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Office of Bar Counsel

Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

Re: Complaint against Jay S. Bybee

Dear Sir or Madam:

NOTICE OF COMPLAINT

Velvet Revolution (“VR”), a Washington, D.C. based non-profit with a network of more than 150 organizations representing over a million members nationwide, including in the District of Columbia, herein lodges a complaint against Jay S. Bybee, former Assistant Attorney General, Office of Legal Counsel (OLC) in the Department of Justice (2001-2003), and now a Ninth Circuit Court of Appeals Judge, Lloyd D. George Courthouse, 333 S. Las Vegas Blvd., Las Vegas, NV 89101; (702) 464-5400. VR requests the *Board on Professional Responsibility, District of Columbia Court of Appeals* take immediate disciplinary action against Mr. Bybee for violations of the *D.C. Rules of Professional Conduct*.

SUMMARY OF COMPLAINT

Jay S. Bybee breached his legal duty and violated the *D.C. Rules of Professional Conduct* by advocating for immoral and unethical “extended” or “enhanced” interrogation techniques (amounting to torture), and other policies that resulted in clear violations of United States and international law.

Specifically, Mr. Bybee, ignored over two centuries of historical and legal precedents, fell short of the “good faith” imperative, and advanced suspect legal analysis and prescriptions for detainee interrogation well outside of accepted and legal norms, thereby providing the false cover of claimed legality for those who then engaged in acts and policies that, in fact, violated the following laws, both in letter and spirit:

- 1) The United Nations Convention Against Torture (UNCAT), Articles 1, 2, 3 and 16 (ratified in October 1994)
- 2) The Geneva Conventions, Article 3, (ratified in August 1955)

- 3) The Eighth Amendment against “cruel and unusual punishment”
- 4) The “Separation of Powers” constructs and imperatives of the U.S. Constitution
- 5) The United States Criminal Code, Title 18, Prohibitions Against Torture (18 USC 2340A) and War Crimes (18 USC 2441)

As the “law of the land,” these legal protections and dictates are clear. Rather than authoring a “good faith” analysis of the applicable law, Mr. Bybee created contrary memoranda ^[1] since repudiated ^[2] from the Office of Legal Counsel, and colluded with a small cadre of Administration lawyers^[3] to advance arguments that led directly to detainee abuses, and, evidence suggests, deaths at overseas U.S. military facilities.^[4] In so doing, Mr. Bybee impeded the administration of justice and violated the U.S. Constitution, the Geneva Convention, the Convention against Torture, the US Criminal Code and several *D.C. Rules of Professional Conduct*. Mr. Bybee did not act in “good faith” but rather in a manner that was illegal, extremely prejudicial, grossly incompetent and clearly immoral.

Therefore, VR calls upon the Board on Professional Responsibility, District of Columbia Court of Appeals, to act immediately to disbar Mr. Bybee for conduct that is a travesty of justice and an affront to the rule of law and the standards of professional legal and ethical conduct.

Further, because the evidence points to violation of numerous laws, VR believes that disbarment will complement steps toward open hearings in Congress and criminal investigations by an independent counsel appointed by the Department of Justice.

APPLICABLE LAW PROHIBITING TORTURE

The U.S. Constitution -- The Supreme Law of the Land

As the initial U.S. report to the *UN Convention against Torture* wrote:

“...the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the United States Constitution provide a nationwide standard of treatment beneath which no governmental entity may fall.” [49., p. 13, Initial Report submitted by the United States to the *Convention against Torture* in 1999 (CAT/C/28/Add.5)]

U.S. citizens are guaranteed these protections. Jose Padilla is one example of a U.S. citizen who was held without charge for several years and subject to the extreme interrogation techniques advocated by Jay Bybee. Citizens of other countries are similarly protected when in United States custody. The Eighth Amendment specifically prohibits cruel and unusual punishment.

The Geneva Convention (1949)

Common Article 3 of the *Geneva Conventions* broadly prohibits "violence to life and person," and specifically prohibits "mutilation, cruel treatment and torture" including "outrages upon personal dignity, in particular humiliating and degrading treatment". These terms include "other forms of cruel, inhuman and degrading treatment or punishment."

The drafters of common Article 3 avoided a detailed list of prohibited acts in order to ensure that it had the broadest possible reach, leaving no loophole.

[<http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>]

The **Army Field Manual** on detainee treatment and interrogation is predicated on the Geneva Convention and specifically requires humane treatment of prisoners and detainees. Exhibit B

UN Convention Against Torture (1994)

Adopted by the United Nations in 1984, the Convention requires states to take effective measures to prevent torture within their borders. The United States ratified the Convention against Torture in October 1994 and it entered into force for the United States on November 20, 1994. To date, there are over 146 nations that are party to the convention.

Article 2(2) of the Convention states that:

"No 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."

***Hamdan v. Rumsfeld* (2002) -- Due Process and Legal Protections**

The Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), held that the Geneva Conventions are applicable to accused members of al-Qaeda. Thus, due process protections apply to all detainees in U.S. custody, including those in military prisons (Guantanamo, Abu Grahیب, Bagram), as well as so-called "black sites" in Poland, Diego Garcia and elsewhere.

US Criminal Code

TITLE 18 § 2340A. Torture

- (a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—

- (1) the alleged offender is a national of the United States; or
- (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

TITLE 18 § 2441. **War crimes**

(a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.— As used in this section the term “war crime” means any conduct—

- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character;

CASE FOR DISBARMENT

District of Columbia (D.C.) Rules of Professional Conduct

The case for Mr. Bybee’s disbarment is simple and clear. A lawyer should demonstrate respect for the legal system and the rule of law. However, in his work for the Office of Legal Counsel and in his testimony before the Senate Judiciary Committee during his judicial nomination hearing, Mr. Bybee did not.

Mr Bybee’s conduct is so far outside the bounds of legal parameters that it falls under *D.C. Rules of Professional Conduct*, **Scope** (p. 4), which reads, “**The Rules do not**

exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”

Mr. Bybee’s legal advocacy stripped due process rights from detainees, and countenanced gross, violent and degrading treatment amounting to torture, which was in no way moral or ethical, by any objective measure. This alone is ground for disbarment.

Rule 3.1 B (Meritorious Claims and Contentions, p. 100) calls for lawyers “to inform themselves about the facts of their clients’ cases and the applicable law” Further, it clarifies that legal claims are frivolous if the lawyer is “unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.” The OLC memos do not directly grapple with the question of minimal due process for the detainees, nor do they fairly present relevant case law, including previous U.S. prosecutions of those who employed waterboarding. In this light, Mr. Bybee’s advocacy was not made in “good faith” and was “frivolous”. Moreover, there is no precedent in case law for the claims of executive power made by the OLC and embraced by the White House.

Rule 1.2 (e) (Scope of Representation) reads, “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.”

In memos authored and/or signed by Mr. Bybee, he extensively detailed the parameters of a number of extreme torture techniques, already in use, that most legal scholars and experts deem to be torture. Therefore, Mr. Bybee violated Rule 1.2 (e) and revealed himself to be deeply engaged in the actual application of the torture rather than a “**good faith**” analysis of the relevant U.S. and international law bearing on questions of interrogation and torture.

Rather than accept the definition of torture^[5] as clearly defined in international law, Mr. Bybee and the Office of Legal Counsel sought to re-define it altogether in the August 1, 2002 memorandum:

“The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure or permanent damage resulting in a loss of significant body functions will likely result.”

The memo also asserts that the criminal law prohibiting torture "may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers." But presidents are bound by the Constitution and in fact

swear to uphold it upon their inauguration. In other words, this policy, as explained by John Dean, “when acting as commander-in-chief, the president can go beyond the law.”¹⁶⁾ Of course, there is no constitutional basis for such a conclusion.

In his confirmation hearing following his nomination to the U.S. Court of Appeal, Mr. Bybee stonewalled questions regarding legal advice he provided relative to the “War on Terror.” After his confirmation, details from an August 1, 2002 torture memorandum to Attorney General Gonzales were leaked revealing the legal analysis quoted above. The release of the four OLC memos by the Obama administration on April 16, 2009, led Senate Judiciary Committee Chairman, Patrick Leahy to declare that Mr. Bybee would never had been confirmed as a Judge had the Committee known of the legal opinions he advanced as Assistant Attorney General.

By his refusal to answer questions put to him, Mr. Bybee withheld critical information from the Judiciary Committee and in so doing violated **Rule 8.4 (c)** defining the **Misconduct** of engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.” By failing to disclose his role advancing the flawed legal underpinnings of the Bush administration torture program, he effectively deceived the Judiciary Committee, and thus directly undermined the integrity of his nomination.

Jay S. Bybee repeatedly demonstrated extreme disregard for well-established rule of law by violating both the letter and spirit of the U.S. Constitution and the treaties that the U.S. had signed and ratified. Mr. Bybee’s advocacy of so-called “enhanced interrogation techniques” was not presented in “good faith” and was grossly unethical and immoral. Therefore, VR calls upon the *Board on Professional Responsibility, District of Columbia Court of Appeals* to disbar Mr. Bybee.

KEY DOCUMENTS IN EVIDENCE

In order to build the case for disciplinary action against Jay Bybee, John Yoo, and other lawyers advocating for, and defining so-called “enhanced interrogation” and to examine the origins of the legal advocacy, it is necessary to review an extensive body of evidence and investigative reporting and analysis, including the following documents/articles:

- 1) Memoranda prepared by lawyers in the Bush Justice Department's Office of Legal Counsel (OLC). [http://www.aclu.org/safefree/general/olc_memos.html] Exhibits C, D, E, F, G, N and O. See also Haynes Memo, Exhibit I.
- 2) The Senate Armed Services Committee Investigation (SASCI) *See*, Attachment B, Senate Armed Services Inquiry Into the Treatment of Detainees in U.S. Custody, released December 2008 (SASCI), pg. xxviii. . Exhibit K
<http://levin.senate.gov/newsroom/release.cfm?id=305735>
<http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>
- 3) Memo released by the Senate Intelligence Committee
<http://intelligence.senate.gov/pdfs/olcopinion.pdf>

4) The Red Cross Report on Detainee Treatment, Exhibit J.

5) Investigative Reporting:

- a. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*
- b. “Report: Abusive tactics used to seek Iraq-al Qaida link”; Jonathan S. Landay, *McClatchy Newspapers* -- Tue, Apr. 21, 2009

1) The **OLC memoranda** offered the patina of legal sanction to the use of techniques such as waterboarding, hypothermia, stress positions, extensive sleep deprivation and confinement with stinging insects to exploit prisoner phobias.

The memos, by carefully defining parameters, clearly demonstrate that the authors of the memos were deeply engaged in the application of torture techniques, not merely giving abstract legal counsel.

2) The **Senate Armed Services Committee report** provided a detailed chronology of the process of formulation of policy respecting the treatment of prisoners, with a special focus on the introduction of torture techniques. Exhibit K

Senior officials in the U.S. government decided to use some of these harsh techniques against detainees based on deeply flawed interpretations of U.S. and international law.

[Levin, McCain Release Executive Summary and Conclusions of Report on Treatment of Detainees in U.S. Custody, December 11, 2008]

3) The **Senate Intelligence Committee memo** details the steps leading to issuance of the OLC memos and identified the Justice Department lawyers and others involved in the process. The memo details a systematic authorized program for the mistreatment and torture of persons denied rights of due process. Letter from Attorney General Eric Holder, Jr. to Senator John. D. Rockefeller IV of the SSCI forwarding declassified narrative, (April 17, 2009).]

4) The **Red Cross Report On Detainee Treatment** was prepared from interviews with a number of detainees and others. In short, it confirms that the types of torture techniques advocated by the attorney we have complained about here were in fact used against many detainees. These techniques included suffocation by water, prolonged stress standing, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, continuous loud noises, exposure to cold temperature and cold water, threats, forced shaving, and deprivation of food. Exhibit J

5) In **testimony at a Senate hearing** on May 13, 2009, Former State Department counselor Philip Zelikow told a committee panel that Bush administration officials engaged in a 'collective failure' with regard to the detention and interrogation of suspected terrorists. He asserted that the torture memos were unsound because "the lawyers involved ... did not welcome peer review and indeed would shut down challenges even inside the government." Georgetown University law professor David Luban testified that the Justice Department torture memos constituted "an ethical train wreck" because they violated constitutional, statutory and international law.

<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301281.html>

6) **Investigation Reporting:** Select reporting from credible sources further suggests that following the attacks of 9/11/01 a host of controversial and illegal policies were advanced persistently and systematically by a small group of lawyers to serve narrow policy goals and political ambitions, with a primary aim of vastly amplifying the power of the Presidency, in direct threat to the system of constitutional checks and balances.

ENDNOTES

[1] See *ProPublica's* comprehensive list of legal memoranda on controversial Bush policies regarding detentions, interrogations and warrantless wiretapping.
<http://www.propublica.org/special/missing-memos>.

A detailed listing of torture related legal memoranda is available here:
<http://www.aclu.org/safefree/torture/torturefoia.html> Exhibit A

The most recently declassified memos from Yoo's *Office of Legal Counsel* can be found here: http://www.aclu.org/safefree/general/olc_memos.html

[2] See April 15, 2009, *Memorandum to the Attorney General Re. The Withdrawal of Office of Legal Counsel Opinions* mentioning the legal opinions expressed in dated memoranda written by Jay S. Bybee, Assistant Attorney General and Steven G. Bradbury, Principal Deputy Assistant Attorney General.

[http://media.mcclatchydc.com/smedia/2009/04/16/16/Taylor-OLCops_withdrawal.source.prod_affiliate.91.pdf]

The TIMES Online reported:

"Jack Goldsmith, who succeeded Jay Bybee - the author of many of these memos - at the Office of Legal Counsel, has since declared that they had 'no foundation' in any source of law and rested on 'one-sided legal arguments'. **Their purpose, he said, was to provide the CIA with a 'golden shield' against criminal prosecution of agents.** After all, the US prosecuted waterboarding as torture when the Japanese used it against American troops during Second World War."

[http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6116281.ec]

John Yoo, who worked under Jay Bybee, was the principal author of the most important of the memos now under scrutiny.

[3] Unredacted Church Report Documents (Previously Classified) (2/11/2009)

<http://www.aclu.org/safefree/torture/387101gl20090211.html>

<http://www.aclu.org/torturefoia/released/021109.html>

These reports from the Criminal Investigation Division of the Dept. of Justice detail the deaths of a number of detainees at Bagram Air Force Base in Afghanistan and at prisons in Iraq. Thus far, 21 homicides have been confirmed, eight of which resulted from abusive interrogation techniques.

[4] Mayer, Jane; *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, Doubleday, 2008.

Mayer sources "hard-line law-and-order stalwarts in the criminal justice system" to describe how beginning on 9/11/01 a group who called themselves the "War Council" worked to upend the American system of law and checks and balances in order to exercise a new legal paradigm for Executive Power. They worked methodically to vastly expand presidential authority ("not limited by any laws") in which the president "had the power to override existing laws that Congress had specifically designed to curb him." David Addington, chief of staff of Vice President Cheney, John Yoo, William James Haynes, Timothy E. Flanigan and Alberto Gonzales, led the 'War Council.'

[5] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly in 1984 and entered into force on June 26, 1987.

It defines torture as any act by which: "severe pain or suffering, whether physical or mental; is intentionally inflicted on a person; for such purposes as":

- a) obtaining from him/her or a third person information or a confession
- b) punishing him/her for an act s/he or a third person has committed or is suspected of having committed
- c) intimidating or coercing him/her or a third person,
- d) or for any reason based on discrimination of any kind;

When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

<http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>

[6] "The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales's Confirmation Hearings," by John W. Dean, Friday, Jan. 14, 2005;

<http://writ.news.findlaw.com/dean/20050114.html>

Timothy Flanigan, authored a memorandum while he was Acting Assistant Attorney General in the Department of Justice, in which he advanced a similar argument. In response, Indiana University law professor Dawn Johnsen wrote that Flanigan "described presidential non-enforcement authority in sweeping terms that would seem to allow the President to refuse to enforce any law that in his view is unconstitutional."

[7] Mayer, Jane, *The Dark Side*, p. 64. Shiffrin told Jane Mayer, "He'd sit, listen, and then say, 'No, that's not right.' He was particularly doctrinaire and ideological. He didn't recognize the wisdom of the other lawyers. He was always right. He didn't listen." Another participant said that whenever Addington cautioned against executive-branch overreaching, "he would respond brusquely, 'There you go again, giving away the President's power.'"

On June 26, 2008, Addington appeared to testify under subpoena from the House Judiciary Committee along with former Justice Department attorney John Yoo in a contentious hearing on detainee treatment, interrogation methods and the extent of executive branch authority.[48][49][50]video

Dan Eggen (2008-06-27). "Bush Policy Authors Defend Their Actions". The Washington Post. http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062601966_pf.html.

Scott Shane (2008-06-27). "Two Testify on Memo Spelling Out Interrogation". The New York Times. <http://www.nytimes.com/2008/06/27/washington/27hearing.html>.

Addington helped to shape an August 2002 opinion from the Department of Justice's Office of Legal Counsel (OLC) that said torture might be justified in some cases.

Douglas Jehl; Tim Golden (November 2, 2005). "In Cheney's New Chief, a Bureaucratic Master". New York Times. <http://www.nytimes.com/2005/11/02/politics/02aide.html?pagewanted=print>.

Sincerely,



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