

Submitted to the Berkeley City Council

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*FireJohnYoo.org thanks Linda Rigas for the preparation of this Memorandum.*

## INTRODUCTION

The Berkeley City Council's passage of the Peace and Justice Commission's Resolution on John Yoo directs UC Berkeley to commence an investigation to prosecute John Yoo for war crimes and crimes against humanity, to dismiss John Yoo from his position as Professor of Law at Berkeley Law, University of California (Boalt Hall), and to disbar him from the practice of law for his flagrant violation of professional ethics. All five elements of the Resolution on John Yoo must be adopted by the Berkeley City Council to have the full efficacy of holding John Yoo responsible for granting, codifying, and institutionalizing the illegality of torture.

John Yoo's authorization of torture continues to 'shock the conscience' of the world with unconscionable and egregious mass murder, methods of torture that have been declared illegal by both domestic and international law, secret rendition, denial of habeas corpus and due process, prolonged isolated detention, and the search, seizure and assassination of any person designated for such by the Justice Department anywhere in the world. John Yoo, under the Office of Legal Counsel (also known as the Supreme Court of the Executive Branch), gave legal advice in bad faith and institutionalized his view of torture — unhinged from the law — to satisfy policies to carry out illegitimate, illegal, and immoral sanctions, occupations, and war on Iraq. As a law professor, John Yoo legitimizes his now-implemented disregard for the law and his creation of draconian law through his substantive teaching on Constitutional Law, International Law, Foreign Relations Law, Separation of Powers, Civil Procedure, International Trade, and International Civil Litigation.

People of conscience are obligated "to all peoples of the world to show why and how these things happened" with the goal of preventing the repeated use and institutionalization of torture in the future. [i] The prevailing muted criticism of torture calls on the residents of Berkeley to emphasize Elie Wiesel's question: "Why has the shameful torture to which Muslim prisoners were subjected by American soldiers [...] not been condemned?"

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THE PASSAGE OF THE PEACE AND JUSTICE COMMISSION'S RESOLUTION ON JOHN YOO BY THE BERKELEY CITY COUNCIL WILL HAVE A BINDING EFFECT ON UC BERKELEY.

The Peace and Justice Commission's Resolution on John Yoo binds UC Berkeley to address the criminality of torture and John Yoo's authorization and implementation of torture. Torture, a war crime that attaches universal jurisdiction, enables localities, such as Berkeley, to prosecute individuals responsible for negligent, purposeful, and reckless disregard for the domestic and international laws during war, even if these violations were pursued under the auspices of the law.

When international laws are adopted, they become domestic laws that must be upheld on the local, federal and state levels. This means that the City of Berkeley is "bound by international instruments to which [the United States] is a party as well as jus cogens norms"

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— 'higher law' that can neither be violated nor modified by any state.

In enacting the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the nation states stipulated that the right not be degraded, and prohibition against being punished torturously, cruelly, and inhumanely is an inalienable right, which cannot be usurped under any circumstances, including during a declared emergency state of war. After World War II, the United States insisted that torture is "always and everywhere immoral and illegal."

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II. **ALL FIVE PROVISIONS OF THE RESOLUTION MUST BE ADOPTED BY THE BERKELEY CITY COUNCIL TO HAVE THE FULL EFFICACY OF UPHOLDING LEGAL STANDARDS OUTLAWING TORTURE AND HOLDING JOHN YOO TO ACCOUNT IN THE CITY OF BERKELEY, AT UC BERKELEY, AND IN A FEDERAL COURT OF LAW.**

Each proposed element stipulated in the Resolution on John Yoo must be adopted in accordance and in relation with all other elements. The Resolution is to be read based on the totality of all five recommendations proffered forth, and not as isolated points that the City Council should elect to adopt in isolation.

All five elements of the Resolution address different levels at which John Yoo is to be held accountable. Recommendations #1, #2, and #5 specifically address John Yoo's continued position of academic stature at Berkeley Law.

Recommendation #1 advocates for a letter to be sent to UC Chancellor Birgeneau to investigate John Yoo's actions. The letter, titled the "Call to Investigate Professor John Yoo" will list the City of Berkeley, among individuals and organizations that support commencement of an investigation on John Yoo.

Recommendation #2 requires Berkeley Law to provide alternative professors to teach both required and non-elective courses that John Yoo teaches, so as to not impede students' course scheduling. Currently, students who elect not to take Constitutional Law from John Yoo are placed on an extensive waitlist for the alternative section. Beyond Constitutional Law, John Yoo teaches substantive elective courses that are necessary for students interested in pursuing international law and the effects of U.S. law in the global context. Law school does not merely entail learning the law; it also has important significance in directing students' practice of law. Current law students, as future holders of power, must be taught a legal set of standards that cannot be neglected in the effective advocacy of a client. Students are entitled to learn the legal framework of foreign relations from professors, unlike John Yoo, whose legal reasoning is based on sound legal grounds and has not raised the great red flags of illegality, and whose legal memos have been admonished, rescinded, and repealed by the Supreme Court and a range of legal commentators.

Recommendation #5 mandates that a letter be sent to the President and Chancellor of UC Berkeley, as well as the Dean of Berkeley Law, outlining all 5 elements of the Resolution and advising them of the City's position of the Resolution. The City of Berkeley's actions have important implications for establishing a basis for UC Berkeley to hold further public hearings on John Yoo and to initiate an investigation on campus.

While Recommendations #1, #2, and #5 call on different authorities at UC Berkeley to take action regarding John Yoo, these Recommendations are bolstered and must be read in context of Recommendations #3 and #4.

Recommendation #3 asks for the U.S. Attorney of Northern California (Joseph

Russoniello) to charge John Yoo with war crimes, and Recommendation #4 states that another letter be sent in February 2009 to the then Attorney General of the United States (Eric Holder) to bring war crimes charges against John Yoo. Both of these recommendations address John Yoo's position as a practicing attorney in the Office of Legal Council between in 2001 until 2003, and call for John Yoo to be prosecuted and held responsible for his legal reasoning and the ramifications of his institutionalizing his legal reasoning.

The totality of all five recommendations set forth in the Resolution sends a strong message to UC Berkeley, the U.S. government, and the people of the world about what action must be taken to end sharing common ground with individuals of professional stature who have codified and accelerated the use of torture, and why John Yoo, along with high Administration officials of torture, must be charged with war crimes and held to account.

**III. JOHN YOO'S POSITION AS PROFESSOR OF LAW AT BERKELEY LAW, NEITHER RAISES THE ISSUE OF ACADEMIC FREEDOM NOR A FIRST AMENDMENT CONFLICT.**

The gravamen of the Peace and Justice Commission's Resolution on John Yoo is to hold John Yoo responsible for his institutionalization of torture in violation of established legal standards and his professional ethics as a lawyer and law professor. This central accusation against John Yoo neither raises the issues of academic freedom nor the First Amendment.

Both academic freedom and the First Amendment protect professional freedom of expression and one's legal right to freedom of speech, petition and assembly. Both these concepts are predicated upon an individual citizen's exercise of ideas within legal bounds. Neither applies in the present case as John Yoo has not acted within legal bounds in expressing how the U.S. government is authorized to use torture and in his articulating the theoretical framework to immunize the government for such actions. John Yoo wrote a set of legal memoranda and employed them to institutionalize the use of torture as a tool for state power, giving legal "cover" to modern day inquisitors.

Neither academic freedom nor the First Amendment protects John Yoo's disregard for the law. The continued stature John Yoo receives as a Professor of Law has deep implications beyond the scope of Berkeley Law, as John Yoo lectures, teaches, and advises students at other law schools throughout the country. This can be seen most recently in John Yoo's awarding of the Fletcher Jones Distinguished Visiting Professorship position at Chapman University School of Law, where he will teach for the coming Spring 2009 semester. The flawed reasoning for John Yoo's appointment at Chapman Law evades and dismisses John Yoo's implementation of torture. Instead, the focus by Berkeley Law, Chapman Law, as well as abettors of torture, has been on John Yoo's academically removed ideas on the unitary executive theory. John Yoo has been evasively characterized as an intellectual who has entered the marketplace of ideas, one who can counter the positions against torture taken by international human rights scholars. However, the application of the facts expressly shows John Yoo as a practicing attorney and law professor who is responsible for the implementation of the current statewide torture policy. Torture is not an intellectual exercise that should render further questions and debate among the intellectually curious. The atrocities of torture must be prevented from being furthered and abetted in our names.

John Yoo's employment of his legal opinions can currently be seen in the draconian policies his codification and acceleration of torture have created, which raise extremely important concerns beyond the scope of intellectual protection under academic freedom and freedom of expression under the First Amendment.

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[i] Opening Statement of the Prosecution, *United States v. Brandt*, reprinted in *The Nazi Doctors and The Nuremberg Code* 67, 68 (George J. Annas & Michael A. Grodin eds., 1992).

[ii] Elie Wiesel, Without Conscience, 352 New Eng. J. Med. 1511, 1513 (2005).

[iii] See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (“The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of jus cogens.”), Ginger, Ann Fagan. Berkeley Town Hall. *No To Torture: John Yoo Must Go Coalition*. June 27, 2008.

[iv] *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*. Physicians for Human Rights. June 2008. 95-96.