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Protesting the government's misuse of law

BY JOSEPH E. KENNEDY

CHAPEL HILL - Today Nobel Laureate Bishop Desmond Tutu will speak at the UNC-Chapel Hill commencement, and former U.S. Attorney General Michael Mukasey will speak at the separate commencement ceremony of UNC's School of Law. For me, these two addresses will have a special connection because a conversation I once had with Bishop Tutu is part of the reason I will be wearing an orange armband protesting Judge Mukasey's selection.

I protest his selection as the School of Law's commencement speaker because of his failure to hold publicly accountable the Department of Justice lawyers who authorized torture under the Bush administration.

People who think that respectfully protesting the selection of a commencement speaker violates the speaker's First Amendment rights understand neither the First Amendment nor the nature of being a commencement speaker. The amendment guarantees your right to speak, not to be free of criticism, and being selected as a commencement speaker is a singular honor.

In protesting I am exercising my First Amendment right to criticize. Free speech can't mean freedom from criticism.

Mukasey, a former U.S. District Court judge, has had a distinguished career and has done many good and honorable things. Unfortunately good and honorable men are often pressed to cover up for deeds done by lesser men. If they lend their distinguished reputations to such an effort, they deserve the criticism they get.

In December of last year Mukasey stated that there was no legal basis for prosecuting the Justice Department lawyers who authored the torture memoranda because they were trying to protect national security and believed that they were acting lawfully. Yet the torture memoranda that the department authored under the Bush administration twisted the interpretation of existing legal authorities beyond any reasonable understanding.

In the Bybee memo of August 2002, a memorandum that Mukasey characterizes as a mistake, the head of the Justice Department's Office of Legal Counsel essentially defined torture as an interrogation technique that causes the equivalent of organ failure. He got that definition not from any legal authority defining torture but from a definition of "severe pain" found in an obscure medical benefits statute.

Such reasoning would receive an F grade if offered by a first-year law student. When offered by the head of the elite Office of Legal Counsel it must be seen for what it was: a lie about the meaning of the law, not a mistake.

I understand that some believe that torture was justifiable in the post-9/11 world. These lawyers were not asked whether the United States needed to torture in order to keep the public safe, however. They were also not asked to come up with the best arguments for defining torture narrowly. They were asked what the law meant.

The difficult but clear job of the government lawyers in this case was to tell the president that if he felt he needed to torture to keep us safe that the United States would have to abrogate or violate the treaties that prohibit torture and pardon the people who had already tortured.

I also understand that some believe that leniency is in order for lawyers who broke rules to keep us safe -- people who might have done the wrong thing for the right reason. Arguments for leniency go to what sanction to impose for wrongful conduct, however, not to whether wrong was done in the first place.

Failing to hold government lawyers publicly accountable for misrepresenting the law of torture compromises the legal profession in a very fundamental way. When lawyers at the highest levels of government pretend that the law means whatever the government wants it to mean, they undermine the rule of law itself.

Which leads me back to Bishop Tutu. I interviewed him in 1983 about how he saw the United States. This was when South Africa still lived under apartheid and years before he won the Nobel Prize that made him an international figure. He told me that as a small boy the example of the civil rights movement here inspired him.

As a lawyer and a law professor, I like to believe that a big part of what has always given this country a special place in the hearts and minds of many oppressed peoples in faraway lands is the role that the rule of law often plays in our very best moments as a people. I think that both the image and the reality of that role are very much at stake in the current controversy about torture, and I think Tutu would agree. The Truth and Reconciliation process he oversaw in South Africa offered leniency to those who thought they were justified in what they did but only after establishing what wrong had been done.

This fundamental ethical issue does not end with the Bush administration, either. Depending on what members of the current administration do, they also may see armbands at future commencements.

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