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PROFESSOR JOHN YOO

Chancellor Robert Birgeneau
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Dear Chancellor Birgeneau:

As you may know, H. Marshall Jarrett, head of the Justice Department's Office of Professional Responsibility, has reached damning although not yet public conclusions about the professional misconduct of Professor John Yoo while working for the Justice Department's Office of Legal Counsel during the Bush administration. The OPR concludes that Yoo erased the line between an attorney charged with providing independent legal advice to the White House and a policy advocate who was working to advance the goals of a faction within the administration. It remains to be seen whether the OPR's report will trigger an investigation as to whether his violations of professional ethics warrant his dismissal from the Pennsylvania bar--the only bar, I believe, of which Professor John Yoo is a member.

I write to you—after dithering for a couple of years—because I have reached the conclusion that what Berkeley Law School Dean Chris Edley calls John Yoo's "Torture Memo" is professional misconduct of a level demanding his dismissal from the University of California:

- First, Berkeley Law School is a professional school. It must teach and model professional behavior of the kind that will be expected of his students as lawyers. In his Office of Legal Counsel opinions on the commander-in-chief powers of the president that concluded the president has a legal right to order members of the U.S. armed forces to violate the Geneva Conventions to which the United States is a party and torture prisoners, Yoo failed to make any reference to the Korean War case of Youngstown, an essential part of any good-faith analysis of the war powers of the president. Yoo's failure is, I believe, a serious breach of professional ethics--misconduct in failing to fulfill his professional duty to provide his clients with a complete and truthful statement of the law. Writing legal arguments that flatly ignore controlling precedent is

misconduct. Students learning to be lawyers need to be protected from coming to believe that it is an acceptable part of lawyering.

- Second, the University of California is a university. Its members must meet canons of scholarly honesty. The work product for others outside the university performed by faculty who teach at professional schools plays much the same role as that of research in other branches of the university. I believe that the argumentative omissions and misrepresentations in the Torture Memo--the failure to meet the standards of practice required by the legal profession--amount to scholarly misconduct of a level equivalent to that of falsifying experimental results.
- Third, Professor John Yoo was not just an advisor, informing those whom Berkeley Law School Dean Chris Edley calls the "deciders"--George W. Bush, Richard Cheney, George Tenet, and Donald Rumsfeld--his view of what the law was. Professor John Yoo was an implementer. The decision had already been made to torture detainees of low intelligence value and little culpability. Attorneys at the CIA and the Department of Defense were protesting that this policy of routine torture was illegal: contrary to U.S. and international law and treaty, and exposed them to potential criminal sanctions. Professor John Yoo was asked not to provide an opinion but to write a document to override objections to an already settled-upon course of action. He thus made use of the powers of the Department of Justice within the executive branch to silence lawyers who had correctly evaluated the legal framework--and so cramdown the torture policy by issuing "get out of jail free" cards in the guise of OLC opinions. Under treaties that are the law of the land here in the United States, an act of legal advice that materially contributes to the perpetration of acts of torture and cruel, inhuman, or degrading treatment is a criminal act if the doers knew that their conduct could possibly and foreseeably lead to the commission of a crime. There is no requirement that they have known the exact specific torture that was to result.
- Fourth, American lawyers have never before had any association with torture: the core of their professional identity to know nothing of the rack, the thumbscrew, the strappado, induced hypothermia, and the water torture. Centuries ago William Blackstone wrote that the rack in the Tower of London--set up by the Duke of Exeter under Henry IV, used by Queen Elizabeth to torture Jesuits and by King James I to torture conspirators in the aftermath of the Gunpowder Plot--had always been "an engine of state, and not of law" <<http://tinyurl.com/dl20090215d>>. Professor John Yoo has made the strappado and the water torture--which Bush administration

bureaucrats spoke of in euphemisms as "severe interrogation methods" just as the Elizabethans of the sixteenth century would speak of taking prisoners to embrace "the Duke of Exeter's daughter"--part of the law.

In the words of Scott Horton, who has investigated these matters at least as thoroughly as anybody:

The Office of Legal Counsel issues its best analysis of a legal issue for the benefit of... the Attorney General... [and] the President.... Yoo... has stated repeatedly... [that he was] asked to advise as to the full legal range of authority of the president with respect to intelligence interrogations. That description can't be squared with the facts. A broad array of highly coercive techniques had already been implemented in rules of engagement issued to special operations teams long before Yoo was approached. Yoo was fully aware of this fact. He was commissioned to craft memoranda, twice, for purposes of a "cramdown." Lawyers and senior figures within both the CIA and DOD had objected to the new techniques very pointedly, noting that they violated criminal statutes and that both policy makers and personnel using them could be subject to prosecution. In response to this "legal uprising"... John Yoo [was asked] to prepare memoranda... to protect the policymakers who had authorized torture techniques from future criminal liability... to wield the Attorney General's opinion powers to silence lawyers who had correctly evaluated the legal framework. Both of these purposes were wrongful, and inconsistent with the proper use of the Attorney General's opinion power....

I learned from one prominent figure that he had seen repeated drafts of the March 2003 Yoo opinion, had cautioned Yoo on serious errors in judgment and interpretation in the memo, and had strongly urged modification of the memo at least to reflect the contrary viewpoint, even if only to distinguish it. Yoo insisted that he wanted it to be "clean." He declined to make any of the changes requested. Similarly, Yoo was warned repeatedly that his views could not be squared with the overwhelming majority viewpoint in the community of law of war scholarship, and that the risk of criminal prosecution of those implementing his policies was severe. In response, Yoo stated that he was crafting his opinion consciously as a bulwark against future prosecution....

[T]he history of [Yoo's] dealings in connection with the issuance of the opinions... suggests that he believed that an OLC opinion had a talismanic power and could be used as a tool to accomplish whatever ends he sought. That is very far from a sincerely grounded good faith belief in mistaken legal concepts.... [T]he torture policies were settled upon and had in fact been implemented. The principal authors were facing severe blow back from career lawyers inside the government. And John Yoo was carted in to use the powers of OLC to silence lawyers protesting the illegality of what was done.... [T]his is precisely how John Yoo understood his role... he was not an independent legal advisor. He had become a facilitator, an implementor of the torture policies. His role had shifted from passive advisor to actor, pushing a process forward....

Did the writing of the memoranda, and his related conduct, violate a criminal or comparable statute? The answer to that question is "yes." The liability of an attorney dispensing advice with respect to the treatment of persons under detention in wartime is subject to a special rule. It cannot be viewed in the same manner as advice given in a complex commercial dispute, for instance... *United States v. Altstoetter*.... Following on the guidelines established by Justice Robert H. Jackson, the U.S. chief prosecutor, Telford Taylor, and his deputy, Charles M. La Follette, established clear principles of accountability for lawyers dispensing legal advice in circumstances virtually identical to those faced by John Yoo.... Each of these criteria is satisfied with respect to Yoo's advice under the torture memoranda. They explicitly address persons under detention. It was reasonably foreseeable that persons would suffer serious physical or mental harm or death as a result of the application of the techniques (in fact there have been more than 108 deaths in detention, a significant portion of them tied to torture). And the analysis was false, a point acknowledged ultimately by the OLC itself... <<http://tinyurl.com/dl20090215c>>

To sum up, the consensus opinion of John Yoo's Torture Memo appears to be that of Georgetown University Law Professor Marty Lederman, who wrote:

I don't think John [Yoo]... actually believed that [his] arguments... would be adopted by many, if any, relevant legal communities.... I don't think John, et al., thought that their arguments would withstand scrutiny if presented to a court. And, perhaps most importantly, I think that John knew full well that many of the specific arguments within his memos about, e.g., the meaning of statutes and the existence of certain criminal defenses, were simply hoey... at best tendentious and off-point... at times mischaracterized in a way that can only be presumed to have been dishonest... <<http://tinyurl.com/dl20090215b>>

And of Yale University Law Professor Jack Balkin, who wrote:

My own conclusion is that Yoo and Bybee did violate their professional obligations to the President as constitutional actor, and to the country as a whole. The reason is a combination of their outrageous theory of presidential dictatorship and their all too eager assistance in what appears to be a conspiracy to commit war crimes... <<http://tinyurl.com/dl20090215>>

If there were reason to believe that Professor John Yoo sincerely believed the doctrines he set forth in his Torture Memo, then academic freedom would provide a powerful reason why he should continue as a member of the university. Universities exist so that skilled and experienced experts can say what they think and publish what they believe. If they are not in fact skilled and experienced experts--if their analyses are incompetent--that is not their fault, but is rather the fault of the university that gave them a place. And as long as they are saying and writing and publishing what they believe, they have a right to membership in and protection by the university. As our own medieval historian Professor Ernst

Kantorowicz said just before his resignation from the Berkeley faculty in protest at being asked to sign a loyalty oath:

There are three professions which are entitled to wear a gown: the judge, the priest, the scholar. This garment stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and his god. It signifies the inner sovereignty of those three interrelated professions: they should be the very last to allow themselves to act under duress and yield to pressure. It is a shameful and undignified action, it is an affront and a violation of both human sovereignty and professional dignity that the Regents of this university have dared to bully the bearer of this gown into a situation in which--under the pressure of bewildering economic coercion--he is compelled to give up either his tenure or, together with his freedom of judgment, his human dignity and responsible sovereignty as a scholar...
<<http://tinyurl.com/dl20090215a>>

Professor Ernst Kantorowicz feared Marxist revolution, and defended the constitution of the United States against all enemies foreign and domestic. But he believed that any Berkeley faculty member whose intellectual inquiries led him or her to conclude that a Marxist revolution would be desirable and that the government of the United States should be overthrown by force and violence should be allowed to say so--and not be subject to pressure or threats of any kind to discourage him or her from saying what he or she believed.

But there is a problem with Professor John Yoo. The problem is that John Yoo is a weathervane. Yoo's Torture Memo of 2003 says that President Bush's commander-in-chief power is without limit save for impeachment itself--that no matter what treaties the United States has signed or laws the United States congress has passed it is unlawful for any member of the United States armed forces to disobey a presidential order to torture prisoners. But only three years before Professor Yoo sang a very different tune. In a 2000 article, "The Imperial President Abroad" <<http://tinyurl.com/dl20090205>>, Professor John Yoo writes that President Clinton's commander-in-chief power is crabbed and restricted. Yoo states that President Clinton has exceeded their bounds: "accelerat[ing] disturbing trends in foreign policy that undermine democratic accountability and respect for the rule of law." How has he exceeded the bounds of his powers as commander-in-chief?

- By "render[ing] the [Congressional] War Powers Resolution a dead letter..."
- By using "troops... not to achieve total victory... but... more limited goals... whose long-term benefits for American security are unclear..."
- And by placing "American troops... under... non-American... commanders... threaten[ing] that basic principle of government

accountability... [for] foreign officials have no obligation to pursue American policy, nor do they take an oath to uphold the Constitution..."

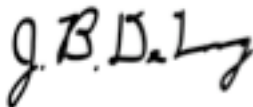
That Professor John Yoo could write "The Imperial President Abroad" in 2000 and the "Torture Memo" in 2003 demonstrates that he does not believe what he writes--at least not for any meaning of "believe" that any of us would recognize.

Academic freedom is a powerful and important principle. But I do not believe it provides a shield for weathervanes. I do not believe it shields those whose work is not the grueling intellectual labor of the scholar and the scientist but instead hackwork that is crafted to be convenient and pleasing to their political master of the day.

I am not an international law professor. I am not a moral philosophy professor. I am just an economics professor. I am aware that my conclusions may be wrong. It is the fact that my conclusions may be wrong has led me to dither about this matter up till now.

But with the OPR report I see no choice: so I ask you, out of a concern for justice, a concern for humanity, and a concern for our reputation as a university, to dismiss Professor John Yoo from membership in our university.

Sincerely yours,

A handwritten signature in black ink that reads "J. B. DeLong". The signature is written in a cursive, slightly slanted style.

J. Bradford DeLong
Professor of Economics