

By Curt Wechsler

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"The facts revealed in the OPR report are shocking to law students like myself," said National Lawyers' Guild Boalt Chapter Co-chair Liz Jackson at a press event at Boalt Hall. Jackson was referencing the new report from the Department of Justice's Office of Professional Responsibility about Boalt Hall Professor John Yoo's involvement in drafting the memoranda that justified torture of detainees in American custody during the Bush Administration. "We are taught to rigorously examine all sides of a controversy and advise clients candidly about the state of the law. The OPR report finds that Yoo did just the opposite. Because his client was the President, and the issue was torture, such professional misconduct had vile consequences."

"The serious breach of professional standards committed during the preparation of the torture memos is well-documented in the public record," stated second year Berkeley Law student Tam Ma. "I hope my fellow taxpayers will join me in calling on the University of California to examine the details of the OPR report and evaluate whether a lawyer-professor who seriously breaches standards of professional conduct should be teaching future lawyers."

In a publicly-released statement in August 2009, Berkeley Law Dean Christopher Edley stated: "When the Attorney General releases the results of DOJ's internal ethics investigation, I and many others will review it carefully and consider whether there are implications for this campus." It is time for Berkeley Law and the University of California administration to review and consider the report's findings...

"We have to remember that it's not 'all about Yoo' and whether he crossed a hyper-technical line in the ethics code," said Steve Rosenbaum, a longtime Berkeley Law lecturer. "The University owes it to its students to set the highest professional standards, as conveyed by faculty with impeccable credentials."

In the same statement to the community, Dean Edley stated that the University would need "very substantial evidence" that there was "clear professional misconduct--that is, some breach

of the professional ethics applicable to a government attorney" before the University could act. That standard has now been met.

"The ORP report concludes that 'Yoo's legal analyses justified acts of outright torture', and that Yoo had 'committed intentional professional misconduct,'" said Sharon Adams, Board Member for the National Lawyers Guild, SF Bay Area Chapter. "The University should begin an investigation into whether Yoo deserves to teach at Boalt Hall, given his blatant disregard for the rule of law and the US Constitution."

"The report adds to the mounting evidence that warrants a full-scale investigation of those who ordered, designed, and justified torture -- including John Yoo," said Alliance for Justice's Melissa Mikesell. "The new findings must be independently investigated, starting with an inquiry into John Yoo's deleted emails that OPR was unable to recover," Mikesell said, referencing the fact that most of John Yoo's e-mails during his tenure at the Department of Justice have been deleted or destroyed.

[Boalt Alliance to Abolish Torture](#)

Background Information

A recently released report by the Justice Department's Office of Professional Responsibility (OPR), which found that University of California (UC) Berkeley Law Professor John Yoo engaged in "intentional professional misconduct" while working for the Office of Legal Counsel, provides grounds for investigations by the University and the DC and Pennsylvania Bar Associations. Both the University and the Bar Associations have declined to investigate allegations of professional misconduct and violations of the UC Faculty Code of Conduct before the release of the OPR report.

The OPR report found "by a preponderance of the evidence" that John Yoo, as a tenured professor of law, "knowingly failed to present a sufficiently thorough, objective, and candid analysis" through "his failure to carefully read the cases, and his exclusive reliance on the work of a junior attorney." The report further states, "Yoo's legal analyses justified acts of outright torture." And in rendering these analyses, the OPR report concludes that "Yoo put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal

advice, and that he therefore committed intentional professional misconduct."

The contents of the OPR report provide a sound basis for action by other entities with jurisdiction over the lawyers' conduct, including the University of California (where Yoo is tenured) and the Pennsylvania Bar Association (where Yoo is licensed). Although Associate Deputy Attorney General David Margolis unilaterally decided to downgrade the OPR findings to "poor judgment," he did acknowledge that the bar associations "can choose to take up this matter." In addition, House Judiciary Committee chair John Conyers has disputed Margolis's decision to downgrade the Justice Department's conclusions and scheduled Congressional hearings.

In response to a complaint filed last fall by the Berkeley Law student coalition, the Boalt Alliance to Abolish Torture (BAAT), the Pennsylvania Bar dismissed the claim and deferred to the OPR investigation. The University also dismissed several complaints pending investigations by the Justice Department. With the release of the OPR report, these institutions no longer have an excuse for delay; they have a pressing duty to investigate the professional misconduct and ethics violations spelled out in the report.

Excerpts from the OPR Report:

"Yoo's legal analyses justified acts of outright torture." p. 252

"Yoo put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice, and that he therefore committed intentional professional misconduct." p. 254

"Given Yoo's background as a former Supreme Court law clerk and tenured professor of law, we concluded that his awareness of the complex and confusing nature of the law, his failure to carefully read the cases and his exclusive reliance on the work of a junior attorney, established by a preponderance of the evidence that he knowingly failed to present a sufficiently thorough, objective, and candid analysis of the specific intent element of the torture statute." p. 253

"[Yoo] knowingly provided incomplete and one-sided advice." p. 252

"[Yoo] knowingly misstated the strength of the Bybee Memo's argument 'that interrogation of [prisoners] using methods that might violate [the torture statute] would be justified under the doctrine of self-defense....'" p. 253

"[S]ituations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear." p. 254

Excerpts from the "Statement of Dean Edley," Aug. 20, 2009:

Lawyers "should not have blanket immunity for all their advice and actions, no matter what." p. 2

"I believe [one of] the crucial questions in view of our university mission [is this]: Was there clear professional misconduct--that is, some breach of the professional ethics applicable to a government attorney...?" p. 3

"When the Attorney General releases the results of DOJ's internal ethics investigation, I and many others will review it carefully and consider whether there are implications for this campus." p. 3

"Non-clinical faculty need not be a member of a bar, and Professor Yoo does not teach our courses on Professional Responsibility." p. 3 (NOTE: Professor Yoo is now Director of a Berkeley Law clinic. Berkeley Law clinics typically fulfill the student Professional Responsibility requirement.)

"It is true, I believe, that government lawyers have a larger, higher client than their political supervisors; there are circumstances when a fair reading of the law must--perhaps as an ethical matter--provide a bulwark to political and bureaucratic discretion. And it shouldn't require a

private plaintiff and a Supreme Court ruling to make it so. Few professions require an oath at entry, but law does. Oaths must mean something." pp. 2-3

Excerpts from the Faculty Code of Conduct and Disciplinary Procedures for the Berkeley Campus:

"Professors, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and to state the truth as they see it. To this end professors devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty. Although professors may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry." (AAUP)

"Professors give due regard to their paramount responsibilities within their institution in determining the amount and character of the work done outside it." (AAUP)

"Types of unacceptable conduct" include: "Serious violation of University policies governing the professional conduct of faculty, including but not limited to policies applying to research, outside professional activities, conflicts of commitment, clinical practices, violence in the workplace, and whistleblower protections."

Excerpts from the Pennsylvania Rules of Disciplinary Enforcement:

The Disciplinary Board must carefully examine members of the State Bar who may have (a) failed to meet the scope and objectives of legal representation, and (b) failed to exercise independent professional judgment and render candid advice. "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Rule 1.2(d)

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Rule 2.01

Excerpts from the U.S. Torture Statute TITLE 18 PART I CHAPTER 113C § 2340A. Torture:

"(a) Offense.-- Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life....

(c) Conspiracy.-- A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy."