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2-7-2010

February 7, 2010: The Crime of John Yoo

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Repository Citation

Ledewitz, B. (2010). February 7, 2010: The Crime of John Yoo. Retrieved from <https://dsc.duq.edu/ledewitz-hallowedsecularism/389>

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Title: The Crime of John Yoo

Date: 2010-02-07T08:49:00.002-05:00

Not a tragedy of course—many people have been without power the last two days, me included—but causing a delay in seeing my letter about John Yoo in today's book review section. Here it is [online](#).

The editors softened the letter by omitting my attack on legal academia, which has accepted Yoo without any investigation of actions such as the torture memo, which was written by then Justice Department lawyer John Yoo and signed by then Assistant Attorney Jay Bybee. The memo constituted a formal legal opinion of the Office of Legal Counsel of the Department of Justice. I state in my letter that Yoo may be a war criminal for knowingly misstating the law in order to promote actions that were in violation of the law of war and international law.

I wish to respond here briefly to the criticism that I am merely pointing to a difference of opinion on legal matters. Yoo cannot be guilty of a crime for simply giving his opinion of the law.

This last statement is correct. But that is not the allegation against Yoo. To illustrate this, consider the introduction to the last part of the memo, Part V: "In Part V, we discuss whether Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war. In Part VI, we discuss defenses to an allegation that an interrogation method might violate the statute. We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A." [[Full text of memo here](#)].

Yoo's job was to state the law as it then existed. That does not mean to argue for a new interpretation of the law that Yoo genuinely believed was what the law was meant to be. It does not even mean predicting what a new Supreme Court opinion might hold. Yoo's job was the equivalent of that of a lower federal court following existing precedent.

Thus the question is whether in 2002, when the memo was written, a lower federal court would, or even might, have held unconstitutional, in a prosecution of persons accused of torture, a legislative limit on the President's authority to order torture or would or even might have held that torture of enemy combatants constitutes self-defense or necessity as a defense to such a prosecution.

The simple answer to this question is that no federal court would have so held in 2002. Even the use of the weasel word "may" in the memo seems to me to constitute knowing misstatement of the law because there was no real possibility of such a holding. Since Yoo was counseling the government to violate the law of war, war criminal seems the correct designation for him. [For further discussion of the torture memo in the context of war crimes, see the [Jurist op-ed](#) by University of Maine law professor James Friedman]