

# What do we do about John Yoo?

**Law professor John Yoo, author of the infamous Bush administration torture memos, is a controversial presence here at Berkeley. Did Yoo really write those memos in good faith?**

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The faculty at the University of California at Berkeley does not know what to think or say or do about our colleague, Berkeley law school professor John Yoo. Universities like ours pride themselves on a commitment to academic freedom. But we also stress our devotion to the rule of law and the primacy of human rights. And therein lies the conflict that roils the Berkeley campus.

We are not altogether certain of what Yoo did as a lawyer in the Bush Justice Department. We know that he wrote the now-infamous memos providing legal justification for torture. But some suspect that what actually transpired may have been even more disreputable; otherwise, Yoo would have spilled the beans by now in order to salvage his reputation. Or so the theory goes. We will probably never know the full truth; the law school dean, Chris Edley, has ruled that any inquiry into what Yoo said, thought, and did while he worked for the Bush administration would have an unacceptable "chilling effect" on academic freedom.

Unfortunately, that does not resolve our problem with the rule of law/human rights part of the equation.

It appears that what happened is this: The Bush White House directed the U.S. armed forces and the CIA to torture people we had captured, some of whom were terrorists, some of whom saw themselves as

lawfully fighting a just war against invaders, and some of whom were innocents in the wrong place at the wrong time, people whose names had been screamed out by others on the rack or had been sold to the CIA by local enemies or opportunists.

When the CIA and armed forces interrogators and lawyers resisted this demand, Vice President Richard Cheney's staff went to Yoo at the Justice Department's Office of Legal Counsel and asked him to write a memorandum stating that the tortures they envisioned were perfectly legal. Cheney and company then went back to the armed forces and the CIA: Here is a letter from the Justice Department stating that this is all perfectly legal, they said. There is no way that anything bad will happen to you if you obey the president's orders. You have a get-out-of-jail-free card.

Without John Yoo or his colleague Jay Bybee (or somebody else willing to write a similar memo) the torture would not have gone forward, and the United States would not have sustained the enormous damage that was inflicted on it.

Lawyer acquaintances have told me that Yoo's torture memos contain clues that they were not intended as serious legal opinions. One such clue is the complete disregard of legal precedent. In navigating through the law, you basically have the following options: You can say that the current circumstance is sufficiently like a previous case the Supreme Court has decided that that precedent rules. You can say that the present situation really has no precedent, so the court would reach an entirely new decision. Or you can say that, while there is a precedent for the situation, that precedent is wrong and should be overturned. There is no fourth option.

Yoo's memos concern presidential powers in a time of war. One famous precedent with which any lawyer would have to grapple is the Supreme Court's decision in *Youngstown*, concerning President Truman's seizure of the country's steel mills to keep them rolling during the Korean War. The Supreme Court ruled his action unconstitutional. The *Youngstown* case set out the Supreme Court's judgment as to how far the president's inherent powers go in a wartime emergency and to what degree those powers are subject to congressional authority.

In his memos, however, Yoo never mentioned *Youngstown*—either to distinguish it as sufficiently different that the decision does not control, or to argue that it was wrongly decided and should be overturned. This, the lawyers say, is compelling evidence that Yoo was acting not so much as a lawyer but as a political hatchet man.

However, most of my colleagues say that just because John Yoo did a bad thing while working for the Bush administration doesn't mean the university has cause to censure or dismiss him. We believe in academic freedom, they say, that professors have the right to say what they think and believe without fear of sanction—as long as they act in good faith.

Along similar lines, *National Journal* reporter [Stuart Taylor writes](#) that we should all stop harassing Yoo because we cannot prove that he did not act in good faith. And [Sandy Levinson](#) of the University of Texas Law School puts forward an alternative defense: that Yoo, like Truman administration Secretary of State Dean Acheson, was "present at the creation" of a new world in which old rules of executive power simply did not apply. Levinson, Taylor, and many others assert that Yoo merely wrote what he believed, setting out his understanding that the law affords the president untrammelled powers in his role as commander in chief of the armed forces.

But in *The Rule of Law in the Wake of Clinton*, a book published in 2000 by the libertarian Cato Institute, John Yoo took an entirely different view of "The Imperial Presidency Abroad," as his contribution was titled.

Yoo wrote: "President Clinton has exercised the powers of the imperial presidency to the upmost ... [and] undermine[d] notions of democratic accountability and respect for the rule of law ... ."

It's a provocative claim, especially coming from Yoo. How does he claim that Clinton did so? By using his powers as commander in chief to place American troops under the command of British NATO generals. "War power questions to one side, President Clinton's military adventures raise a second legal and constitutional difficulty—their unprecedented reliance on multilateral cooperation," Yoo writes. "That position has serious constitutional and policy defects .... [T]he Constitution nowhere permits the president ... to delegate federal power completely outside of the national government."

Yoo's Bush-era writings support presidential powers so wide-ranging that the president can order the torture of captives regardless of what treaties the U.S. has signed or what laws the U.S. Congress has passed. Yet we are expected to accept that Yoo previously believed that the president's power as commander in chief is so puny and circumscribed that he cannot lawfully put American troops under the command of allies?

Dwight D. Eisenhower—not the commander in chief but merely the theater commander—in December 1944 placed the U.S. First Army under the command of British Field Marshal Montgomery. President Wilson put the army of Gen. Pershing under the command of French Field Marshal Foch. Commander in chief George Washington put American troops under the command of Jean-Baptiste Donatien de Vimeur and Marie-Joseph Paul Yves Roch Gilbert du Motier. And let's not talk about the command authority over the Continental Army exercised by Friedrich Wilhelm Ludolf Gerhard Augustin von Steuben at Valley Forge.

So what does John Yoo believe? In the summer of 2000, when Republicans were condemning President Clinton for overreaching his powers as commander in chief, Yoo seemed to have been very happy to cook the dish. I suspect that had Al Gore been president from 2001 to 2009, Yoo's "The Imperial President Abroad" would have been the theme of subsequent Yoo articles, each arguing that President Gore had exceeded his powers.

Some Yoo defenders no doubt believe that 9/11 changed everything. I don't think it did. But if 9/11 altered the landscape so thoroughly that our old laws are no longer adequate for the new era, then we need to change our laws. We can revoke our adherence to the Geneva Conventions. We can withdraw from the U.N. Convention Against Torture. We can amend Article I so the president can suspend habeas corpus whenever he wishes. And we can remove the requirement that the federal government detain suspects only with probable cause.

Yoo didn't argue that we needed to change our laws and Constitution—he just argued that the old ones meant something completely different than what the Supreme Court held in *Youngstown*.

As for the argument that what Yoo authorized was not really a regime of torture, the last I heard, more than 50 detainees died under it. It may no longer matter to the deceased whether or not John Yoo acted in good faith. But here at Berkeley, we'd still like to know.

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