

By Kenneth Theisen

On February 19th the Department of Justice's (DOJ) Office of Professional Responsibility (OPR) finally issued its report on whether John Yoo and Jay Bybee should be held accountable for their actions associated with their role providing legal cover for torture and other crimes during the Bush regime. DOJ found that they are not very competent lawyers and that they engaged in "professional misconduct" by ignoring legal precedent and providing poor legal advice. But it did not hold them accountable for the crimes committed under the cover of their "legal" memos.

Yoo played a key role in the Bush regime. His advice and legal memos provided not just the "legal cover" for torture, but also for war, indefinite incarceration without trial, rendition, massive spying and other practices that many consider criminal conduct. The report virtually ignores this.

From the very beginning it was clear that the Obama administration and Attorney General Eric Holder would never charge Yoo or other Bush regime officials with crimes for their actions in the U.S. war of terror. The investigation and report was narrowly confined to whether Yoo's conduct violated the professional standards owed by an attorney. Yoo, Bybee, and other Bush regime officials were even allowed to dispute the initial draft report by making proposed revisions to it.

But regardless of the conclusions of the report, it is clear that Yoo went beyond poor judgment or engaging in professional misconduct. His actions deserve public condemnation and Yoo should be disbarred, fired as a law professor, and prosecuted for his actions. And it must be made clear that Yoo was not the one making judgments. He was merely the "hired gun" attorney providing the legal cover for decisions already made by President Bush and VP Cheney and other top regime officials. Without his "advice" the various criminal actions listed above could not have been committed as easily. When Yoo is tried he should have these top-level officials as fellow defendants.

Many ask why an attorney should be prosecuted for providing legal advice. But Yoo's actions were not confined to legal advice but were intended to provide legal cover for crimes. As one example, Yoo's infamous 2002 torture memo came about as a result of a refusal by Michael Chertoff, then-chief of DOJ's criminal division, to give a guarantee to the CIA not to prosecute

its employees for torture. Yoo then met with David Addington, VP Cheney's chief counsel, and then White House counsel Alberto Gonzales, to get around this decision. Yoo next inserted a section in his memo about the commander in chief's alleged wartime powers to permit torture and another saying that CIA officers accused of torture could assert they were acting in "self-defense" to prevent terror attacks.

Yoo's "advice" was essential to the crimes carried out by the Bush regime. DOJ's Office of Legal Counsel (OLC) has traditionally advised the executive branch as to what is legal and illegal. If OLC says something is legal, the executive branch can proceed with its agenda. This happened after Yoo issued his OLC memos. Yoo provided the "get out of jail free card" to the Bush regime.

Yoo's memos permitted the Bush regime to launch wars; conduct massive surveillance; to imprison, torture, and abuse prisoners; to hold prisoners indefinitely without legal protections including habeas corpus; and to generally disregard various provisions of the Constitution and international law. All of this patently illegal advice flows from Yoo's notorious theory of the "unitary executive" – better known as "If the President does it, it's legal...."

Legal scholar David Cole writes: "Yoo had a hand in virtually every major legal decision involving the US response to the attacks of September 11, and at every point, so far as we know, his advice was virtually always the same—the president can do whatever the president wants."

Torture is a war crime, and a crime against humanity. International and U.S. law both prohibit torture, under any and all circumstances, without exception. Yet while the Bush-Cheney torture state was being built, people in this country were told the lie that torture is necessary to keep Americans safe, and acceptance of this "excuse" has already spread widely in society. A 2008 survey by WorldPublicOpinion.org indicated that only 53% of Americans surveyed opposed torture in all circumstances. A 2006 Pentagon survey of troops in Iraq found that more than 1/3 of surveyed troops believed that torture was acceptable if it helped save the life of a soldier or helped obtain information about insurgents.

Yoo also provided secret legal memos for the Bush regime that professed to supply a legal basis for illegal surveillance. Much of the content of these memos is still classified. But what has already been made public is revealing. Yoo concluded that the Foreign Intelligence Surveillance Act (FISA) could not "restrict the president's ability to engage in warrantless searches that

protect the national security" and that "unless Congress made a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless searches in the national security area - which it has not - then the statute must be construed to avoid such a reading."

Clearly Yoo devoted his legal skills to serving as legal architect of many of the Bush regime's crimes. Under cover of his memos: thousands have been subjected to torture, tens of thousands incarcerated, tens of millions spied upon, and a million have died in U.S. imperialist wars. Without the provision of "legal cover," many of these crimes would not have been possible.

The criminal past must be repudiated and yes – punished. If we fail to hold our government accountable for the creation of a national security state that utilizes torture and commits other crimes, we are condoning these crimes. The crimes will also be repeated. This is why Yoo must be held accountable. And if Yoo is not prosecuted by the Obama administration for his actions that led to so many crimes, then this administration is condoning those crimes and also deserves condemnation.

*Kenneth J. Theisen is an Oakland resident and a steering committee member of World Can't Wait that seeks to hold John Yoo accountable for his actions during the Bush regime.*