

Is This Man a Monster?

The president asked John Yoo to define torture. He did it. Are Yoo's "torture memos" one of the most heinous mistakes in American history—or could he have been right?

HE IS THE YOUNG JUSTICE DEPARTMENT LAWYER—thirty-four at the time—who wrote the Bush administration's first decisions on prisoner detention, interrogation, habeas corpus, military commissions, and the Geneva Conventions. He is the man who defined torture as pain equivalent to "death or organ failure," who said that the president could crush the testicles of a child to make his father talk, who picked the lock on Pandora's box and unleashed the demons of Abu Ghraib. He's been accused of war crimes and compared to the Nazi lawyers who justified Hitler. Many good Americans would like to see him fired, shamed, even imprisoned. But in his classroom at Berkeley School of Law, John Yoo is a charming and patient teacher, popular with students and cordial to all. He's wearing an elegant blue suit offset by a shiny silver tie. His face is more like a shield than a face, expressionless and almost perfectly round, but his voice is relaxed and warm. At this moment, he's trying to get his students to define war. "So Judge Tatel says it's not so hard to say what a war is—casualties. What else?"

"Aircraft flying everywhere."

"There were no wars before Kitty Hawk?"

"Ships sailing around."

"So maybe the use of armed forces. But in the 1980s the U. S. bombed Libya. It lasted an hour, less than a hundred people were killed. Would that meet your standard for a war?"

No, the student says.

[By] **JOHN H. RICHARDSON**

For more on this story, and for the complete John Yoo interview, go to esquire.com/john-yoo.



"How about use of troops? The U.S. sent troops to Somalia, primarily to reduce civilian casualties. Is that a war?"

"I don't think so."

The questions keep coming until the student hits overload. "There are scholars who spend their lives studying this!"

Yoo chuckles. "Unfortunately including myself."

It seems grotesque, doesn't it? To sit in a comfortable classroom as the future lawyers of America clack away on their laptops, parsing definitions with the man whose legal mind turned America into a torturing nation?

Jose Padilla's lawyers certainly think so. "We are talking about the torture of an American citizen in an American prison by American officials," one of them told me, indignation rising fresh in his voice. Padilla is the former Chicago gang member who was arrested in O'Hare Airport in May 2002 as he returned from terrorist training camps in the Middle East with plans—or so the government believed—to explode a "dirty" nuclear bomb in the United States. After he was convicted on more general terrorism-conspiracy charges, his lawyers took the extraordinary step of filing a lawsuit against the junior-level lawyer they saw as the first link in the chain. "Defendant Yoo prepared the Torture Memos," they said, referring to several Justice Department opinions, including a memo that was signed on August 1, 2002, and withdrawn in shame two years later. "He knew the Torture Memos would be transmitted to senior government officials, including officials at the White House and Department of Defense, and would be relied upon by military and intelligence officers in formulating and implementing programs of confinement and interrogation for suspected 'enemy combatants.'" Yoo also wrote the memo that put the "enemy combatant" label on Padilla. As a result, the lawsuit claims, Padilla was held without charges for three years and eight months, completely alone under twenty-four-hour camera surveillance, with his windows blacked out and no clock or radio or TV to help him mark time. Sometimes the lights were left on for days, sometimes he was left in the dark for days, sometimes the cell was extremely hot, sometimes extremely cold. His sleep was constantly interrupted and he was threatened with death and given disorienting drugs and shackled and forced into stress positions for hours at a time. Whenever he was moved, he wore a blindfold and noise-canceling headphones to reinforce his isolation and helplessness. After a few years of this intentional effort to break his will and destroy his mind, Padilla was given to "involuntary twitching and self-inflicted scratch wounds" and his jailers often observed him weeping in his cell, so broken and passive that he had become "like a piece of furniture."

Padilla's claims have not been proven. Some of them, like the accusations of death threats and use of drugs, go beyond even Yoo's liberal interpretation of interrogation laws. But they remind us of what we have done *and what we will continue to do*. Consider the fight over Michael Mukasey's nomination for attorney general, when Mukasey refused to call waterboarding torture. He said he didn't want to put the CIA officers who made these judgments in the heat of battle "in personal legal jeopardy." It seemed so ridiculous, right out of 1984. The Khmer Rouge used waterboarding. We prosecuted Japanese generals for doing it. But Mukasey was confirmed anyway, and four months later President Bush vetoed a law that banned waterboarding. Consider also that courts and Congress have endorsed many of Yoo's opinions, including the use of military commissions and the extended detention without criminal charges of "enemy combatants" who are American citizens.

And consider this—we still can't even agree on the basic question that Yoo is asking his law class today, which turns out to be not a quibble or a technicality but the very first question that landed on his desk on the afternoon of September 11, 2001:

Is this a war? How can the president respond? Can he use the Army? Will he need congressional approval? *Is this a war?*

"It's like pornography," one student says. "You know it when you see it."

It's just semantics, says another. "When there's something as powerful as war, we don't want the president to just go ahead."

But why not? Yoo asks.

"Because we like checks and balances and we like the Constitution?"

"So you're worried about one person making mistakes. War is so dangerous, the stakes are so high, you wouldn't want one person making that decision?"

"That's why it's so important to have checks and balances," the student agrees. "Otherwise the president could run wild. Like we have today, with the powers of an unchecked president—I call that running wild."

"So you're worried about errors," Yoo answers, perfectly calm. "That's certainly the case with Iraq. We overestimated the benefits and underestimated the costs."

But now the hour is up and the students gather their papers—and Yoo still keeps shooting out last-minute questions. "Is the president really prone to error more than the other branches? Isn't that also true of Congress? If you require Congress to give preapproval for every conflict, what is the cost? Why didn't Truman ask for a declaration of war in Korea, even though Congress would have given him one?"

These are hard questions. Most of us shrug them off and judge Yoo and Bush through the lens of Abu Ghraib and Guantánamo. But Yoo didn't shrug them off. He put them at the center of his thinking. As a consequence, he is being hauled before Congress in May and will be forever defined by the abuses of the Bush administration.

From his office, he has a million-dollar view of San Francisco and the Golden Gate Bridge. There are law books everywhere. His screen saver is a picture of his wife. His iPhone screen saver is a picture of his wife too, which helps take the edge off all the hate calls. On the floor, there's a shopping bag from a local hippie institution called Amoeba Music. On the wall, a framed goodbye card from the Department of Justice. "Thank you for your excellent service to America," John Ashcroft wrote. "We are stronger and safer because of you."

He turns out to have lots of unexpected quirks. He's pro-choice. He thinks flag burning is a legitimate form of free speech. He thinks the government is "wasting a lot of resources" in the war on drugs. He thinks the phrase "war on terror" is misleading political rhetoric. He's cowriting an article that makes a conservative case for gay marriage. "Our argument is, the state should just stay out of these things, because it doesn't hurt anybody." And he's definitely alarmed by the more theocratic Republicans. "When Mike Huckabee says he wants to amend the Constitution so that it's consistent with God's law, that scares the bejesus out of me."

We go for a stroll down Telegraph Avenue, and he's a bit disappointed there aren't more tie-dyed renegades. "Usually this

[I]t must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.

¹ This narrow definition of illegal torture became the most notorious passage from the “torture memo” authored by Yoo, signed on August 1, 2002, by Assistant Attorney General Jay S. Bybee, and approved by John Ashcroft.

is the land time forgot.”

“Do you often come here to mock the hippies?”

“I don’t come here specifically for that. I try to multitask.”

The hippies might be worn out from protesting, he says. Two weeks ago, the Berkeley City Council called the local Marine recruiters “unwelcome intruders” and it turned into a huge controversy, with Republicans threatening to cut millions in city funds and thousands of protesters massing outside City Hall with signs that said WATERBOARDING IS TORTURE and TAKE A STAND AGAINST TORTURE. “I think the city was nuts,” Yoo says. “You can be against the war, but to be against the armed forces? It’s crazy.”

“People aren’t always as coherent as you’d like them to be.”

“It shows you what a strange place this is.”

“Or how unpopular the war is.”

“It’s the level of anger that really shocks me,” he says.

“I’m surprised that you’re surprised,” I say.

The anger is often directed at him. Protesters in Guantánamo orange have disrupted his class and dogged him in public forums. I talked to another Berkeley law professor who refuses to attend faculty meetings with him. “Until he atones,” he said, “I don’t want to be in the same room with him.” But Yoo shrugs it all off. He likes living among liberals, he says. “Liberals from the sixties do a great job of creating all the comforts of life—gourmet food, specialty jams, the best environmentally conscious waters.”

We stop in at Amoeba Music and he cruises the sci-fi shelves—he’s a fan of *Ghost in the Shell*, the anime that inspired *The Matrix*. Usually he buys classical music, but his taste in pop runs to anthemic bands like the Who and U2. “Nothing too esoteric. I don’t have any fancy tastes in pop music.”

He seems very pleased that the entire record store smells like marijuana. “That’s what Berkeley smells like!”

At Steve’s Korean B.B.Q., Yoo talks about his parents. They were teenagers during the Korean War, a serious pair who both became doctors and moved to the U.S. out of gratitude and a love of democracy. “They saw the United States as saving their country, and I agree with them,” he says. “It *did* save their country. And then it let people in. It was extraordinarily generous. I wouldn’t be here if it wasn’t for the generosity of the United States.”

He grew up in the elite Main Line area of Philadelphia and

went to a prep school where he wore a suit and tie and learned Greek and Latin. He seems to have been a natural-born conservative, attracted even as a teenager to Ronald Reagan’s message of anticommunism, low taxes, and small government, values that resonated with the immigrant dream of personal freedom. But he was never angry or righteous about it. “He was completely open and tolerant of everyone,” says Gordon Getter, a prep-school classmate. “He had a genuine sense of humor,” says Thomas Schwartz, one of his professors at Harvard. “He would argue and people would get mad at him, but he never seemed to take it personally.”

He was also exceptionally brilliant, Schwartz says. “These were extraordinary students, and John was a star among them.”

As an undergraduate in the history department, Yoo developed a deep interest in presidential power. His senior thesis was about Eisenhower’s plan to share nuclear weapons with the other members of NATO. The example of Truman in Korea was never far from his mind—with North Korean troops sweeping south, Truman rushed U.S. troops to war without pausing for a congressional debate and tried to seize the steel companies to guarantee arms production.

But when Yoo arrived at Yale Law School, everyone seemed to agree that Congress was the dominant policymaker and should approve every war. It was the standard liberal position in the wake of Vietnam, but Yoo saw Vietnam through the lens of Korea, imagining how life would have been for his parents under the savage dictatorship of Kim Il Sung. His preference for Truman’s lonely fortitude only deepened when he became a clerk for Laurence Silberman, one of the leading champions of the “unitary executive” theory of expansive presidential powers. In free moments around the courthouse, Silberman painted Congress as a flock of tiny men with tiny ropes intent on binding the president down—annoying in peace but dangerous in war.

Over the next few years, Yoo alternated between stints as a professor at Berkeley and jobs in Washington, first with Justice Clarence Thomas and next with Senator Orrin Hatch. Though he disagreed with them on basic issues like abortion and the attempt to remove Clinton from office, he was drawn to their lonely integrity. Hatch was “one of the few guys in the Senate who really would go to the mat on principle,” he says. He also picked up another crucial lesson during the Whitewater investigation, when Senate committee members would demand documents and President Clinton refused to provide them, each side insisting that the Constitution supported its position. “But they worked out deals,” Yoo says. “The system is almost designed

for them to come into conflict, and they work out a deal. So that had a big effect on me.”

Back at Berkeley, he started putting it all into a book. As the first chapters hit the legal journals, he became a star on the lecture circuit, a young hotshot with a provocative theory. His basic idea was that the Constitution has tons of rules on how to pass legislation but almost nothing on war. So the president takes action and Congress fights back, an improvisation with one partner leading, and that is the way it was meant to be—the real reason Truman didn’t ask Congress for an authorization before going into Korea, the reason Clinton continued to bomb the Serbs in defiance of the War Powers Act, the reason Bush has resisted every attempt by Congress to restrict his war policies.

Yoo’s analysis hinges on the Declare War Clause. Most scholars—most people—believe it was intended to give Congress power to decide whether to go to war and that the founders saw this as an essential bulwark against tyranny. Yoo makes a case that it was really meant as a formal recognition of wars already under way, and the founders intended the real bulwark against tyranny to be Congress’s power of the purse. “Several times every year, Congress has a chance to vote on funding the Iraq war,” he keeps telling me. “It’s an amazing power—if 51 percent of them refuse to vote for it, the war is over.”

Abraham Lincoln is Yoo’s best argument. Congress had already passed a statute laying out an explicit legal procedure for freeing slaves, but Lincoln ignored the law and freed the slaves under his “unilateral executive authority in wartime as commander in chief to take measures necessary to win a war,” as Yoo puts it. Lincoln used the same grounds to suspend habeas corpus, a right the Constitution explicitly grants to Congress. If you really believe that Yoo is all wrong and the unitary-executive theory completely false, you kind of have to say Lincoln behaved like a tyrant.

Jonathan Freiman, Jose Padilla’s attorney, bristles when I run Yoo’s arguments down for him. “The Supreme Court has said every time it’s been asked since 9/11, *a state of war is not a blank check*. The Constitution applies.”

But Congress and the Supreme Court also accepted the military commissions and the enemy-combatant designation and even the indefinite detention of an American citizen named Yaser Hamdi, Yoo would say.

Freiman concedes the point. But Hamdi was arrested in a foreign country in the zone of combat, he says. “That’s a pretty small category, a battlefield in a foreign country. It’s not a category that encompasses Padilla.”

But that’s exactly the problem. Padilla was arrested a few months after his associates killed three thousand people in New York City. So where is this battlefield?

It’s a dangerous question, Freiman says. “The argument that the entire United States has become a battlefield by virtue of those heinous attacks on 9/11 is just an argument to make the Constitution completely optional, an argument to extend presidential power to the level of monarchy—to every inch of life in this country.”

For the next two hours, he pounds Yoo from every possible angle: They already had Padilla under arrest and could have held him under charges like conspiracy or levying war. But they

wanted to interrogate him and they wanted to use harsh methods, so they just made up their own rules. This was the natural result of rejecting the Geneva Conventions instead of treating Al Qaeda members as ordinary war criminals. “Before 9/11, you’re either a criminal or a soldier. What the government said was, We want a third category where the black shade is drawn, where there are no protections whatsoever, where there is no law.”

Freiman is particularly passionate when he rips into the torture memo itself. Did I know that the Justice Department was now investigating how it ever came to be written? Did I know that the man who took over Yoo’s department withdrew it, calling it “deeply flawed, sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the president?” What Yoo *should* have done was look at the Eighth Amendment, which forbids cruel and unusual punishment. He should have considered international treaties against torture and cruelty and civil rights along with a host of domestic laws and statutes. But Yoo wasn’t acting as an honest lawyer, he says. As the Padilla lawsuit states, he was “a key member of a small, secretive group of executive officials who exerted tremendous influence over antiterrorism policy and who were known as the ‘War Council.’” So he bent the law to justify a course of action he was already determined to take.

Freiman is especially scornful about the “necessity argument,” as legal philosophers call it—the idea that the president can take extraordinary actions in an emergency to protect the nation, that the information in Padilla’s head was worth cracking it open. “That’s the argument that every despotic regime in every corner of the globe has been making for sixty years,” he says. “Necessity, national security. The Nazis invoked necessity too. The question is, How do you deal with those threats? Are you bound by human rights, or are you not?”

This is why Freiman filed Padilla’s lawsuit against Yoo. To redraw that line, he says, to recover our sense of justice and decency, to salvage the idealism that once shone so bright, America must pass judgment on John Yoo.

So let’s go back to that moment in the heat of battle. The way Yoo tells the story, he was sitting at his desk at the Justice Department when the first plane hit the World Trade Center. He had only been working there two months, hired to answer the White House’s questions on foreign-policy laws at a time when the biggest legal issue before him was a treaty about polar bears. When the order came to evacuate Washington and people began heading out into the streets, someone from the attorney general’s office told him to stick around.

Soon the questions came:

Is this a war?

Do we need to declare war?

Can we scramble planes?

And again: *Is this a war?*

There was no obvious precedent. Yoo considered the level of violence and the source, thousands of civilians killed in coordinated attacks by a foreign enemy intent on crippling our government. He considered the Civil War, when people asked if it was a war or a rebellion and if Southerners should be treated as traitors or members of a foreign nation. He considered our history of warfare against nonstate groups like Indians and pirates.

He considered the level of military response that might be likely, because a military response itself would imply a state of war. He may have considered his friend Barbara Olson, dead on one of the planes. He found himself returning to this thought:

If a nation had done it, would we have any doubt it was a war?

So yes, it was a war. That's the decision he made while the buildings were still burning.

He stayed till two or three in the morning and when he left Justice and crossed the Fourteenth Street Bridge, the Pentagon was still burning. He saw the flames reaching up so high they lit the sky. But he didn't sleep because his phone kept ringing, each call another variation on the theme: Can we use force? What standards would guide the use of force? *Is this a war?*

Everyone reviewed his war memo. Ashcroft signed off. And Congress passed the Authorization to Use Military Force with only one opposing vote. If this was the first mistake in the war on terror, as many now believe, it was a mistake the nation made together.

The decision on military commissions came next and seemed like a no-brainer, Yoo says. We had always used military commissions in wartime because they were less cumbersome and many civilian laws (like stalking and assault) made no sense in a war context. It also seemed like a good idea to keep the prison camps distant from U.S. soil, both for safety and to insulate them from those same domestic laws.

The Geneva Conventions issue came up in December 2001. In retrospect it may seem obvious that any departure from Geneva was a policy mistake, the first step down the slippery slope, but Yoo points out that President Reagan explicitly refused to extend Geneva rights to terrorists in 1987. There were also technical problems, such as Geneva requirements that POWs be held in barracks instead of prisons, which didn't seem a practical approach to enemies who didn't wear uniforms and deliberately killed civilians, war criminals by definition. The Taliban was a tougher issue because Afghanistan had something closer to regular-army units and had signed the Geneva Conventions, but Yoo argued that Afghanistan was a failed state, so its signature didn't mean anything—which even he admits was pushing it. The point was, they weren't massing orderly brigades to attack the United States. They gave safe haven to terrorists. With Colin Powell pushing back, Bush finally decided to deny Geneva rights to Al Qaeda but to extend them to the Taliban—a necessary improvisation, Yoo says, a recognition that something new had entered the world.

The interrogation question came up only briefly, Yoo insists. In one meeting he attended in the White House Situation Room,

someone worried that under Geneva, "we would only be able to ask Osama bin Laden loud questions, and nothing more." But this was all just an academic exercise until late March 2002, when the CIA captured Al Qaeda's chief of operations, a man named Abu Zubaydah. They approached Yoo and said they had solid reasons to believe that Zubaydah knew the names of hundreds of terrorists and the details of attack plans that could include nuclear weapons. On top of that, Zubaydah was an expert in interrogation and how to resist interrogation. If it wasn't exactly the famous "ticking bomb" scenario come to life, where you are certain there is a bomb and certain your captive knows where it is, it was close enough. Yoo insists that nobody ever proposed crossing the line into outright torture and that he personally considers torture repugnant and unjustified under any conditions. But they did believe that this was a strange new kind of war, where the front lines were inside the heads of men like Padilla and Abu Zubaydah. So, what about things like isolation, prolonged interrogation, forced exercise, and limited sleep? Where was the line, exactly?

"How long did it take to come up with an answer?"

"I don't remember."

"Weeks? Months?"

"Probably weeks."

The Eighth Amendment did not apply, Yoo decided. It forbade cruel and unusual punishment, but punishment came only after a criminal conviction. His critics savage him for not considering American laws against coerced confessions and police brutality, but Yoo points out that the memo only applies to noncitizens "outside the United States." They say he should have considered our treaty obligations under the United Nations Convention Against Torture, which also forbids "cruel, inhuman, or degrading treatment," but Yoo believed that treaties were only binding when Congress passed statutes translating them into domestic law, a position recently affirmed by the Supreme Court. That meant the binding law was the antitorture statute Congress passed in 1994 in the wake of the convention, a statute that forbade "severe" physical pain and "prolonged mental harm." So these were the critical questions:

How do you define "severe pain"? How do you define "prolonged mental harm"?

Some say this is where he should have balked. "Torture violates the very premise of the legal system itself, that there is something irreducible and inviolable about every person," says Yoo's fellow Berkeley law professor [continued on page 150]

II

[T]he mental strain experienced by an individual during a lengthy and intense interrogation... would not violate Section 2340(2). On the other hand, the development of a mental disorder such as post-traumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement.

² A lesser-known passage from Yoo's memo that allows that harm to the mental health of the prisoner might constitute torture. This passage seems to presage the Jose Padilla case, in which Yoo is a defendant.

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[continued from page 131] Robert H. Cole. "You can't write a memo about it the way you would write about snowmobiling in Yosemite." At the very least, they say, Yoo should have warned of the moral danger the question posed to the essence of America.

Yoo says he shared those concerns. He says he thought he was writing a memo for exceptional cases, for the highly trained specialists of the CIA. "I never thought it would be a good idea for the Army to do it, to put it in the hands of eighteen-year-old kids. But it would be inappropriate if I had that that worry and it changed the way I interpreted the law."

So he buckled down to one of the world's most thankless jobs, defining the limits of acceptable pain. He knew it would be easy to draw a vague standard that sounded good and then give the CIA a meaningful wink. But that wouldn't be fair to the officers in the field.

He wanted to draw a clear line.

The problem was, the Justice Department had never prosecuted anyone under the anti-torture statute, so there were no judicial opinions to guide him. Dictionaries defined *severe* as "extreme" and "hard to endure." Yoo studied all the international precedents he could find, including the judgment of the European Court of Human Rights in *Ireland v. the United Kingdom*, which found that the use of hoods, continuous loud noise, sleep deprivation, reduced diet, and a stress position called "wall-standing" were all cruel and degrading but not torture.

So where was the line?

He got the crucial phrasing about organ failure and death from a U.S. law concerning health care.

I can't let this pass. "John, you're a very engaging guy. I like you. I can't picture you writing that phrase, 'organ failure or death.'"

"It's the phrase Congress used," he says.

"But health care and interrogation are wildly different subjects."

"That's a fair criticism. But it's still the closest you can get to any definition of that phrase at all."

"But this isn't legal theory anymore. It's going to have a body count."

"It's a difficult issue, I admit. It's the use of violence. It's unpleasant. I don't disagree with that."

"You could have drawn the line in a different place."

"I really tried to distinguish between law and policy," he insists. Despite Yoo's shocking language defining severe pain as "equivalent to" organ failure or death, he points out that the memo clearly defines as torture mock executions, threats of imminent death, and beatings. He also says it's unfair for people to confuse the war crimes of Abu Ghraib with the aggressive interrogations he authorized. His memo also includes a long list of examples of acts that various courts have found to be torture, page after page of severe beatings and electric shocks and even one case where guards shackled a man to a bed, placed a towel over his face, and poured water

down his nose—a nearly exact description of waterboarding, "which people ignore because they focus on that one sentence," Yoo says. "So if you read the whole opinion, I don't think of it as a license to do anything you want to."

It's true, the list is there, the cautionary intent clear. I've never seen it mentioned by any of his critics. But so is Yoo's pet theory about the president's unlimited war powers in an emergency, the passage that would, at least in theory, justify crushing testicles: "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements in the field." This is the section that drives people crazy. When the new head of the Justice Department's Office of Legal Counsel officially withdrew the memo, he singled it out for its "unusual lack of care and sobriety," its "curious and one-sided legal arguments." No matter what Lincoln or Truman did, they say, Yoo never should have tried to make presidential lawbreaking legal. But Yoo insists that suicide terrorism in the age of nuclear weapons is precisely the kind of situation he anticipated in his law-school theory, the reason the founders left the president's war powers vague.

"But at the same time," I say, "you know that by writing that opinion, by using those words, you're opening the gates."

"I agree," he answers. "The language is not pleasing, it's not politically savvy—I didn't see that as my job."

"And you didn't have any moral qualms?"

He looks me right in the eye. "I think there are some moral questions. But the other side of the moral question is the lives you might save. I have a hard time believing any responsible American president would have said, 'No, absolutely not, do not ask him any more questions, give him a lawyer.' I don't think Al Gore would have said that."

But those harsh interrogation techniques migrated straight to Iraq. What about that?

"That was definitely not permitted under the decision-making level I was at," Yoo says. "It was clearly not. The Geneva Conventions fully applied in Iraq."

And the memo he wrote that was made public this spring, which justified harsh interrogation techniques for military interrogators?

That worried him, he says. But it only applied to interrogators of Al Qaeda prisoners in Guantánamo, and Yoo says that he expressed his concerns to officials "at high levels of the Department of Justice, the White House, and the Department of Defense."

Is it possible that partisan loyalty blinded him to the dangers of putting all that power into the hands of a president so reckless and extreme, the worst combination of cowboy machismo with this radical theory of executive power?

"I can see why people have that view, but I just don't think this is the product of people who have this radical worldview."

"But Cheney was primed. He said we would have to go to the dark side."

Yoo doesn't say anything for a moment, then answers in his usual measured tone. "In World

War II, we interned people, tens of thousands of citizens. We tried citizens who were enemy spies under military commissions which had no procedures at all. We let the Air Force kill hundreds of thousands of civilians in fire-bombing runs in Europe. We dropped a nuclear weapon on Japan. Waterboarding we think is torture, but it happened to three people. The scale of magnitude is different."

"But if the war goes on forever, we've created a torture state."

"We've done it three times," he repeats.

"The White House launched an elective war against a country based on false premises."

"They made a mistake."

"But your theory puts the power in the hands of a person who then can invade the wrong country."

"Who can make a mistake. The Constitution can't protect against bad decisions," he insists. "What the framers were really worried about was not that the president would make a mistake, but that the president would become a dictator, and I really don't think Bush has become that."

And looking back? Does he still think it was the right decision?

"I still think I would have done the same—with Abu Zubaydah. But I didn't want the military to use these methods. My advice was not taken on that."

Yoo left the Justice Department in May of 2003, just after Mission Accomplished, three months before Major General Geoffrey Miller was sent to Iraq to "Gitmoize" Abu Ghraib.

So what is severe pain? We asked John Yoo, and he drew the line for us, and now he is tainted in our eyes, rendered unclean by his contact with the unspeakable. The broken figure of Jose Padilla and the horrors of Abu Ghraib will loom behind him forever. "I got a call from the *L.A. Times* asking me if he was a war criminal," says his old Harvard professor sadly. "All my friends see him in that light." But if you read the thousands of essays and books and blogs that rage against him, you will find very few that give a satisfactory answer to the question Yoo was asked. How would you define severe pain? If thousands of lives are at stake and time is of the essence? Would you allow sleep manipulation? Heat and cold? Isolation? Hunger? I asked Jose Padilla's lawyer three times. Where would you draw the line, Mr. Freiman? He dodged it twice. The third time he said outright, "I'm not going to draw that line for you. But I'll tell you where I would have looked—I would have first looked at the Constitution to see what was permissible, then I would have looked at the Geneva Conventions...."

So we still don't have an answer to the question. Some people take comfort in the argument that torture never works. Others say that only an imminent threat to the existence of the nation would justify it. Some say that torture should always be against the law as long as we remember that some laws are meant to be broken, a camp that includes John McCain and

John Yoo

Judge Richard Posner in his recent book, *Not a Suicide Pact: The Constitution in a Time of National Emergency*: “In national emergencies most soldiers and other security personnel are willing to do what the situation demands and leave their legal liabilities to be sorted out later. They live for such emergencies, and are selected for courage.”

Was that Yoo’s real mistake? Saying it out loud?

I ask him the question nobody in the Bush administration wants to answer. “Is waterboarding torture?”

He doesn’t hesitate. “It’s on the line. It doesn’t cause long-term or permanent pain, but it does cause intense pain. It seems to meet the requirements of the statute in some ways—but not all. So it seems to me that in very limited circumstances, you can use it.”

Is what was done to Jose Padilla morally wrong?

“I really cannot talk about that, however much I would like to, because of the litigation brought by Padilla against me,” Yoo says. “But perhaps I can say that the memos only applied to captured Al Qaeda and Taliban leaders held outside the United States. They would not apply to an American citizen or permanent resident alien held anywhere in the world, or to anyone held within the United States.”

He has other regrets. “I could have tried to press harder on what the Army should have

done,” he says. But he won’t back down on the rest. He’d write the torture memos the same today, he told me. Alone among Bush administration officials, he does not run from what he has done. He writes editorials and participates in as many as forty public forums a year. In Los Angeles, I even saw him debate a professor of queer theory, an absurd spectacle. “No man is above the law,” she said, wanting it to be simple. “This is a question of tragic choices,” he answered, insisting it is not.

Not that anyone is listening. Yoo has become the focus of national anger about every excess in the war on terrorism, and minds are made up. But dismissing him as a monster just means that we don’t have to think about why he did what he did. Grant him his good intentions, entertain the possibility that he did it to save lives, recognize the honor in his refusal to hide, and his story becomes a cautionary tale about the incremental steps that can lead a nation to disaster.

Back in his class, the ghosts return. “Let’s turn to *Hamdi v. Rumsfeld* on page 172,” he says.

The students open their books.

“Did you all do *Mathews* in civil procedure? Remember, it was a case about terminating welfare benefits, and it was all a question of balancing different interests. So what is Hamdi’s interest?”

“To not be detained—liberty.”

“And what is government’s interest?”

“To wage war.”

Pages rustle, the sound of leaves blowing across graves. ■