

John Yoo: The President's Executioner

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The title of this article – The President's Executioner – is a play on words. It refers to professor John Yoo, who teaches law at Boalt Hall, University of California, Berkeley. But this man – mild-mannered by all appearances – is not what he seems. He is the man who was, more often than nearly any other, behind the White House decisions to violate the international laws of war. He was the one who told the White House how to get away with committing war crimes. While he may have been a henchman for others who instructed him to make the arguments he did, he repeatedly refused to reverse himself, both while he worked in the Department of Justice and after he left that office and returned to academia.

But it was also during this time period, as we now know, that the Department of Justice became "politicized." Instead of executing the laws as it should have been doing, the Justice Department became an instrument of President Bush, executing his wishes.

And John Yoo executed White House wishes to twist the law into something it was not and was not meant to be.

Yoo, however, did more than execute orders. The so-called "Torture Memos," in the writing of which Yoo was an active and primary participant, opened the door to such abuse of the laws that some detainees were actually murdered. For all practical purposes, they were executed, without a trial or guilty verdict.

Thus, the President's Executioner.

Yoo & the Unlimited Executive

Professor Yoo teaches the following courses: International Civil Litigation, International Law, Constitutional Law, Foreign Relations Law, Civil Procedure, International Trade, Separation of Powers Law. These courses cover big issues. They relate not to person-to-person issues, to one family's inheritance, a personal injury lawsuit, or a burglary. Most of the courses Professor Yoo teaches relate to how our country is run and who has the power to do what, internally and internationally.

But it would be a mistake to rely on Yoo's advice in these areas, for he would be interpreting laws he has broken and advised others to break.

The Office of Legal Counsel (OLC) at the Department of Justice is the office that issues legal opinions for the President and other departments (including the Department of Defense) in the executive branch. OLC opinions are relied on by these offices to guide them in carrying out their jobs. They are rarely rescinded, having almost the precedential effect of judicial decisions.

Yoo was the Deputy Assistant Attorney General in the OLC. While there he participated in authoring several documents, all of which became mainstays of the administration's policies at particular points and most or all of which the OLC later rescinded. The memos all manifest one characteristic: they all suggest that the President, as President and Commander-in-Chief, has the authority to violate any laws or treaties he sees fit in order to protect the country.

Jack Goldsmith, a Harvard law professor who became Deputy Attorney General after Yoo left and who was the one who made the difficult (and unpopular) decision to rescind Yoo's opinions (and who later resigned because of it), writes in his book **"The Terror Presidency: Law and Judgment Inside the Bush Administration"** that Yoo's "interrogation opinions" contained an "unusual lack of care and sobriety in their legal analysis," and that "[n]owhere was this more evident than in the opinions discussion of the President's commander-in-chief powers." (p. 148)

Yoo's opinion went much further than necessary, Goldsmith thought. Yoo wrote: "Any effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Goldsmith states: "This extreme conclusion has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law." (pp. 148-9) Yoo's pronouncement about presidential powers, furthermore, "was all the more inappropriate because it rested on cursory and one-sided legal arguments that failed to consider Congress's competing wartime constitutional authorities, or the many Supreme Court decisions potentially in tension with the conclusion." (p. 149)

Of course, the "interrogation opinion" was not Yoo's only one, as we now know.

The Yoo Memos

Yoo's memos were written in the wake of 9/11. On September 18, 2001, Congress issued the **Authorization to Use Military Force (AUMF)**, which authorized President Bush to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Only fourteen days after 9/11 and a week after Congress issued the AUMF, Yoo submitted his first memo: **"Memorandum Opinion for the Deputy Counsel to the President"** titled "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." This memo claimed:

The President has constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations. The President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

On November 13, 2001, the White House issued a **Presidential Military Order (PMO)** on

detentions, which Yoo co-authored with Vice President Cheney's legal counsel, David Addington. The PMO purported to authorize the Secretary of Defense to detain terrorist suspects indefinitely and created military commissions to try those he decided to try. It established procedural baselines for commissions which (along with later-issued DOD procedures) were later ruled unconstitutional by the Supreme Court in ***Hamdan v. Rumsfeld***.

A little over a month later, on December 28, 2001, Yoo submitted another memorandum, this time co-authored with fellow Deputy Assistant Attorney General Patrick F. Philbin, to William J. Haynes II, General Counsel to the Department of Defense, titled **"Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba."** While expressing some uncertainty, the memo argues that "the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained" at Guantanamo. (The administration maintained this argument all the way up to the Supreme Court, which ruled against it in ***Rasul v. Bush***.)

Then, on January 9, 2002, Yoo submitted a memorandum titled **"Application of Treaties and Laws to al Qaeda and Taliban Detainees"** and co-authored with Special Counsel Robert J. Delahunty, that purported to address "the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan."

This memo argued that the President was not bound by international laws in the war on terror. The memo stated that "any customary international law of armed conflict in no way binds, as a legal matter, the President or the US Armed Forces concerning the detention or trial of members of al-Qaeda and the Taliban." The memo purported to deny the protections of international laws to detainees and to exempt from liability those who denied such protections. The memo thus approved and promoted violations by the U.S. of long-standing international laws and treaties.

Finally, Yoo authored a memo that was dated August 1, 2002, titled **"Standards of Conduct for Interrogation under 18 U.S.C. ss. 2340-2340A"** (the statutes that implement the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT)). According to Goldsmith, "This opinion was addressed to Alberto Gonzales from my predecessor, Jay Bybee, but according to press reports and John Yoo's public comments, it was drafted by Yoo himself." (Terror Presidency, p. 142)

Among other criteria, it stated that "[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Goldsmith states: "The opinion formed part of the legal basis for what President Bush later confirmed were 'alternative' interrogation procedures used at secret locations on Abu Zubaydah, a top al Qaeda operative; Khalid Sheikh Mohammed, the al Qaeda mastermind behind the 9/11 attacks; and other 'key architects of the September 11th' and other terrorist attacks." (p. 142)

Jordan Paust writes in "Beyond the Law": "The memo attempted to justify torture as well as the intentional infliction of pain more generally as interrogation tactics" and it "was completely erroneous with respect to Geneva law and war crime responsibility." (p. 11)

Media and Legal Experts on Yoo's Memos

The January 9, 2002 memo, which discusses the application of treaties on detainees, is widely viewed as having sparked the abuse and torture of prisoners by members of the U.S. military. The Department of State (DOS) responded to Yoo that “both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed.” Two days after Yoo issued his January 9th memo, DOS legal adviser **William H. Taft, IV, commented** that all three of Yoo’s main premises were wrong as a matter of international law and other arguments he made were “without support,” “contrary to the official position of the United States,” and “legally flawed and procedurally impossible at this stage.”

In a May 25, 2004 Newsweek article, referring to Yoo’s memos, reporter **Michael Isikoff stated** that “Critics say the memos’ disregard for the United States’ treaty obligations and international law paved the way for the Pentagon to use increasingly aggressive interrogation techniques at Guantanamo Bay — including sleep deprivation, use of forced stress positions and environmental manipulation — that eventually were applied to detainees at the Abu Ghraib prison in Iraq.”

(For all the so called “torture memos” and other “**Interrogation Documents**,” [**click here.**](#))

Scott Horton — an expert on human rights law and the law of armed conflict, a professor at Columbia University School of Law, a commentator for Harper’s Magazine, and a partner at Patterson, Belknap, Webb & Tyler LLP in New York — **wrote** that “ following the issuance of high-level legal advice [eg., the Yoo/Delahunty and other memos] ... command authorities in Iraq no longer considered the Geneva Conventions to restrain them in their handling of detainees.”

Isikoff quoted Kenneth Roth, the executive director of Human Rights Watch, who had examined the memo. Roth “described it as a ‘maliciously ideological or deceptive’ document that simply ignored U.S. obligations under multiple international agreements. ‘You can’t pick or choose what laws you’re going to follow,’ said Roth. ‘These political lawyers set the nation on a course that permitted the abusive interrogation techniques’ that have been recently disclosed.”

Jordan J. Paust, Professor of International Law at University of Houston Law Center wrote in his book “**Beyond the Law: The Bush Administration’s Unlawful Responses to the ‘War’ on Terror,**” about the memo: “Yoo and Delahunty knew that their claim” about the application of the Geneva Conventions “was completely contrary to developments in the customary laws of war recognized by the International Court of Justice and the International Criminal Tribunal for Former Yugoslavia, but they thought their reliance on a fifty-three-year-old text and ‘historical context’ was preferable...” (p. 10.)

Another eminent law professor, **Stephen Gillers**, at New York University School of Law **noted that:** “Explicitly and by omission, then, the lawyers [Yoo and Delahunty] told the government it could treat detainees from Afghanistan as though they existed outside the rule of law.” While the Memo purported to consider the effect of international treaties and federal law on the treatment of detainees from Afghanistan, it “ignore[d] duties imposed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which the United States ratified with reservations in 1994) and the federal torture statute, which creates criminal liability for U.S. nationals who commit torture abroad under color of law.” As further explained by Scott Horton (and quoted by Gillers), the Yoo and Delahunty memo “is not only wrong, it lays the groundwork for the commission of war

crimes.”

But the January 9th memo is clearly not the only one that could be construed as giving interrogators *carte blanche* on extreme techniques. The August 1st memo specifically deals with the issue of torture and attempts to redefine it to permit interrogations that most experts agree would violate traditional prohibitions. Goldsmith notes that the definition of pain amounting to torture was “culled ... ironically, from a statute authorizing health benefits.” (p. 145) According to Yoo himself, the denial of Geneva protections and the coercive interrogation “policies were part of a common, unifying approach to the war on terrorism.” (Paust, p. 177, fn. 14, quoting Yoo, **“War by Other Means.”**)

Yoo’s Most Recently-Revealed Memo

Last week, the Washington Post published yet another memo that Yoo had authored. This one was dated March 14, 2003 and discussed **“Military Interrogation of Alien Unlawful Combatants Held Outside the United States.” (Part 1, Part 2, Part 3, Part 4)**

Here again, Yoo argues that the President is not bound by federal laws. “Such criminal statutes, if they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution’s grant of the Commander in Chief power solely to the President,” writes Yoo. The laws by which Yoo says the President is not bound are those that prohibit torture, assault, maiming, stalking, and war crimes. Yoo’s opinion restricts the application of treaties against torture to definitions that, once again, simply authorize torture as long as it doesn’t kill the person.

Further, contrary to current understanding of international law, Yoo’s memo declares that “our previous opinions make clear that customary international law is not federal law and that the President is free to override it at his discretion.” And finally, the memo suggests several defenses (military necessity and self defense) for those brought up on criminal charges for violating laws during interrogations.

According to Vincent Warren, the Executive Director of the Center for Constitutional Rights:

The ‘Torture Memo’ was not an abstract, academic foray. Rather, it was crafted to sidestep U.S. and international laws that make coercive interrogation and torture a crime. It was written with the knowledge that its legal conclusions were to be applied to the interrogations of hundreds of individual detainees... And it worked. It became the basis for the CIA’s use of extreme interrogation methods as well the basis for DOD interrogation policy.

Warrens adds that “Yoo’s legal opinions as well as the others issued by the Office of Legal Counsel were the keystone of the torture program, and were the necessary precondition for the torture program’s creation and implementation.”

Marjorie Cohn, President of the National Lawyers Guild, analyzing Yoo’s actions in light of the relevant case law, **writes that** Yoo was an “integral part of a criminal conspiracy to violate U.S. laws” in which “it was reasonably foreseeable that the advice [Yoo] gave would result in great physical or mental harm or death to many detainees.”

Cohn echoes **Scott Horton**, who writes that Yoo’s “analysis was false, a point acknowledged ultimately by the [Office of Legal Counsel in the Department of Justice] itself”

and points out that “a solid basis exists under the standard articulated by the United States under which John Yoo may be charged and brought to trial” for the false legal advice he gave.

Crimes

Yoo’s efforts to deny rights to detainees is, alone, a breach of basic requirements of the 1907 Hague Convention, which states that “it is especially forbidden ... [t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.” (**Laws and Customs of War on Land** (Hague IV); October 18, 1907, Art. 23)

Breaches of the Hague or Geneva Conventions may constitute war crimes, by definition, under the 1996 **War Crimes Act**.

“War crimes” are not just crimes under some vague view of unenforceable international law subject to dispute by civilized nations. Nor are they just crimes under widely accepted international laws; they are also crimes under U.S. federal domestic law.

Professor Yoo not only laid the groundwork for the commission of war crimes by others, but his “legal advice” was itself a promotion of crime. His memos provided advice on how to break the law and avoid prosecution. His continued endorsement of the views expressed in his memo could be construed as continued promotion of unlawful activities, which could subject him to criminal prosecution. (Paust, p. 20.)

Beyond the issue of Yoo’s direct liability for aiding and abetting crimes is the question whether the Yoo/Delahunty memo has misled other departments or branches of the government. In a November 7, 2005, blog entry, **Horton pointedly asked**: “Has the Department of Justice been corrupted by its ‘torture memoranda’?” Given subsequent revelations of Justice Department improper “politicization” and firings of U.S. attorneys, the effect of Yoo’s memos seems highly relevant.

Professor Paust, who calls the Yoo/Delahunty memo “manifestly erroneous,” “unprofessional, and subversive,” states: “What is particularly disturbing is the attempt to mislead and abuse the judiciary to further the denial of required rights and protections.” Paust points to at least one instance where a court has been misled. (Paust, pp. 19-20.) Paust says that the “criminal memoranda and behavior of various German lawyers in the German Ministry of Justice, high-level executive positions outside the Ministry, and the courts in the 1903s and 1940s that were addressed in informing detail in “The Justice Case” ... reflect the concern regarding government lawyer attempts to use courts to further a denial of required rights and protections under the laws of war. Consequences for the German legal system were disastrous ... and consequences for a number of lawyers included criminal convictions for, among other crimes, aiding and abetting violations of the laws of war.” (pp. 19-20)

Horton, in a **response** to a **statement issued by Christopher Edley, Jr.** dean of the law school at the University of California, Berkeley, where Yoo teaches, states the legal standard in *The Justice Case*, also known as ***U.S. v. Altstoetter***:

First, the case dealt with persons under detention in wartime (not POWs, in fact most of the cases in question addressed persons not entitled to POW or comparable protections).

Second, it had to be reasonably foreseeable that the advice dispensed would result in serious physical or mental harm or death to a number of the persons under detention. Third, the advice given was erroneous.

Horton sums up: "Each of these criteria is satisfied with respect to Yoo's advice under the torture memoranda" and adds that "what [Yoo] did raises not merely ethics issues, but actual criminal culpability." Horton's conclusion bears marking:

Yoo is protected by the political umbrella of the Bush Administration for the moment, which is to say, he is protected by his actual fellow conspirators, including those who continue to run the Department of Justice. That protection will expire soon enough, and it is highly unlikely that the Government which follows in its wake will be prepared to act quite so strenuously as this one in Yoo's behalf.

1 For all the so-called "torture memos" and other "Interrogation Documents," see <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/>.

List of Links in article (in order of their appearance in the text [linked text bolded in text]):

"The Terror Presidency: Law and Judgment Inside the Bush Administration"

<http://www.amazon.com/Terror-Presidency-Judgment-Inside-Administration/dp/0393065502>

Authorization to Use Military Force

<http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>

Yoo's memo: "Memorandum Opinion for the Deputy Counsel to the President"

<http://www.usdoj.gov/olc/warpowers925.htm>

Presidential Military Order

<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>

Hamdan v. Rumsfeld

<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>

Yoo's memo: "Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba."

http://www.pegc.us/archive/DOJ/20011228_philbinmemo.pdf

Rasul v. Bush

<http://www.law.cornell.edu/supct/html/03-334.ZS.html>

Yoo's memo: "Application of Treaties and Laws to al Qaeda and Taliban Detainees"

http://pegc.us/archive/DOJ/20020109_yoomemo.pdf

Yoo's memo: "Standards of Conduct for Interrogation under 18 U.S.C. ss. 2340-2340A"

http://pegc.us/archive/DOJ/bybee_memo_20020801.pdf

Taft Comment

http://pegc.us/archive/State_Department/taft_memo_20020111.pdf

Michael Isikoff stated

<http://www.texscience.org/reform/torture/>

Interrogation Documents

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/>

Scott Horton ... wrote (The Return of Carl Schmitt)

<http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html>

Paust: "Beyond the Law: The Bush Administration's Unlawful Responses to the 'War' on Terror"

<http://www.amazon.com/Beyond-Law-Administrations-Unlawful-Responses/dp/0521711207>

Stephen Gillers ... noted that

<http://www.law.com/jsp/article.jsp?id=1086989271507>

Yoo: War by Other Means

<http://www.amazon.com/War-Other-Means-Insiders-Account/dp/0871139456>

Yoo memo: " Military Interrogation of Alien Unlawful Combatants Held Outside the United States"

(Part 1) <http://media.washingtonpost.com/wp-srv/nation/pdfs/OLCMemo1-19.pdf>

(Part 2) <http://media.washingtonpost.com/wp-srv/nation/pdfs/OLCMemo20-39.pdf>

(Part 3) <http://media.washingtonpost.com/wp-srv/nation/pdfs/OLCMemo40-59.pdf>

(Part 4) <http://media.washingtonpost.com/wp-srv/nation/pdfs/OLCMemo60-81.pdf>

According to Vincent Warren (Center for Constitutional Rights)

<http://nlg.org/news/statements/CCR%20statement%20on%20Yoo%20VW%20final.pdf>

Marjorie Cohn ... writes that (NLG)

<http://globalresearch.ca/index.php?context=va&aid=8710>

Scott Horton (response to Dean Edley)

<http://balkin.blogspot.com/2008/04/response-to-dean-edley.html>

Laws and Customs of War on Land

<http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>

War Crimes Act

http://www.law.cornell.edu/uscode/18/usc_sec_18_00002441--000-.html

Horton pointedly asked (Return of Carl Schmitt)

<http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html>

Horton response to Dean Eldey

<http://balkin.blogspot.com/2008/04/response-to-dean-edley.html>

Dean Edley's statement

<http://www.law.berkeley.edu/news/2008/edley041008.html>

U.S. v. Altstoetter

<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm>

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