

Torture of “enemy combatants”: Call for Dismissal and Prosecution of John Yoo

Center for Constitutional Rights Supports National Lawyers Guild Call for Dismissal and Prosecution of John Yoo

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On April 1, a secret 81-page memo written by former Deputy Assistant Attorney General John Yoo in March 2003 was made public. In that memo, Yoo advised the Bush administration that the Department of Justice’s Office of Legal Counsel would not enforce U.S. criminal laws, including federal statutes against torture, assault, maiming and stalking in the detention and interrogation of enemy combatants. The week after the publication of Yoo’s memo, the National Lawyers Guild issued a press release calling for the Boalt Hall Law School at the University of California to dismiss Yoo, who is now a professor of law there. The NLG also called for the prosecution of Yoo for war crimes and for his disbarment.

Two days later, the Center for Constitutional Rights released a letter supporting the NLG’s call for Yoo’s dismissal and prosecution. CCR Executive Director Vincent Warren wrote, “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... 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.”

The day after the NLG issued its press release, Boalt Hall Dean Christopher Edley, Jr. posted a statement on the Boalt Hall website, responding to “the *New York Times* (editorial April 4), the National Lawyers’ Guild, and hundreds of individuals from around the world” who had criticized or questioned Yoo’s continuing employment at Boalt Hall.

Dean Edley cited the University of California’s Academic Personnel Manual sec. 015, which lists under “Types of unacceptable conduct: ... Commission of a criminal act which has led to conviction in a court of law and which clearly demonstrates unfitness to continue as a member of the faculty.” Edley said he was not convinced Yoo had engaged in “clear professional misconduct – that is, some breach of the professional ethics applicable to a government attorney – material to Professor Yoo’s academic position.” Edley was likewise not convinced “the writing of the memoranda, and [Yoo’s] related conduct, violate[d] a criminal or comparable statute.”

Edley felt Yoo’s conduct was not “morally equivalent to that of his nominal clients, Secretary Rumsfeld, *et al.*, or comparable to the conduct of interrogators distant in time, rank, and

place.” Edley wrote, “Yes, it does matter that Yoo was an adviser, but President Bush and his national security appointees were the deciders.”

Indeed, ABC News reported last week that Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. George W. Bush, the decider-in-chief, admitted, “yes, I’m aware our national security team met on this issue. And I approved.”

These top U.S. officials are liable for war crimes under the U.S. War Crimes Act, and for violation of the Convention Against Torture and the Geneva Conventions, which are all part of U.S. law. They ordered the torture which was carried out by the interrogators.

But John Yoo and the other Justice Department lawyers, including David Addington, Jay Bybee, William Haynes and Alberto Gonzales, are also liable for the same offenses. They were an integral part of a criminal conspiracy to violate U.S. laws. In *U.S. v. Altstoetter*, Nazi lawyers were convicted of war crimes and crimes against humanity for advising Hitler on how to “legally” disappear political suspects to special detention camps. The United States charged that since they were lawyers, “not farmers or factory workers,” they should have known their technical justifications for circumventing the Hague and Geneva Conventions were illegal.

The cases of *Altstoetter* and those of the Bush lawyers share common aspects. Both dealt with people detained during wartime who were not POWs; in both, it was reasonably foreseeable that the advice they gave would result in great physical or mental harm or death to many detainees; and in both, the advice was legally erroneous. More than 108 people have died in U.S. detention since 9/11, many from torture. And the Department of Justice’s Office of Legal Counsel later withdrew the memoranda, an admission that the advice in them was defective.

Furthermore, the Bush lawyers have engaged in ethical violations which should result in their disbarment. As New York University School of Law Professor Stephen Gillers wrote in *The Nation*, H. Marshall Jarrett, counsel for the Justice Department’s Office of Professional Responsibility, who is examining the legal advice these lawyers provided, “should find that this work is not ‘consistent with the professional standards that apply to Department of Justice attorneys.’”

Even Dean Edley appears to recognize that the case of John Yoo is not a simple issue of academic freedom, such as “merely some professor vigorously expounding controversial and even extreme views.”

As CCR President Michael Ratner wrote in the forthcoming book, *The Trial of Donald Rumsfeld*, “Had these various opinions been written as a law school or academic exercise, they could be merely condemned and their authors would fail their class, but they would not be held criminally accountable. But they were not an academic exercise. They were written by high-level attorneys [such as John Yoo] in a context where the opinions represented the governing law and were to be employed by the President in setting detainee policy. This was more than bad lawyering; this was aiding and abetting their clients’ violation of the law by justifying the commission of a crime using false legal rhetoric.”

It is inconceivable that Attorney General Michael Mukasey, who has served as a rubber

stamp for Bush's illegal policies, will bring any of these leaders or lawyers to justice. There is a chance that a future attorney general will do so. Barack Obama has pledged to have his Justice Department and Attorney General "immediately review the information that's already there and to find out are there inquiries that need to be pursued . . . if crimes have been committed, they should be investigated . . . Now, if I found out that there were high officials who knowingly, consciously broke existing laws, engaged in coverups of those crimes with knowledge forefront, then I think a basic principle of our Constitution is nobody above the law." Congress should repeal the provision of the Military Commissions Act that would give these deciders and lawyers immunity from prosecution for torture and other mistreatment committed from September 11, 2001 to December 30, 2005.

In addition to criminal prosecutions, disbarments, and the dismissal of John Yoo from the Boalt Hall faculty, Jay Bybee, who was rewarded for his illegal advice with a federal judgeship, should be removed from the bench by impeachment.

It is time for the impunity enjoyed by the Bush administration to come to an end.

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