Written by **Thomas R. Eddlem** on January 31, 2009

"Torture Memo" Author Attacks Torture Ban

Yoo was the primary author of what was popularly called the "torture memo," which was issued under the byline of his Justice Department boss Jay S. Bybee, so his column in the *Wall Street Journal* was perhaps not surprising. The torture memo purported to give legal cover for the Bush administration to engage in practices universally regarded before September 11 as torture while at the same time denying it was torture.

In his column, Yoo criticized Obama's decision to close Guantanamo, claiming that "the civilian law-enforcement system cannot prevent terrorist attacks." He implied: 1. Bush stopped all terrorist attacks; and 2. Obama would rely exclusively upon local police and Miranda rights for international terrorist networks.

It should be stressed that the Bush military enforcement system hasn't prevented attacks on Americans. American soldiers have suffered thousands of deaths and tens of thousands of injuries from thousands of terrorist attacks under the Bush policy, resulting in far more than the deaths from September 11. But Yoo doesn't count terror attacks against our soldiers, implying that their lives do not mean as much as other people's lives.

And no one, including Obama, ever said that the federal government would have to rely exclusively on the civilian justice system to deal with terrorists. Indeed, foreign terrorists have traditionally been tried and convicted under either the civilian or military system. And nothing in Obama's executive orders prevents the use of the military justice system from dealing with terrorists.

Yoo's false assumption that Obama plans to criminally prosecute the detainees in the civilian system leads to a whole host of red herring issues. "A defendant's constitutional right to demand government's files often forces prosecutors to offer plea bargains to spies rather than risk disclosure of intelligence secrets," Yoo concluded. But the Uniform Code of Military Justice allows for witnesses to be heard in secret while at the same time protecting the rights of the accused. The Obama administration could still use the military prosecution option without creating the outrage of justice that the Bush Administration tried to impose on detainees.

"Military commission trials have been used in most American wars," Yoo wrote, in an attempt to justify the Bush administration's failed military commission systems. But Yoo failed to mention that past military commission trials were conducted under the Uniform Code of Military Justice.

Perhaps even more importantly, he failed to mention that Bush administration tried its best to avoid bothering to have any military commission trials at all. The Bush Justice Department openly claimed the right to detain anyone it declared an enemy combatant — whether American citizen or foreigner — indefinitely. They fought any hearing — civilian or military — all the way to the Supreme Court several times, and eventually settled on a kangaroo court-style hearing concocted by the executive branch without any legal foundation. And it only bothered to establish its own military commissions after some detainees were on the verge of winning Supreme Court decisions.

The obviously unconstitutional Bush "military commissions" were abolished by the U.S. Supreme Court in the Hamdan case, and Congress then passed the Military Commissions Act of 2006 to give the false veneer of constitutionality to essentially the same kangaroo courts that had just been quashed by the Supreme Court.

The Fifth and Sixth Amendments of the U.S. Constitution allow only two systems of justice for dealing with those accused of crimes: civilian justice and the military justice. The latter is today called the Uniform Code of Military Justice.

The Military Commissions Act, which invented a third justice system for certain detainees the administration clamed were enemy combatants, was rightly declared unconstitutional by the Supreme Court last year.

Yoo also employed and obviously false rhetorical statement as a means of criticizing Obama's ban on U.S. government officials employing waterboarding and other forms of torture: "His new order amounts to requiring — on penalty of prosecution — that CIA interrogators be polite." The executive orders do not require CIA interrogators to be polite, and Yoo knows this. In fact, some observers have correctly pointed out that Obama's executive orders still allow the loophole for torture through the Bush policy of "extraordinary rendition." Many detainees (even innocents) have been subject to the most brutal forms of torture under this policy.

"It is naïve to say," Yoo concludes, "as Mr. Obama did in his inaugural speech, that we can 'reject as false the choice between our safety and our ideals." Clearly, Yoo believes we must give up our most cherished freedoms in order to be "safe."

But history has documented the opposite, that people who are not free are never safe.