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Ten Years of Torture: Marking the 10th Anniversary of John Yoo’s “Torture Memos”

by Andy Worthington
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Exactly 10 years ago, on August 1, 2002, Jay S. Bybee, who at the time was the assistant attorney general in the Justice Department’s Office of Legal Counsel, signed two memos (see [here](#) and [here](#)) that will forever be known as the “torture memos.” Also identified as the “Bybee memos,” because of Bybee’s signature on them, they were in fact written primarily by John Yoo, a law professor at the University of California, Berkeley, who worked as a lawyer in the OLC from 2001 to 2003.

Although the OLC is supposed to provide impartial legal advice to the executive branch, Yoo was not interested in being impartial. As one of six lawyers close to Vice President Dick Cheney — along with David Addington, Cheney’s legal counsel; White House Counsel Alberto Gonzales; White House Deputy Counsel Tim Flanigan; William J. Haynes II, the Pentagon’s general counsel; and his deputy, Daniel Dell’Orto — Yoo played a significant role in formulating the notion that in the Bush administration’s “war on terror,” prisoners could be held as “enemy combatants” without the traditional protections of the Geneva Conventions; in other words, without any rights whatsoever.

That position was confirmed in [an executive order issued by George W. Bush on February 7, 2002](#). It was not officially challenged until the Supreme Court reminded the government, in [Hamdan v. Rumsfeld](#) in June 2006, that [Common Article 3 of the Geneva Conventions](#), which prohibits torture and “outrages upon personal dignity, in particular humiliating and degrading treatment,” applies to all prisoners seized in wartime.

What was never officially mentioned, and is still unknown to many U.S. citizens, is that the [UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), which Ronald Reagan signed in 1988, confirms that there are never, ever any excuses for the use of torture. Article 2.2 states unambiguously, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

In the “torture memos,” Yoo — with Bybee’s approval — attempted, cynically, to redefine torture so that it could be used on [Abu Zubaydah](#), the “high-value detainee” seized in a house raid in Faisalabad, Pakistan, on March 28, 2002. Yoo claimed that torture was the infliction of physical pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” or the infliction of mental pain which results “in significant psychological harm of significant duration e.g. lasting for months or even years.” Compounding his arrogance, it was later discovered that Yoo had lifted his definitions from a Medicare benefits statute and other health-care provisions.

Yoo — and Bybee — also approved 10 techniques for use on Abu Zubaydah, including waterboarding, an ancient torture technique, known as *tortura del agua* to the more honest torturers of the Spanish Inquisition, which involves controlled drowning. As a result, [Zubaydah was waterboarded 83 times](#); another “high-value detainee,” Khalid Sheikh Mohammed, was waterboarded 183 times.

Unforgivably, Yoo and Bybee have never been prosecuted for their cynical decision to claim that torture is not torture — and they are joined in this lack of accountability by all the other torturers of the Bush administration, including Bush, Cheney, Donald Rumsfeld, Addington, Gonzales, Flanigan, Haynes, and Dell’Orto, as well as Douglas Feith, the undersecretary of Defense for policy, who was included in [a Spanish anti-torture lawsuit](#) as part of the “Bush Six,” along with Addington, Bybee, Gonzales, Haynes, and Yoo.

In Yoo’s and Bybee’s case, a four-year internal investigation into their ethical conduct concluded in 2009 that they were guilty of “professional misconduct.” It was a conclusion that would have led to professional sanctions and that might have opened an entire can of worms for Yoo, the law professor, and Bybee, who by then was a judge on the Ninth Circuit Court of Appeals. However, a notorious DoJ fixer, David Margolis, was allowed — or encouraged — to overwrite the report’s conclusions, deciding instead that the two men had only exercised “poor judgment,” a decision that carried no possibility of any sanctions or accountability whatsoever, as I explained in [an article at the time](#).

The decision to allow Margolis to allow Yoo and Bybee to evade accountability is typical of the Obama administration, which has refused to engage with any attempt — internally or internationally — to prosecute those involved in the Bush administration’s torture program, even though crimes were undeniably committed, as I explained in [an article a month after Margolis’s whitewash](#).

As a result of the refusal to hold anyone accountable for torture, America’s entire belief in itself as a country founded on the rule of law has been poisoned. The only hope for those demanding

accountability appears to be the possibility that other countries will do what senior U.S. officials have refused to do.

In Spain, for example, two cases, including the case against the “Bush Six,” already mentioned, are still ongoing. And in Poland an investigation into a secret CIA torture prison that existed from 2002 to 2003 is also ongoing, with [charges already leveled](#) against the country’s former spy chief, Zbigniew Siemiatkowski.

Time will tell whether these attempts will eventually ensnare the architects of America’s descent into a nation that officially embraced torture. But it is important that anniversaries like this are remembered, even if amnesia has stricken almost the whole of the mainstream media.