

# other means outer limits: john yoo and the public memorialization of exception

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between 2001 and 2003, John Yoo, a first generation Korean émigré who previously and subsequently worked as a professor of law at the University of California, Berkeley, served as a Deputy Assistant Attorney General for then Attorney General John Ashcroft's Office of Legal Counsel (OLC). In this capacity, Yoo was instrumental in formulating, through a series of memos, the legal rationale or justification for certain methods of "coercive interrogation" that many, including myself, would understand to constitute torture. In the wake of the Abu Ghraib scandal in 2004, a number of these memos (specifically those written in 2002) became public through leaks, catapulting the "soft-spoken" Yoo, by then once again a professor at Boalt Hall, into the media and public eye as the so-called "architect of torture."<sup>1</sup> For the past four years, the media attention on Yoo has hardly dissipated; his name has in many ways become a metonymic distillation of the debate over torture itself, with literally hundreds of articles, books, and documentaries either addressing Yoo's role in particular or utilizing his voice through a choice, and often quite provocative quote (which Yoo, hardly the shy and retiring academic he sometimes fashions himself as, has been all too happy to furnish). This essay seeks to address two interconnected and indeed sometimes intractable issues concerning the figure of John Yoo. First, how does the legal rationale that Yoo helped engineer, and which he has profusely and liberally articulated through the abovementioned amplified trade publications, countless public interviews, newspaper editorials, and so on, fit within larger public debates over the usage and/or justification of torture by United States military and CIA interrogators? Secondly, though not separately, I seek to interrogate how Yoo, as he has been represented and positioned in the media spectacle surrounding torture, reflects and reveals certain cardinal features of the shifting function and constitution of the post 9/11 "public intellectual."<sup>2</sup> To recapitulate the object of my inquiry succinctly, how, in his

1 Scott Horton "Deconstructing John Yoo" January 23, 2008 <http://www.harpers.org/archive/2008/01/hbc-90002226>, as accessed on June 2, 2008.

2 Posner, Richard. *Public Intellectuals: a Study of Decline*. This text is a helpful and rigorous resource in theorizing the post 9/11 role of the public intellectual – whether or not we wind up classifying Yoo as such..

dual capacities as public intellectual and former Department of Justice operative, does John Yoo function within the maelstrom of the public debate over torture?

Before addressing Yoo on the level of media spectacle and popular discourse, it is necessary to first articulate and lay out a working version of Yoo's main argument(s). To his credit, Yoo has remained remarkably consistent in his reasoning and logic from platform to platform and although his rhetoric shifts in register from, say, an OLC memo to a pithy and provocative public outburst, his basic arguments have remained steady and coherent (if not exactly or precisely static).<sup>1</sup> In summarizing his argument and herein, I am drawing primarily on his 2006 mass market publication *War by Other Means: An Insider's Account of the War on Terror*, in which he himself exposits, in rather broad strokes, the logic and reasoning behind his (slightly) qualified justification of "coercive interrogation" and how this relates to his more general understanding of wartime executive power, along with the accordant distribution of decisive agency amongst the three branches of the United States government. In summarizing these arguments, I also draw on both the 2002/2003 memos themselves, Yoo's 2005 academically directed scholarly monograph *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, and his public utterances in interviews and editorials. Yoo's central argument is itself a rather blunt instrument, regardless of the various dimensions of rhetorical finesse that in different ways accompany or expound it. Although it should be understood as a heuristic device, I argue that by starting with a synthetic or working understanding of the argument, we can set the ground for a more thorough examination of the rhetorical shifts Yoo makes from platform to platform, as well as the semantic or semiotic significance of these shifts.

## an unprecedented act of war and executive privilege

From the OLC memos he authored to his editorials, interviews, and books, the ground of Yoo's argument (if it can be understood in the singular), or its first principle, is that the September 11, 2001 attacks on the World Trade Center and the Pentagon represented an act of war that was largely or fundamentally unprecedented; an event, that is, which opened up a new legal and martial era for the United States and its government; an event which must nonetheless take whatever historical precedence that can be drawn from previous wars rather than prior criminal prosecutions, including, principally, the criminal trials that followed the first World Trade Center bombings in 1993. This argument is already a site of some contestation, as many have pointed out its flaws.<sup>2</sup> But to forge ahead nonetheless, if the attacks are seen to constitute an act of war, then the President, in his capacity as Commander-in-Chief, Yoo argues: "has the authority to decide wartime tactics and strategies," strategies which can include the suspension of *habeas corpus*. Further, following this logic, which he argues com-

1 *War by Other Means* borrows literally the structure of its organization and the logic of its argumentation from the March 14, 2003 memo sent by Yoo to William J. Haynes, General Counsel for the Department of Defense.

2 The choice of scheduling the terrorist attacks as criminal or martial indeed establishes the manner and methods through which the United States can legitimately respond, a fact that was not lost on Susan Sontag, Derrida, and various prescient others, who before the campaign in Afghanistan even began, loudly argued for the necessity of categorizing or understanding it as a criminal prosecution by, as it were, other means.

es directly out of the constitution and the intention of its authors, the executive in a time of war, is un beholden to either the legislative or judicial branches (which indeed he claims can only dampen the swift decisiveness demanded of the executive in wartime). As he writes in the 2003 memo:

The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause...and the Commander-in-Chief Clause. The Framers understood the Commander-in-Chief Clause to grant the President the fullest range of power recognized at the time of ratification as belonging to the military commander... Our reading of the constitutional text and structure are confirmed by historical practice and by the functional consideration that national security decisions require a unity in purpose and energy that characterizes the Presidency alone.

According to this reasoning, in responding to the terrorist attacks "the President could use force abroad alone, if necessary, without Congress' authorization."<sup>3</sup> What exactly represents "force" becomes significant, as we will see shortly, when it is applied to the capture, interrogation, and imprisonment of its martial objects, that is, al Qaeda and Taliban operatives. Throughout the stages of the OLC/Yoo's rationale/reasoning, 9/11 as an event continually serves as the anchor for and of the various practices and procedures that are, to say the very least, not intuitively acceptable or legitimate constitutionally.<sup>2</sup>

In the introduction to *War by Other Means*, Yoo begins with regards to the project of his book, which, he notes, "seeks to explain the choices that the Bush administration made after 9/11...decisions [that] were controversial because the events of 9/11 itself were unprecedented."<sup>3</sup> Similarly, in the 2003 memo he authored, Yoo argues that the "terrorist attacks marked a state of international armed conflict between the United States and the al Qaeda terrorist organization."<sup>4</sup> This point becomes for Yoo one of the most significant fulcrums of his rather profuse public pontificating, and also marks an essential step in the logic of his argument. To recapitulate this grounding, for everything that proceeds, the three following propositions must be accepted:

- 1.) 9/11 was an act of war by a non-state agent.
- 2.) It was "unprecedented," legally and historically.
- 3.) The executive alone has the authority to establish policy in response.

## the role of law, precedence, geneva, and humane standards

The second stage, or the product of understanding September 11th as an act or dec-

1 *War by Other Means*. p.13

2 Many have argued that Yoo's legal reasoning is flawed. Jack Goldsmith, who worked for the OLC after Yoo, claims that part of his work there was 'cleaning up' Yoo's faulty and shoddy work. Many others, including David Cole, writing for the *New York Review of Books* have also claimed that Yoo reasoning is indeed not constitutionally legitimate.

3 *War by Other Means*. p.15

4 Memo from John Yoo (OLC) to William J. Haynes II (DoD), dated March 14, 2003, p. 2.

laration of war is to understand al Qaeda (and by extension the Taliban) as the United States' martial enemy in the "armed conflict" that it inaugurates. But because al Qaeda is a non-state actor, an organization that, he argues, lacks sovereignty, recognition, and attendant international responsibility, the ways in which "war" as such should be constituted in response is categorically different than, say, previous conflict against the Axis Powers, Vietnam, Korea and so on. As Yoo argues, in prosecuting the so-called war on terror, the United States thus "must take aggressive action to defeat al Qaeda, while also adapting the rules of war to provide a new framework to address the new enemies of the twenty-first century." What "adaptation" means precisely he explains by turning again to the fact of al-Qaeda's non-state status and the necessity of thus grounding its legal categorization in the notion of "enemy" or "unlawful" combat. While prior conflicts with such "unlawful combatants" are documented and can serve, in some ways, as legal precedence, what makes 9/11 unprecedented is al Qaeda's "covert use of global transportation and commercial channels to move its men and resources across borders undetected" (Yoo, 17). This, according to Yoo, functionally suspends the rule of "civilized" or legal war and as he argues with reference to the precedence:

The customary laws of war have always recognized stateless fighters as illegal, unprivileged enemy combatants. This is a category that has existed for centuries. Pirates were the scourge of the oceans, and any nation could capture them: they were never owed the status reserved for legal combatants who obeyed the rules of civilized warfare (Yoo, 8).

Concerning the memos that he was instrumental in crafting (and whose logic he later advocated for publicly), this issue of legal or illegal combat becomes significant with regards to the Geneva conventions, as well the United States' own federal anti-torture legislation (from 1994) vis-à-vis the problem of interrogation and incarceration. In short, because al Qaeda operatives are illegal and non-state agents (and because they have not signed it) the Geneva conventions do not apply to their capture, questioning, and imprisonment, according to Yoo. More problematically for Yoo (and the site of some significant rhetorical glissades in both the memos and in public) both Iraq and Afghanistan are "legal" state agents who have signed the Geneva conventions, but this a point we will return to later. To proceed, for now, Yoo claims:

The structure of the Geneva conventions, as ratified by the United States, made clear that al Qaeda could not possibly claim their benefits. Al Qaeda simply was not a nation-state, and it had never signed the Geneva Conventions (Yoo, 45).

This understanding, then, serves as the justification for interrogative practices that admittedly violate Common Article Three of the Geneva Conventions. While he argues that such a violation is fundamentally irrelevant and un-actionable by the international community, Yoo (in both the memos and publicly) nonetheless notes that the US still 'mostly' follows the spirit of the conventions, treating captured operatives "humanely." The category of the "humane" (and its relative lack of any fixed, conventional, or binding semantic value what soever) becomes especially significant in the wake of Abu Ghraib, and other international scandals su-

rounding the United States' usage of torture there, at Guantanamo, as well as the ancillary practice of so-called "extraordinary rendition." While the United States may not follow or be obliged to follow the Geneva Conventions, their practices are nonetheless "humane," Yoo and his cohort argue, but this generosity is an index of U.S. morality and not linked to some manner of obligatory international legal obligation. In short, as Yoo is fond of noting, what type of interrogation methods the U.S. uses is above all else a policy choice; policy that can be determined exclusively by the executive.

Moving on, now, to the role of Yoo and these memos within the public sphere, it is important to make a few points about the function and role of the memos and indeed Yoo himself within the decision making apparatus of the Bush administration. To phrase the problem succinctly:

## what did yoo actually do?

Yoo's role within the administration was itself actually rather limited, a point which Yoo himself occasionally (and somewhat reluctantly) makes publicly. Policy, specifically the decisions that led to what can be understood as torture, were made, predominately, by Donald Rumsfeld (then Secretary of Defense), Vice President Dick Cheney, and, to a lesser extent, President George Bush (as well as key members of their respective staffs such as L. Scooter Libby). Yoo's role in the Department of Justice, as an OLC deputy, was simply to provide legal cover for decisions that were already made or being made, primarily by the Pentagon. This legal cover was meant, above all, to establish the foundation for staving off future international prosecutions of theoretical breaches in binding international law and/or ratified convention (by other state agents who might, for instance, try to use the international criminal court or the UN). That is to say, the memos themselves reflect or, excuse the pun, memorialize the decision to use "coercive interrogation," torture, they do not represent the decision itself. To borrow one of Rumsfeld's favorite and most odiously macho metaphors, the memos do not constitute the gloves' removal, but the retroactive legal justification thereof. This is precisely what Columbia Law lecturer Scott Horton suggests in a recent *LA Times* editorial:

It increasingly appears that the Bush interrogation program was already being used before Yoo was asked to write an opinion. He may therefore have provided after-the-fact legal cover. That would help explain why Yoo strained to take so many implausible positions in the memos.

Given that this understanding of his role is becoming more and more verifiable – that is, that he was essentially a conveniently utilized bureaucrat – one of the most interesting things about Yoo is the degree of prominence his voice and visage have garnered since the 2002 memos were leaked (as part of the scandal surrounding the abuses at Abu Ghraib, first made public in a series of *New Yorker* articles written by Seymour Hersh, starting in April, 2004). In some measure, this is due to his willingness to participate in the public realm, a willingness and participation to which we will shortly turn. But I would also like to bring up here, and pause for a brief moment, on the memos themselves. What, I mean to ask, is the

semiotic significance of legal memos as objects (visual, textual, referential, and otherwise) as they manifest in HBO or PBS documentaries, print journalism, popular histories, and so forth? How do we read the memos both as texts and as what we might call raw media matter? Similarly, how do we conceive of or theorize their position within various registers of public discourse (television news, print dailies, weeklies, etc.)? One way to understand the memos in their mass media manifestation would be to conceptualize them metonymically, or just symbolically, as objects emblemizing the, what is in many ways opaque, bureaucratic decision-making and implementation process. Like the by now iconographic images of the abuses at Abu Ghraib, an image of the memos can serve as a highly distilled icon for how such abuses came to pass. In a three hundred word *New York Times* article for example, the argument of the memos themselves is perhaps less significant than their availability as an indexical object of the bureaucratic process, an objectified or reified mark of the process that led to torture.

### the circus: public intellectuals, jack bauer and fast-talker yoo

In his 2001 study of public intellectuals, Richard Posner provisionally defines the contours of what he believes constitutes a public intellectual in the first years of the twenty-first century:

[A] public intellectual expresses himself in a way that is accessible to the public, and the focus of his expression is on matters of general public concern of (or infected by) a political or ideological cast.... When public intellectuals comment on current affairs, their comments tend to be opinionated, judgmental, sometimes condescending, and often waspish. They are controversialists, with a tendency to take extreme positions.... Public intellectuals are often careless with facts and rash in predictions (Posner).

Drawing on methods both explicitly sociological (i.e. quantitative analysis of media frequency) as well as more speculative theorization, Posner's ultimate argument is that the rise in academic specialization has impoverished what was once an important figure of public service and opinion-making: the multi-competent public intellectual, emblemized for him by figures like John Dewey, Max Weber, and George Orwell. For Posner, these figures, with their varying degrees of official academic affiliation, were instrumental in helping to formulate both the tropes through which the public made sense of the world and, in a certain ways, their sense of the world itself. Orwell, Weber, and Dewey all serve for Posner as examples of what contemporary public intellectuals decidedly lack. Public intellectuals should not only be popularizers of specialized knowledge, Posner argues, but also broadly capable of engendering dynamism and sophisticated discourse in the public realm. They should be educators, in all the complexity that that role demands. But the problem he claims is that public intellectuals have increasingly become either semi-covert one issue political operatives or middling and meddling obscurantist philosophers, fetishized in the media precisely for their opacity. The

failing in public intellectual work, he argues, is that given the tenure system, media intellectuals are generally free to enter and exit the public realm as it suits them; that is, their sustenance and career are not dependent (and thereby not balanced) by market forces, which in the past have, as it were, kept such figures in check. While this meta-theorization tends to reek of the ashes of Alan Bloom – closing American minds and all – what makes Posner's work somewhat valuable is the more strictly economic and empirical analysis of how the market for public intellectual goods actually works, analysis which include the discussion of sales figures.

What these figures help to reveal is that works like *War by Other Means: An Insider's Account of the War on Terror* are fundamentally products that demand marketing, publicity, and the media visibility of their authors. This is of course problematic however we look at it, perhaps even especially so when it focuses on human rights abuses like the United States' usage of torture. Though it is somewhat taboo and difficult to deal with, torture, within the public, becomes as much a site of "intellectual" commerce as something like the Clinton impeachment scandal, which generated great profit for public intellectuals like Posner himself who used mass interest in the proceedings and the meaning of "is" to push often quite pitifully profitable mass publications.

All the same, what Posner ably demonstrates (perhaps despite himself) is that public intellectual work is not merely, or even primarily, a public service. It is above all else a business that allows hyper specialized but often-underpaid academics to boost their incomes and sense of agency. When academics enter the public realm, whether through *New Yorker* articles (think, for example, of Oliver Sacks who has become a millionaire in just that way), *Atlantic Monthly* pieces, and so on down (in terms of lucrativeness) to the *New York Review of Books*, they do so in no small part for the massive bump in income that such work, along with the increased visibility it fosters, generates. The extreme positions and "controversialist" rhetoric so often found in public intellectual work is in large measure a product of showbiz know-how, generated towards the marketability of a particular notion in an sea of bold, sometimes shiny, and often spectacular claims (and the thirty dollar books that exposit them). This fact is true both of works on the left and on the right of the political spectrum and as Posner helps to show through sales figures and quantitative analysis thereof, the market for public intellectual work is as much a consumer industry as Hollywood blockbusters, Danielle Steel page turners, and so on. This does not mean that public intellectual goods are exclusively or arbitrarily part of a consumer economy of exchange, but this sort of attention does help to evaluate the work and ultimate function of a figure as fundamentally insignificant yet recursively prominent as John Yoo. That is, Yoo in his voluminous public appearances, emblemized by his all-to-willing interviews, editorials, and his mass publication, is a commodity: the "architect of torture" is both salesman and professor. That he happened to be responsible for the legal justification of policies ultimately generated by figures like Donald Rumsfeld, policies that led to almost unspeakably unacceptable lapses in basic human decency, in a way makes his work all that much more seductive and buyable. He was there, after all. Similarly, even the recent civil case brought against Yoo on behalf of Jose Padilla, is perhaps even more significant for the value it accrues to the Yoo brand, than it is as a site of



resistance against the work that he and his bureaucratic ilk undertake and have undertaken as Bush administration lackeys. Media visibility can be an almost inescapable feedback loop generating more than anything else marketable value for its objects, whether they be Barbie dolls or Boalt Hall professors.

Alan Lightman, a theoretical physicist and popular novelist, has also offered a tripartite schema for the classification of public intellectual activity, one that further helps to clarify Yoo's public presence. While Lightman is ultimately concerned with the ways in which scientific knowledge permeates the public sphere, his schema is helpful herein. As Lightman argues in his "The Role of the Public Intellectual," public intellectuals and their activity can be classified into three levels of prominence and influence. In the first level, public intellectuals speak exclusively about their own discipline, making palatable their specialized knowledge for a consumer public. On the second level, the public intellectual gestures towards explaining how their specialized field and their findings within it influence broader socio-cultural or political phenomena. On the third level, which Lightman claims is "by invitation only...[T]he intellectual has become elevated to a symbol, a person that stands for something far larger than the discipline from which he or she originated." In this highest-level Lightman includes figures like the late Susan Sontag, Noam Chomsky, E.O. Wilson, Henry Louis Gates, Edward Said, and other similarly prominent intellectuals. What is notable about all of these figures is the degree to which they are or were both highly accomplished in their various fields and highly competent in fashioning prose that is accessible and inviting to a range of readers. Figures in this third level actively shape public opinion, while those on levels one and two operate in far more circumscribed capacities – the are more exegetes or operatives than they are agitative opinion makers.

Folding Lightman's schema into a Posnerian-inflected economic framework further helps to elucidate just what kind of figure John Yoo is, and it also helps to evaluate the variant rhetorical modalities discussed in the introduction to this essay. Synthesizing Posner and Lightman's findings help to appraise the following rhetorical gestures or, more appropriately, wild gesticulations, found in Yoo's *War By Other Means* and in his public appearances.

In introducing his role in the Guantanamo Bay scandal, Yoo begins with a short and rather awkward attempt to frame himself within the "bustling" life of the Bush administration. This is an example of what Posner characterizes as a "personal interest anecdote," a narrativization technique that he claims is demanded of academics writing for a popular audience (in a hybridized idiom shaped by the back and forth between abstruse academic authors and their popular press editors). Describing his trip to "Gitmo" in the context of the scandal that emerged several years later, Yoo says the following:

I witnessed these humane standards myself at Gitmo...To be sure, conditions were not those of a hotel...[but]...U.S. armed forces were ordered to treat the al Qaeda and Taliban humanely, and they did so admirably (Yoo, 44).

Later in the work, Yoo, when discussing the deaths of civilians in both Afghanistan and Iraq, makes the following claim:

A corollary of the right to destroy enemy personnel and assets is the fact that deaths of the civilians that occur as a result of legitimate attacks against military targets are not illegal (Yoo, 44).

To characterize these remarks as "extreme positions" would be to understate the matter, but that is exactly the point; whether or not Yoo actually or precisely 'believes' his own rhetoric is almost beside it. These kinds of claims are for the most part absent in the memos and in *The Powers of War and Peace*, both of which are crafted in incredibly dry and logically sequential legalese. Though the performative callousness of the "legitimate civilian deaths" and "humane incarceration standards" referenced above indeed shock and are intended to do just that, more interestingly and revealing is the way in which Yoo articulates a variation of what has come to be called "the ticking time bomb scenario," a trope that appears throughout the literature on torture. In short, the "ticking time bomb scenario" asks if torture would be situationally acceptable if a hidden bomb were ticking and a potential torturee could reveal the intelligence that might save thousands (or millions) of lives by leading to its diffusion. As minds more able than my own have amply demonstrated, this scenario is largely preposterous, a what-if that bears very little resemblance to any real world situations that have or will be likely to be encountered. Advocates of torture nonetheless often bring up this scenario as a kind of limit case, as does Yoo in the section of *War by Other Means* dedicated to interrogation. Interestingly, he does so through reference to a television program, and not an entirely abstracted what-if:

What if, as the popular Fox television program 24 recently portrayed, a high-level terrorist leader is caught who knows the location of a nuclear weapon in an American city. Should it be illegal for the President to use harsh interrogation short of torture to elicit this information? (Yoo, 42)

What is revealing about this quote is the way in which Yoo structures the rhetoric of his reasoning in ways that are at odds with the rhetoric of both the memos and his academic writings. In both, Yoo claims that whatever "what-if" situations might be manifest are secondary, even irrelevant, in terms of what the executive is legally allowed to authorize in the context of a war. Indeed, in both, he often tries to avoid reference to any real or imaginary situations, concentrating exclusively on what the law allows for (which he argues is nearly everything). What the reference to 24 indicates is that Yoo, in writing to the public, is explicitly sexing up or spectacularizing his linguistic style, forming a kind of glitzy macho toughness that he awkwardly employs exclusively in public contexts. In transitioning from the highly referential bureaucratic rhetoric of the OLC memos and his academic work (i.e. a rhetoric excessively punctuated by incessant reference to legal precedence), to a kind of performative toughness resonant with the public utterances of Donald Rumsfeld, Yoo is actively trying to craft a public persona that his soft voice, fleshy face, and leaden prose seem ill-equipped to handle. It appears that Yoo is increasingly trying to market himself as an eminently quotable 21st century Kissingerian Realpolitiko, a finding that the following public interchanges underscores: "It depends on why the president thinks he needs to do that."

As Yoo's star has or has appeared to be in danger of waning, his public rhetoric has become more extreme. Widely reported and noted particularly in *Taxi to the Darkside* (dir. Alex Gibney 2008), the left weekly *In These Times*, on the Internet, and elsewhere, in a 2006 public debate with Doug Cassel, a noted human rights advocate, Yoo's bravado jumped in order of magnitude. In an exchange over Yoo's understanding of executive rights, he was asked by Cassel what was clearly a provocative request for clarification:

**Cassel:** If the President deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him?

**Yoo:** No treaty.

**Cassel:** Also no law by Congress. That is what you wrote in the August 2002 memo.

**Yoo:** I think it depends on why the President thinks he needs to do that.

Perhaps in a successful reflection of his intention, this quote was widely disseminated, reinforcing the emerging perception of Yoo as a public extremist, in turn garnering him expanded visibility.

To return to Lightman's schemata, how should we understand the level of Yoo's public intellectual activity? Clearly, Yoo, who is either at or below level one, in making public claims like the preceding and though referencing Jack Bauer in articulating the "ticking time bomb scenario," a fiction elevated to the level of justification, a pulpy plot point promoted to the status of real tough reasoning, Yoo is jockeying for a higher level of public influence. In reality, Yoo is simply a specialist in a particular variant of conservative jurisprudence, "framer's intent" as it pertains to martial law. That he clumsily presents this reading of constitutional law in the public realm with such awkward and grandiose rhetoric reveals just how desperately he seeks a greater public role. On the level of media spectacle, Yoo is nonetheless sadly proving himself rather capable, though thankfully in strictly circumscribed capacity. We can only hope that he will have a short shelf life. But within academia and its more public face, Yoo and his statements have also been taken up as a clear articulation of the so-called "state of emergency" thesis. What is Yoo's future role and what that might tell us about the future of public intellectual activity?

### an exceptional logic

In theorizing and expressing their dissent against the Bush administration's post 9/11 policy, many academic voices – from the rather exalted and abstrusely erudite mytho-politico philosophizing of Giorgio Agamben to internet law blogs, Harpers editorials, essays by semi-public intellectuals like Susan Buck-Morss, Judith Butler, – have made an analogy between Yoo's logic and that of Carl Schmitt. That is, some have argued that Yoo's work in the OLC had a decisive role in establishing the legal authorization for or represent a contemporary invocation of "exception," or a "state of emergency" isomorphic with Carl Schmitt's notion of exception, theorized in his 1922 *Political Theology*.

Many, that is, have argued that the Bush administration's policy is "exceptional" in the Schmittian sense. For the purposes of this essay, I will be ignoring Agamben, for whom, to do any justice, one must meet on the level of mythology, philosophy, and meta-history. But thinkers far less notable and sophisticated than Agamben have also suggested that Bush administration's policy is either explicitly or implicitly "Schmittian," and numerous writers in *The New Yorker*, *The New York Review of Books*, *Harpers*, and their ancillary blogospheric companions, have suggested a direct causal link between Schmitt's writing and Yoo's OLC memos.

Scott Horten, a frequent Yoo critic, this time writing for *Harpers*, suggests that while one of Yoo's favorite metaphors, "war by other means," comes from a crass misreading of Clausewitz, Yoo's real progenitor is Carl Schmitt:

[While] Yoo cites Clausewitz, he seems to have another German thinker in mind: Carl Schmitt. As the "crown jurist" of Germany in the thirties, Schmitt is famous for a number of flashes of dark lawyerly brilliance that supported the deconstruction of the Weimar Republic and hastened the rise of an authoritarian, and then totalitarian dictatorship. One of these was the use of external threat to justify a "state of exception," followed by a transposition of the external threat to the internal political dynamic. This was done with a purpose: collapsing the careful allocation of powers in the Weimar Constitution in favor of one all-powerful Leader. John Yoo would call him the "commander in chief." Curiously, for John Yoo the commander-in-chief has narrowly circumscribed powers when he's a Democrat, and robust and dictatorial authority when he's drawn from John Yoo's own political party. But then a foolish consistency is the hobgoblin of little minds, as Emerson teaches us (Schmitt, 1).

This analysis is familiar, as Sanford Levinson, the editor of an important volume on torture, and a law professor at the University of Texas, has written in similar ways on the connection between Yoo and Schmitt. My own judgment of this connection is that it might take us down the wrong line of reasoning, in that it might give Yoo's logic more legitimacy or substance than it deserves, through suggesting an unwarranted philosophical lineage. For here, this connection will have to stand as tentative.

In the end, what are we to make of John Yoo? How should we understand his persistent media presence? Though he would like to fashion himself as an emerging public intellectual, a real voice, this is clearly not the case. More than anything he has acted as a pawn, a position holder, and twice over no less. Within the administration his work served merely procedurally and within the media spectacle he has allowed himself to be a kind of manifest metonym. In both cases, this place could just as well have been occupied by someone else, by other means, or by a similarly willing face.

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# relocating Pornography Post-9/11

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has taught in israel, new zealand and australia since completing a post-doctorate on gender in the middle-east. research publications include *female absence: women, theatre and other metaphors* (lang 2003) and journal articles on palestinian ritual, dance, race/gender issues and identity politics. her current research concerns trauma and embodiment. rob works as a dance and movement therapist, performs improvisational movement and circus, and directs a theatre for disabled practitioners. she currently teaches at monash university victoria, australia.