

# YOO AND ACADEMIC FREEDOM

Via Marty Lederman, John Yoo's Dean, Chris Edley, writes a provocative (though unsurprising) letter regarding John Yoo and academic freedom (h/t scribe). I've interspersed some comments and questions between the excerpts below.

Professor Yoo began teaching at Berkeley Law in 1993, received tenure in 1999, and then took a leave of absence to work in the Bush Administration. He returned in 2004, and remains a very successful teacher and prolific (though often controversial) scholar. Because this is a public university, he enjoys not only security of employment and academic freedom, but also First Amendment and Due Process rights.

As I've shared with a number of people in comments before, I had a conversation with the Provost of a prestigious private university recently; we spoke about his efforts to ensure the law faculty included good, but conservative, thinkers. I raised Yoo and it was clear that Yoo has become every Dean's worst hiring nightmare—the young, controversial, but apparently brilliant academic who goes on to do horrible things in government **after** he has gotten tenure. This whole question would be different, after all, had Yoo not had tenure before he had written these memos.

That said, I'm disappointed that Edley didn't say more about my biggest worry: Yoo's teaching. It's one thing to keep a controversial scholar on faculty because of academic freedom. It's one thing for that scholar to (as Edley describes elsewhere in his memo) air unpopular views. It's another thing to have someone who—more than anyone save David Addington on Bush's legal staff—assaulted the Constitution, doing real

damage in the short and potentially long term.

It's one thing to guard Yoo's right to write controversial academic articles. It's yet another to have him teach future lawyers Constitutional Law.

So I'm curious how Edley measures Yoo's teaching when he compliments it here? Is Yoo well-liked by students? Challenging? Rigorous? But just as importantly, is he teaching future lawyers to do as he has done, deliver the goods for the client even if doing so fundamentally conflicts with the Constitution? Is Yoo training the next generation of lawyers who will approach the law and the Constitution itself with a utilitarian attitude? Do students like Yoo because he teaches them to be the best sophists they can be? I don't know the answer, but I'd sure like to.

Does what Professor Yoo wrote while not at the University somehow place him beyond the pale of academic freedom today? Had this been merely some professor vigorously expounding controversial and even extreme views, we would be in a familiar drama with the usual stakes. Had that professor been on leave marching with Nazis in Skokie or advising communists during the McCarthy era, reasonable people would probably find that an easier case still. Here, additional things are obviously in play. Gravely so.

My sense is that the vast majority of legal academics with a view of the matter disagree with substantial portions of Professor Yoo's analyses, including a great many of his colleagues at Berkeley. If, however, this strong consensus were enough to fire or sanction someone, then academic freedom would be meaningless.

There are important questions about the content of the Yoo memoranda, about

tortured definitions of "torture," about how he and his colleagues conceived their role as lawyers, and about whether and when the Commander in Chief is subject to domestic statutes and international law. We press our students to grapple with these matters, and in the legal literature Professor Yoo and his critics do battle. One can oppose and even condemn an idea, but I do not believe that in a university we can fearfully refuse to look at it. That would not be the best way to educate, nor a promising way to seek deeper understanding in a world of continual, strange revolutions.

There is more, however. Having worked in the White House under two presidents, I am exceptionally sensitive to the complex, ineffable boundary between policymaking and law-declaring. I know that Professor Yoo continues to believe his legal reasoning was sound, but I do not know whether he believes that the Department of Defense and CIA made political or moral mistakes in the way they exercised the discretion his memoranda purported to find available to them within the law. **As critical as I am of his analyses, no argument about what he did or didn't facilitate, or about his special obligations as an attorney, makes his conduct morally equivalent to that of his nominal clients, Secretary Rumsfeld, et al., or comparable to the conduct of interrogators distant in time, rank and place. Yes, it does matter that Yoo was an adviser, but President Bush and his national security appointees were the deciders.** [my emphasis]

This last bit—which I disagree with—strikes me as the reverse Nuremberg defense. In the same way those who facilitated torture still cling to

the inadequate claim that they were just following bad orders, Edley here gives Yoo the excuse that he was just providing advice, that his advice is distanced from the outcome of that advice because someone else ultimately exercises the key moral decision. Furthermore, I think this argument allows Edley to ignore what appears to have gone on here—Yoo appears not to have conducted real analysis, but rather he appears to have delivered shoddy opinions that gave Bush and Rummy and Tenet and Cheney the green light to do what they had decided to do before they sought his advice. Yoo, in a sense, willingly took on the role of decider here, because by providing such utilitarian opinions, he freed Bush and Rummy and Tenet and Cheney of the requirement that they risk their own moral authority to implement plans they claim were correct. Yoo lent them his own moral authority, and in doing so allowed them to escape the moral and legal consequences of their own decisions.

So, yeah, Bush and Rummy and Tenet and Cheney are in the wrong here. But so is Yoo, because he has tried and has thus far succeeded in placing them in a position where all of them can commit moral wrongs without owning those actions.

Ultimately, I think Edley makes the wrong comparison with Yoo's actions. It's not a question of whether Yoo's opinions are worse than a historian denying the holocaust or a professor who, in his own time, marches with Nazis. Rather, the correct comparison seems to be with a doctor—who happens to teach at a university—willfully hurting his patients. Or an engineer—who happens to teach at a university—who willfully builds bridges he knows will collapse.

That comparison may not—probably does not—change the high standards for academic freedom. I tend to believe that before Berkeley could attempt to fire Yoo, he would have to be disbarred, OPR would have had to find he acted improperly when he wrote his opinions on torture and warrantless wiretapping (and, unfortunately, that's unlikely

to happen). But that doesn't prevent Berkeley from seriously considering whether it is wise to have a man who has violated the ethics of his craft—indeed, challenged the Constitution on which that craft rests—teaching his methods to students who will one day be expected to fulfill the ethics that Yoo has so badly failed to fulfill.