“IT’S NOT THAT YOO ENGAGED IN REALLY BAD LAWYERING, REALLY IT’S NOT”

I’m fascinated by this op-ed by David Rivkind and Lee Casey, arguing that we’re all beating up on poor little John Yoo because we believe international law should trump US law.

> In truth, the critics’ fundamental complaint is that the Bush administration’s lawyers measured international law against the U.S. Constitution and domestic statutes. They interpreted the Geneva Conventions, the U.N. Convention forbidding torture, and customary international law, in ways that were often at odds with the prevailing view of international law professors and various activist groups. In doing so, however, they did no more than assert the right of this nation — as is the right of any sovereign nation — to interpret its own international obligations.
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> [snip]
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> That is why these administration attorneys have become the particular subjects of attack.

The central thrust of the op-ed is, of course, one giant shiny object. The role of international law has absolutely nothing to do with calls for Yoo to be held liable for his egregious opinions authorizing torture and warrantless wiretap. As I have pointed out, Looseheadprop has pointed out, and apparently Jack Goldsmith and other lawyers have pointed out, the problem was rather that Yoo ignored the key precedent in US law when he formulated his opinions. From Lichtblau’s book:

> When Goldsmith and other Justice Department lawyers dusted off the early legal opinions on the NSA program, they were shocked to find that Yoo had not even factored into his legal analysis a seminal Supreme Court precedent on presidential power: the Youngstown steel case.

If I, a non-lawyer, can poke giant holes in Yoo's legal opinions with a 30 second PDF search, then those opinions should clearly not be relied upon as valid. The question, though, is why the opinions were so shoddy: deliberate intent or incompetence? Using Rivkin and Casey's assertion that Yoo is one of "the country's finest legal minds," I have to conclude that the opinions are so shitty because Yoo could only authorize the things he did by ignoring US law—and that his effort to sidestep US law was indeed, an ethically and perhaps legally problematic act. The fact that Jack Goldsmith agrees with me about the shoddiness of these opinions—someone who fully agrees with Yoo about the appropriate role of international law in the US—proves that our complaints have nothing to do with international law.

So Rivkind and Casey are clearly trying to misrepresent to the WSJ's readers what's at issue here. They're trying to distract from the fundamental shoddiness of Yoo's (and others') opinions.

Why? And why now?

I would assume that Rivkind and Casey—the Bush Administration's primary legal apologists for the Administration's abuses of power—have been sent out to start muddying the issues surrounding the legal opinions underlying the key actions in the Bush GWOT. That is, I would assume this op-ed reflects a real concern on the part of the Administration that the debate over the role of lawyers justifying their legally suspect programs is about to become more politically charged. And the fact that Rivkind

and Casey published in the WSJ suggests the Administration is even worried about the public opinion of the WSJ's conservative readers.

I can't help but think of something that Scott Horton wrote shortly before he hung up his blogging keyboard (~~but which I can't seem to find this morning~~ Update: thanks to William Ockham for finding the link): the role that Yoo and Haynes and others came to play in our regime of torture may be about to break open in a public way.

> In response to this "legal uprising," David Addington and Alberto Gonzales decided to task John Yoo to prepare memoranda. These memoranda were commissioned with two purposes in mind. First, to protect the policymakers who had authorized torture techniques from future criminal liability (something which Gonzales had identified as early as January 2002 as a serious prospect). And second, to wield the Attorney General's opinion powers to silence lawyers who had correctly evaluated the legal framework.
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> Both of these purposes were wrongful, and inconsistent with the proper use of the Attorney General's opinion power. Criminal investigators may well conclude that this act joined John Yoo in a joint criminal enterprise with the persons who devised and pushed implementation of the torture policies.
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> Indeed, this is not entirely a speculative matter. We will shortly learn in the mass media that some prosecutors have already reached that conclusion and that the preparation of a criminal case is underway.

If they're already sending Rivkin and Casey out to confuse the issues, I suspect the Administration is rather worried about what's to

come.