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Professor William Drummond  
Chair, Academic Senate, Berkeley Division  
Stephens Hall  
University of California

Dear Professor Drummond:

As we discussed this morning, I write this as a consequence of reading what Boalt Dean Chris Edley calls the "Torture Memo" of Professor John Yoo—which horrified me. I write to ask you to appoint a special committee to examine the matter of Professor John Yoo--the matter that Boalt Hall Dean Chris Edley has named "The Torture Memo and Academic Freedom"—the role played by John Yoo in the Bush administration's policy of subjecting to torture not high-ranking Al Qaeda members with information about ticking bombs but low-level prisoners irrespective of their guilt or innocence or of any information suggesting their guilt or innocence.

I ask you to appoint to this special committee members of the faculty with expertise in moral philosophy, the role of the university, international relations, human rights, and constitutional law. I ask you to instruct this committee to write of a public report to the Academic Senate no later than this Labor Day, advising the Senate of the pros and cons of actions that the Academic Senate might or might not take in the matter of Professor John Yoo, including:

(I) no action, as Professor Yoo's actions while on leave at the Office of Legal Counsel have been misrepresented in the press and on the internet, and he has been defamed.

(II) no action, as Professor Yoo's "Torture Memo" and related work while on leave at the Office of Legal Counsel are protected under academic freedom or are otherwise not germane to his status at Berkeley.

(III) a complaint to Executive Vice Chancellor and Provost George Breslauer calling for the censure of Professor Yoo for actions while on leave at the Office of Legal Counsel that amount to one or more of:

(A) a breach of professional legal ethics, with respect to the duty that a lawyer and above all a law school teacher who educates future lawyers owes his clients to inform them truthfully and completely of the state of the law;

(B) work performed for the Office of Legal Counsel sufficiently misleading to rise to the same level in a professional school as work that violates the principles of scholarly integrity reaches elsewhere in the university;

(C) participation in a conspiracy to violate U.S and international law by torturing detainees, detainees whose guilt in the acts of or even association with Al Qaeda was not only not proven but not even likely.

(IV) a complaint to Executive Vice Chancellor and Provost George Breslauer calling for the dismissal of Professor Yoo for actions while on leave at the Office of Legal Counsel that are, et cetera.

If you have not read John Yoo's recently-released "Torture Memo," and have not been as horrified and appalled as I am, I strongly urge you to read it in full.

However, after reading the "Torture Memo" I found myself frozen, with no firm or settled judgment as to what appropriate action is in this context. I lack sufficient knowledge of the facts. I lack sufficient knowledge of the issues. Thus I want you to appoint a special committee to write a report because I am enough of a liberal and enough of an academic to believe that discussion of these issues will help.

On the one side there are the claims of academic freedom, enunciated most strongly by our own medieval historian Ernst Kantorowicz just before his resignation from the faculty in protest. He said:

There are three professions which are entitled to wear a gown: the judge, the priest, the scholar. This garment stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and his god. It signifies the inner sovereignty of those three interrelated professions: they should be the very last to allow themselves to act under duress and yield to pressure. It is a shameful and undignified action, it is an affront and a violation of both human sovereignty and professional dignity that the Regents of this university have dared to bully the bearer of this gown into a situation in which--under the pressure of bewildering economic coercion--he is compelled to give up either his tenure or, together with his freedom of judgment, his human dignity and responsible sovereignty as a scholar...

In Professor Kantorowicz's view, a Berkeley faculty member should be allowed to state whatever his or her judgment leads him to state--even if it is that the government of the United States should be overthrown by force and violence--and that no pressure or threats of any kind should be applied to discourage him from saying what he or she decides to say.

On the other side there are at least four interrelated considerations.

The first consideration is that Professor Yoo is professor at a professional school, Boalt Hall, and thus must teach and model professional behavior that will be expected of his students as lawyers. Professor Yoo failed in his Torture Memo to make any reference to the Korean War case of *Youngstown*, an essential part of any good-faith contemporary analysis of the war powers of the executive branch. This failure to analyze and other

deficiencies in the memorandum make it, I have been told, a serious breach of professional ethics--misconduct in failing to fulfill his professional duty to provide his clients with a complete and truthful statement of the law. Writing legal arguments that ignore (not find some way to distinguish, but flatly ignore) controlling precedent is misconduct. Students learning to be lawyers need to be protected from coming to believe that it is an acceptable part of lawyering.

The second consideration is that the work product for others outside the university performed by faculty who teach at professional schools plays a role analogous to that of academic research in other branches of the university. I am informed by some that the argumentative omissions and misrepresentations in the Torture Memo and in other work by John Yoo for the Office of Legal Counsel amount to misconduct that rises to a level equivalent to that of falsifying evidence in a scholarly work. As one attorney observed, "while outside legal work isn't formally scholarship, it has its own ethical obligations." The absence of relevant Supreme Court precedent from the Torture Memo is a "failure to meet the standards of practice required by the legal profession [that] appears... close enough to a failure to abide by the standards of the scholarly profession that it can be treated as an equivalent level of scholarly misconduct."

The third consideration is that some claim that Professor Yoo was not just an advisor, informing those whom Boalt Dean Chris Edley calls the "deciders"--George W. Bush, Richard Cheney, George Tenet, and Donald Rumsfeld--his view of what the law was. Professor Yoo was an implementer. The decision had already been made to torture detainees of unknown but probably low value who there was no reason to think had any knowledge of any possible "ticking bomb." Attorneys at the CIA and the Department of Defense were protesting that this policy of routine torture was illegal: contrary to U.S. and international law and treaty, and exposed them to potential criminal sanctions. Professor Yoo was asked not to provide an opinion but to write a document to override objections to an already settled-upon course of action, making wrongful use of the opinion-issuing power the Attorney General possesses within the executive branch to silence lawyers who had correctly evaluated the legal framework--and so cramdown the torture policy by issuing what was essentially a "get out of jail free" card in the guise of an OLC opinion. This, I am informed by some, may be a crime. I am informed that the standard, under treaties that are the law of the land in the U.S., is that an act of legal advice that materially contributes to the perpetration of acts of torture and cruel, inhuman, or degrading treatment is a criminal act if the actors were at minimum reckless as to the consequences of their advice: it is necessary only that the actors have accepted that their conduct could possibly and foreseeably lead to the commission of a crime, not that they have known the exact crime that was contemplated and was to be committed.

The fourth consideration is that it is a key part of our society that our lawyers in the common-law tradition have no association with torture--that it is part of their professional identity to know nothing of the rack, the thumbscrew, the strappado, induced hypothermia, and the water torture. So William Blackstone wrote centuries ago. A rack had been set up in the Tower of London by the Duke of Exeter under Henry IV, and had been used by Queen Elizabeth to torture Jesuits, and by King James I to torture conspirators in the aftermath of the Gunpowder Plot--a true ticking bomb. But, William Blackstone proudly stated, this rack had always been "an engine of state, and not of law." Some inform me that John Yoo's role in making the strappado and the water torture--which Bush administration members of the twenty-first century speak of in euphemisms as "severe interrogation methods," just as the Elizabethans of the sixteenth century would speak of taking prisoners to embrace "the Duke of Exeter's daughter"—routine bureaucratic policy is enough of a breach of professional ethics to make him unsuited to teach in a law school.

I cannot evaluate these considerations. The facts are unclear. I have no special expertise in moral philosophy, professional ethics, the role of the university, international relations, human rights, or constitutional law. I am

out of my depth. But I do know that these are vitally important issues--and I firmly believe that Berkeley as an institution does itself no good service if it does not publicly address the matter of John Yoo, and does not face us with an extraordinarily sharp conflict between powerful principles.

And so I ask that this matter be referred to a committee that has the proper expertise: a committee that can properly weigh the considerations of moral philosophy, professional ethics, the role of the university, international relations, human rights, and constitutional law, and publicly set out its conclusions and our options. I do this in the classical liberal belief that argument and discussion are good, and will make us see these issues more clearly.

Sincerely yours,

J. Bradford DeLong  
Professor of Economics