bybee following his impeachment, these words from the committee’s report may be of help:

“The other OLC opinion issued on August 1, 2002 is known commonly as the Second Bybee memo. That opinion, which responded to a request from the CIA, addressed the legality of specific interrogation tactics. While the full list of techniques remains classified, a publicly released CIA document indicates that waterboarding was among those analyzed and approved. CIA Director General Michael Hayden stated in public testimony before the Senate Intelligence Committee on February 5, 2008 that waterboarding was used by the CIA. And Steven Bradbury, the current Assistant Attorney General of the OLC, testified before the House Judiciary Committee on February 14, 2008 that the CIA’s use of waterboarding was ‘adapted from the SERE training program.’

“Before drafting the opinions, Mr. Yoo, the Deputy Assistant Attorney General for the OLC, had met with Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, to discuss the subjects he intended to address in the opinions. In testimony before the House Judiciary Committee, Mr. Yoo refused to say whether or not he ever discussed or received information about SERE techniques as the memos were being drafted. When asked whether he had discussed SERE techniques with Judge Gonzales, Mr. Addington, Mr. Yoo, Mr. Rizzo or other senior administration lawyers, DoD General Counsel Jim Haynes testified that he ‘did discuss SERE techniques with other people in the administration.’ NSC Legal Advisor John Bellinger said that ‘some of the legal analyses of proposed interrogation techniques that were prepared by the Department of Justice... did refer to the psychological effects of resistance training.’

“In fact, Jay Bybee the Assistant Attorney General who signed the two OLC legal opinions said that he saw an assessment of the psychological effects of military resistance training in July 2002 in meetings in his office with John Yoo and two other OLC attorneys. Judge Bybee said that he used that assessment to inform the August 1, 2002 OLC legal opinion that has yet to be publicly released. Judge Bybee also recalled discussing detainee interrogations in a meeting with Attorney General John Ashcroft and John Yoo in late July 2002, prior to signing the OLC opinions. Mr. Bellinger, the NSC Legal Advisor, said that ‘the NSC’s Principals reviewed CIA’s proposed program on several occasions in 2002 and 2003’ and that he ‘expressed concern that the proposed CIA interrogation techniques comply with applicable U.S. law, including our international obligations.’”



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David Swanson is the author of the upcoming book “Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union” by Seven Stories Press and of the introduction to “The 35 Articles of Impeachment and the Case for Prosecuting George W. Bush” published by Feral House and available at Amazon.com. Swanson holds a master’s degree in philosophy from the University of Virginia. He has worked as a newspaper reporter and as a communications director, with jobs including press secretary for Dennis Kucinich’s 2004 presidential campaign, media coordinator for the International Labor Communications Association, and three years as communications coordinator for ACORN, the Association of Community Organizations for Reform Now. Swanson is Co-Founder of AfterDowningStreet.org, creator of ConvictBushCheney.org and Washington Director of Democrats.com, a board member of Progressive Democrats of America, the Backbone Campaign, and Voters for Peace, a member of the legislative working group of United for Peace and Justice, and convener of the accountability and prosecution working group of United for Peace and Justice.

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