Statement by

David B. Rivkin, Jr.

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OPINION

The War on Terror Is Not a Crime

By DAVID B. RIVKIN JR. and LEE A. CASEY
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Lynching lawyers, as Shakespeare once suggested, has never appealed much to the legal profession itself – literally or figuratively. But an exception apparently will be made for a group of attorneys who advised President Bush and his national security staff in the aftermath of 9/11. They've been subject to an increasingly determined campaign of public obloquy by law professors, activist lawyers and pundits.

Their legal competence and ethics have been questioned. Suggestions have even been made that they can and should be held criminally responsible for "war crimes," because their legal advice supposedly led to detainee abuses at Abu Ghraib and elsewhere.

The targets of this witch hunt include some of the country's finest legal minds – such as law Prof. John Yoo of the University of California at Berkeley, Judge Jay Bybee of the Ninth Circuit Court of Appeals, and William J. (Jim) Haynes II, former Pentagon general counsel. Others frequently mentioned include former White House Counsel Harriet Miers, former Attorney General Alberto Gonzales, and former Undersecretary of Defense Douglas Feith.

Many positions taken by these attorneys, laying the fundamental legal architecture of the war on terror, outrage international activists and legal specialists. Nevertheless, in a series of cases beginning with *Hamdi v. Rumsfeld* (2004), the U.S. Supreme Court has upheld many of their key positions: that the country is engaged in an armed conflict; that captured enemy combatants can be detained without criminal trial during these hostilities; and that (when the time comes) they may be punished through the military, rather than the civilian, justice system.

The Court has also required that detainees be given an administrative hearing to challenge their enemy-combatant classification, ruled that Congress (not the president alone) must establish any military commission system, and made clear that it will in the future exercise some level of judicial scrutiny over the treatment of detainees held at Guantanamo Bay – although the extent of this role is still being litigated. Overall, the administration has won the critical points necessary to continue the war against al Qaeda.

Most controversial, of course, was the Bush administration's insistence that the Geneva

Conventions have limited, if any, application to al Qaeda and its allies (who themselves reject the "Western" concepts behind those treaties); and the administration's authorization of aggressive interrogation methods, including, in at least three cases, waterboarding or simulated drowning.

Several legal memoranda, particularly 2002 and 2003 opinions written by Mr. Yoo as deputy assistant attorney general for the Office of Legal Counsel, considered whether such methods can lawfully be used. These memoranda, some of which remain classified, explore the limits imposed on the United States by statute, treaties, and customary international law. The goal clearly was to find a legal means to give U.S. interrogators the maximum flexibility, while defining the point at which lawful interrogation ended and unlawful torture began.

Behind this inquiry is a stark fact. In this war on terror, the U.S. must not only attack and defeat enemy forces. It must also anticipate and prevent their deliberate attacks on its civilian population – al Qaeda's preferred target. International law gives the civilian population an indisputable right to that protection.

Lawyers can and do disagree over the administration's conclusions. However, it's now being claimed that the administration's legal advisers can be held responsible for detainee abuses.

This is madness. The lawyers were not in any chain of command, and had no theoretical or practical authority to direct the actions of anyone who engaged in abusive conduct. Those who mouth this argument are engaged in a kind of free association which, if applied across the board, would make legal counsel infinitely culpable.

In truth, the critics' fundamental complaint is that the Bush administration's lawyers measured international law against the U.S. Constitution and domestic statutes. They interpreted the Geneva Conventions, the U.N. Convention forbidding torture, and customary international law, in ways that were often at odds with the prevailing view of international law professors and various activist groups. In doing so, however, they did no more than assert the right of this nation – as is the right of any sovereign nation – to interpret its own international obligations.

But that right is exactly what is denied by many international lawyers inside and outside the academy.

To the extent that international law can be made, it is made through actual state practice – whether in the form of custom, or in the manner states implement treaty obligations. In the areas relevant to the war on terror, there is precious little state practice against the U.S. position, but a very great deal of academic orthodoxy.

For more than 40 years, as part of the post World War II decolonization process, a legal orthodoxy has arisen that supports limiting the ability of nations to use robust armed force against irregular or guerilla fighters. It has also attempted to privilege such guerillas with the rights traditionally reserved to sovereign states. The U.S. has always been skeptical of these notions, and at critical points has flatly refused to be bound by these new rules. Most especially, it refused to join the 1977 Protocol I Additional to the Geneva Conventions,

involving the treatment of guerillas, from which many of the "norms" the U.S. has supposedly violated, are drawn.

The Bush administration acted on this skepticism – insisting on the right of a sovereign nation to determine for itself what international law means. This is at bottom the sin for which its legal advisers will never be forgiven. To the extent they can be punished – or at least harassed – perhaps their successors in government office will be deterred from again challenging the prevailing view, even at the cost of the national interest.

That is why these administration attorneys have become the particular subjects of attack.

Messrs. Rivkin and Casey served in the Justice Department under Presidents Reagan and George H.W. Bush, and were members of the United Nations Subcommission on the Promotion and Protection of Human Rights from 2004-2007.