

2015

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Stephen A. Rosenbaum

Golden Gate University School of Law, srosenbaum@ggu.edu

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Recommended Citation

2 Int'l L.J. of London 391 (2015).

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Just Between Yoo and He: Two Justice Department Lawyers' Imaginary Torturous Email Exchange

*Stephen A. Rosenbaum**

Abstract *On December 9, 2014, the U.S. Senate Select Committee on Intelligence released its long-awaited Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, which The New York Times described as "a portrait of depravity that is hard to comprehend and even harder to stomach." The Times had reported four years earlier that a number of Department of Justice (DoJ) emails were determined to be missing during the Office of Professional Responsibility's investigation of the Bush Administration memoranda providing legal justification for "enhanced interrogations," the so-called "torture memos." What follows is an imaginary exchange of emails between two young lawyers during their tenure at the DoJ Office of Legal Counsel (OLC) in 2002. Any resemblance to real persons, living or dead, is purely coincidental.*

* John & Elizabeth Boalt Lecturer, University of California, Berkeley School of Law; Professor, American University of Phnom Penh. Board of Advisors, *International Law Journal of London*. The views expressed here do not necessarily represent those of the University of California, American University of Phnom Penh, or the *International Law Journal of London*.

-----Original Message -----

Subject:

Date: 08 June 2002 09:39:43

From: JY

To: PP

Hey, General. Just read your Note in 105 *Harvard L. Rev.* 2001 (1992). Nice niche work!

----- Original Message -----

Subject:

Date: 08 June 2002 11:18:22

From: PP

To: JY

Prof, I wrote that 10 years ago, before I graduated. Are you conducting an investigation of me? And what's with this *General* stuff? I'm a *Deputy Assistant Attorney General*.

JY: Yeah, I know. Nothing wrong with a little title glorification. That's pretty cool what you wrote about the English Medieval County Courts and sealed written instruments. Sprinkling in all that Latin. *Potest dici quid habet de convencione et si nichil habeat potest peti iud icium.*

PP: Graduating *summa cum laude* from Yale undergrad doesn't exactly make me an expert, and it's not like I'm old enough to have attended mass before the Vatican II vernacular reforms. But, I *was* at the top of my Latin class in high school. ☺

JY: You're talking to a born-and-bred Episcopalian. Besides, you are quite the scholar, Dude, investigating the medieval law on covenants. And, the bit about "the well-established practice of specific pleading." I'm looking into specificity right now—specific intent vs. general intent.

PP: I don't know that the Bench of Westminster or the Justices in Eyre have much to say about that.

JY: No matter. I like your conclusion, where you say: "Rather than assuming that the requirement was a foreign element imported into the action in covenant without any need, scholars should attempt to elaborate on the principles of proof revealed in the yearbooks to show how contemporaries' understanding of covenant itself could have generated the specialty rule." There's too much reliance on foreign sources. When we have Anglo-American law, that should be adequate rationale, don't you think?

PP: There are some Norman-French legal traditions as well that got adopted by the Anglo-Saxons. You teach international law, right, Prof?

JY: Just because I *teach* it doesn't mean I believe it should guide our own nation's actions. Especially at this critical time. It's all about national security, Bro. Speaking of *Anglo-American*, what do you know about the Medieval County Courts when it comes to crime and punishment?

PP: Well, Article 20 of the *Articles of Eyre* was issued in September 1194, formally establishing Coroners in every county throughout England. The General Eyre referred to the periodic visits by these itinerant jurists, who travelled around the country dispensing justice on behalf of the king. This was the forerunner of the Assizes, derived from the Anglo-Norman for "sittings" which, in turn, gave way to the present day Crown Courts. Only a portion of the Coroners' duties related to inquests and death investigations. They were also required to be present at certain trials as rapporteurs and witnesses.

JY: What do you mean?

-----Original Message -----

Subject:

Date: 09 June 2002 13:24:10

From: PP

To: JY

You've heard the phrase "trial by ordeal?" Well, even before the Anglo-Saxon regime, it was perfectly legal to test guilt or innocence with an ordeal by fire or water. For example, an accused was made to carry a bar of red-hot iron in his hands while he walked nine marked paces. In the unlikely event that no burns appeared on his hand, he was judged innocent. Otherwise, he was promptly hanged. A variation was licking red-hot iron with the tongue or, sometimes the suspect had to run barefoot over nine red-hot ploughshares.

JY: Yeah, I get that. What about water? Any ice baths or simulated drowning?

PP: Nothing that elaborate. The suspect would be thrown into water. If he sank, he'd be declared innocent, but if he floated, he'd be deemed guilty, taken out and hanged. Same difference, right? The role of the Coroner was to always be present to record these ordeals. And, that was also to be sure to have an eye on the forfeiture to the Crown of the accused felon's goods.

JY: So, like some kind of medical and judicial oversight?

PP: Exactly. But already by 1215 these practices were forbidden by a canon of the Fourth Lateran Council. The Fourth Council had convened, at the earlier behest of Pope Innocent III. Kind of ironic that that's the same pope who later annulled the Magna Carta.

JY: Like I was saying, my connection with the Catholic Church begins and ends with Henry VIII's falling out with the papacy.

PP: Yeah, that was also about annulments. Anyway, the Lateran Council also forbade clerics from acting as judges in extreme criminal cases, or taking part in matters connected with judicial tests and ordeals. That canon seems to have also put an end to trials by ordeal.

JY: Odd that the Church would take a stance against trials by ordeal, or at least the involvement of clerics, when it later engaged in similar tactics—and worse—to extract confessions from so-called heretics, Judaizers, and witches.

-----Original Message -----

Subject:

Date: 14 June 2002 20:51:25

From: PP

To: JY

Yeah, actually in 1252, Pope Innocent IV issued a papal bull, *ad extirpanda*, which authorized the use of force by the Holy Inquisition for eliciting confessions in limited and defined circumstances. These were the parameters placed by His Holiness on the techniques to be used by secular authorities:

That it not cause loss of life or limb;

That it be used only once; and

That the Inquisitor deem the evidence against the accused to be virtually certain.

JY: So, the standard was essentially that no one be killed or maimed, and that it be applied only on suspects where guilt was pretty much confirmed?

PP: Yep. *Citra membri diminutionem et mortis periculum*. Why are you so interested in this?

JY: The Latin makes it sound so dignified, so legal. And the interrogation technique was to be applied only once?

PP: Yeah.

JY: I guess the techniques can generally lose their effectiveness after several repetitions.

-----Original Message -----

Subject:

Date: 18 June 2002 11:28:03

From: PP

To: JY

Dunno, but a variation of trial by fire was commonplace. For example, the victim's feet could be held to a fire or they could be strapped into an iron chair with a fire lit underneath. Or red hot irons could be applied. Burning or molten liquids could also be used, the victims being forced to dip limbs in them or have the liquids poured down their throats. The Inquisition's most common means of torture were burning, beating, starvation, and suffocation. But, it didn't end there.

JY: Did the Inquisition address the severity of inflicted pain or suffering?

PP: Not really, but the medical personnel were supposed to make sure that no one died in the process. And mutilation was technically forbidden, e.g., using heated metal pincers, thumbscrews, boots, or other devices designed to burn, pinch or otherwise mutilate hands, feet

or, bodily orifices. I don't know if that rule was derived from "no loss of limb," but it seems a pretty fine line.

-----Original Message -----

Subject:

Date: 28 June 2002 09:19:33

From: JY

To: PP

Hey, man, fine lines are what it's all about in law. Think back to your 1L courses.

PP: There were even more depraved methods for extracting confessions. Like restraint or confinement in damaging positions. Placement in a cage, gibbet, or casket. Exposure to the elements, hanging from the rafters, allowing insects to breed or feed on the victim's flesh.

JY: So, let's see...cramped confinement, stress positions, hanging from rafters, insects...hmm.

PP: Then the ultimate: the so-called "water cure." I would puke if I had to describe more.

JY: Water cure??

PP: Tomás de Torquemada, Spain's notorious Inquisitor General, supposedly wanted to improve the procedures of previous inquisitions and "mitigate" the use of torture. He was appointed by Pope Sixtus IV in a papal bull of 1478, at the behest of Ferdinand and Isabella. Accused heretics were brought to trial in a long and involved process. Torquemada was fiercely anti-Semitic and devised a formulaic protocol for identifying and entrapping so-called New Christians or *conversos*, based on stereotypes of supposed Jewish customs. If the accused didn't confess, an *interrogatorio* was ordered. Torquemada's guidelines demanded that inquisitors conducting the interrogation remain "cautious, circumspect, and charitable" in their search for the truth. During these proceedings, two members of the clergy unconnected to the court were always present to monitor the questioning.

JY: So, again, the process was transparent and overseen by interrogation specialists or quasi-judicial officers.

-----Original Message -----

Subject:

Date: 05 July 2002 12:42:13

From: PP

To: JY

Well, in fact, Torquemada presided over a modified version of torture. The water cure was usually the first level of torture. When the inquisitor finished reviewing the charges of heresy, he looked to the attending physician to give him a nod of assent and then pointed to the jugs of water. The accused man or woman would be laid naked on a ladder, tipped so that the head was lower than the feet. The henchman would tightly bind the body with ropes and stretch it out to full length. On cue, a henchman would lift a one-liter jug. Iron prongs held the jaws open and nostrils were plugged, allowing breathing only through the mouth. Water was poured into the

open mouth, with a linen cloth draped over it, preventing the alleged heretic from spitting the water back out. The overwhelming sensation of drowning forced the detainee to swallow the water. Torquemada's rules of torture next stipulated that no more than eight liters of water could be used in a single session.

JY: Wait, let me understand. A maximum of eight liters? Sounds like the techniques were applied in a sort of "escalating fashion."

PP: Look, I'm no expert, but that's what I've read. I have no idea why eight liters was the designated number. Does it really matter? If this didn't coax a confession or admission of guilt, the rack might be used as the next level. The accused would be laid face up on a table and bound with ropes at the wrists and ankles, which would be pulled in increments to produce terrible pain. If the rack proved to be ineffective, the accused was then tied with ropes by the wrists and led up to a scaffold, in a procedure known as *strappado* or squassation. The interrogator would then demand that the accused confess. If the response was not satisfactory, the inquisitor instructed a henchman to shove the heretic off the scaffold. The ropes stopped the accused abruptly before feet touched the ground, wrenching the joints and producing excruciating pain. This was repeated as deemed necessary under the watchful eye of a physician who checked the suspect after each drop to make sure the person did not die. That would've violated the Pope's bull.

JY: That's no bull s**t. You said a doctor had to also be present along with interrogators?

PP: Right. The mandates of the 15th Century Spanish Inquisition required the presence of a physician to monitor the health of the accused. The purpose of torture would be nullified if the accused were physically unable to hear and understand the proceedings.

JY: Uh-huh.

PP: I think I see where you are going with this, Prof. But I think it's best you left it for a classroom hypothetical when you get back to giving lectures or writing final exams or articles.

JY: Remember, the Prez accepted our conclusion that the Geneva Convention doesn't apply to the terrorists at Guantanamo.

PP: Oh, right.

JY: Speaking of which... JB needs more ammo for G'tmo—and other venues. He's got down the Con Law arguments. After all, he used to teach that stuff. But, again, it's those damned humanitarian law and human rights conventions we need to get around. And the US anti-torture statute and Torture Victims Protection Act.

PP: Say, I hear that W may nominate him for a seat on the Court of Appeals.

JY: Yeah, that would serve the Ninth Circuit right. Haha. I was talking with JB yesterday. He showed me a 1942 directive from Gestapo Chief Heinrich Müller. It's all about what he termed *Verschärfte Vernehmung*. That translates from the German as "enhanced (or 'sharpened' or 'intensified') interrogation."

PP: What's your point, Prof?

JY: Well, for one thing, it shows that there is a line between "torture" and these Enhanced Interrogation Techniques. Ya know, the Third Reich was meticulous about legal conformity. Couldn't let the lumpenprole Nazi street thugs go about uncontrolled. Needed to have it all done properly, by the book.

PP: WTF?

-----Original Message -----

Subject:

Date: 10 July 2002 22:19:02

From: JY

To: PP

Look, I'm not trying to emulate the Nazis' *Geheime Staatspolizei* or the *Sicherheitsdienst*. I'm just sayin'....

PP: Who's the Übermensch linguist now? But, watch where you're going with this, Dude.

JY: I mean we don't need to adopt wholesale the U.N. or Council of Europe interpretations of torture. Why kowtow to a bunch of high-paid functionaries in Geneva, or some snot-nosed Eurocrat law clerks writing opinions for Strasbourg-bound judges?

PP: You mean like we used to write for The Honorable C. "Slappy" T. when we clerked for the Supremes?

JY: That was a *real* Court. Look, we've got a job to do, Bro. To tell the interrogation specialists just how far they can go. And we can do our own analysis. The military has relied on legal advice for years in these kinds of situations.

PP: OK, so what did the Gestapo say was permissible?

-----Original Message -----

Subject:

Date: 11 July 2002 14:52:24

From: JY

To: PP

Well, Müller's top secret directive said enhanced interrogation techniques could only be applied if "preliminary interrogation" demonstrated that the detainee "can give information about important facts connections or plans hostile to the State or the legal system" and the info can't be otherwise obtained by inquiries.

PP: Sounds a bit like the papal bull: "That the Inquisitor deem the evidence against the accused to be virtually certain."

JY: Bull or not, it's about very limited application: In order to obtain intelligence about connections and plans hostile to the State. That's what we're up against, like the next Al- Qaeda plot. And these detainees have info to share—which they are unwilling to give based on other “inquiries.”

PP: I can see the headlines now once this memo gets leaked, Mein Bruder.

JY: Don't worry. It'll be stamped with our own Secret *Reichs Matter*—English only, of course. Hehe.

PP: Yeah, right.

JY: Besides, like I was saying, even the notorious Third Reich had legal limits. These EIT's couldn't be used on just anyone, without Müller's permission. Only Communists, Marxists, terrorists and saboteurs. And [Soviets and Poles] who refused to work, as well as “asocial persons” and “idlers.” I guess this last category would be like our welfare bums, psychos and homeless. Oh, yeah, the list also included resistance fighters, parachutists and get this: “members of the Bible-researcher sect.”

PP: JB wouldn't be too happy with that last category, whoever it's supposed to include.

-----Original Message -----

Subject:

Date: 14 July 2002 10:49:43

From: JY

To: PP

Right. We don't have to take this stuff verbatim, and I'm not for a moment suggesting we cite this as our source. It just shows that drawing lines between torture and enhanced interrogation is not a new business for government lawyers.

PP: Yessir, General.

JY: Remember, that's *Deputy Assistant* Attorney General.

PP: Of course. But you still didn't tell me what's on the Gestapo's list of *verboten* techniques.

JY: Actually, the directive just lists what's *permitted*. Pretty mild stuff: simple rations (bread and water); hard bed; dark cell; sleep deprivation; exhaustion exercises.

PP: Yeah, standard ops.

JY: But the last EIT is a little tricky: blows with a stick. I guess that'd be a baton. And if more than 20 blows are administered, then “a doctor must be present.” JB says cold baths were ruled out at first, and waterboarding too.

PP: Waterboarding?

JY: Ya know, pretty much the water “cure” you said the Pope had permitted by the Church’s interrogation specialists. With a doctor present, and only after early inquiries were not successful. I’d call that “in escalating fashion.”

PP: Holy Inquisition. Holy s**t!

-----Original Message -----

Subject:

Date: 15 July 2002 13:26:18

From: JY

To: PP

Now, there’re just a few slight problems in relying on these kinds of instructions. First, the guys who carry out this stuff don’t always read—or follow—the instructions in the legal memos.

PP: No kidding.

JY: About three years after the end of WW II, Norway put on trial a few Gestapo interrogators or so-called *Krimineloberassistenten*.

PP: That’s the job title? Sounds hella ominous.

JY: Yeah, the Germans run all their words together and the Nazis threw in an *über* or an *ober*. As I was saying, it’s about title glorification and maybe professionalization. It looks like these senior assistants in criminal affairs didn’t exactly follow Müller’s directive to a *T* when it came to the sanctioned EITs. They administered blows with truncheons and kicks to the body and face of several Norwegian underground paramilitary resisters and other citizens. They also fired shots, used instruments of torture and stripped a guy and placed him in a cold bath where he was repeatedly ducked under water. Others were also subjected to hypothermic baths.

PP: Yep, sounds like they didn’t stick to the list of enhancement techniques.

JY: The defendants were all found guilty, of course, but what’s interesting is how the judges analyzed these cases. They noted that because these Norwegian paramilitary fighters didn’t wear uniforms they were not entitled to the special protections that soldiers would’ve received under Article I of The Hague Regulations.

PP: That’s what I wrote about the Gitmo gang. So they’re allowed to be treated more harshly, right?? Enemy combatants are not protected by the Geneva accords.

-----Original Message -----

Subject:

Date: 20 July 2002 15:24:38

From: JY

To: PP

Right, but it was kind of an academic defense, because the court found other grounds for upholding the charges. Any way, it’s instructive for our purposes. President Cheney and

Secretary Rumsfeld have supported our arguments on numerous occasions: we are not fighting a conventional war with conventional troops. These are rogue combatants operating in rogue states and they aren't being held on US soil. You know that argument. You have already written a memo on how the Gitmo detainees aren't covered by the Geneva Conventions. They are not POWs and they don't merit the same treatment we owe foreign soldiers.

PP: You mean *Vive* President, don't you?

JY: Oh yeah. The other thing that's noteworthy is that the Norwegian court found it decisive that the interrogators had inflicted *serious* physical and mental suffering on the detainees. And the seriousness of the infliction offset possible mitigation of the ultimate punishment for the crimes. These crim assistants were charged under Norway's post-war so-called "Civil Criminal" Code for "caus[ing] harm to another person's body or health, or put[ting] another person into a state of helplessness, unconsciousness or any similar state." The sentences were to be increased if the injury resulted in sickness, temporary disability for a period of weeks, permanent injury, or ultimately death. Likewise, if the act was "premeditated and carried out in a particularly painful way."

PP: And what was the Nazis' defense?

-----Original Message -----

Subject:

Date: 28 July 2002 12:50:54

From: JY

To: PP

That the acts of alleged torture in no case resulted in death, and most of the injuries inflicted were slight and did not result in permanent disablement. Of course, that wasn't entirely true according to the evidence.

PP: Sounds like we're back to the standards of the Inquisition?

JY: Well, kind of. I prefer to think about this as a question of "specific intent." What does the U.S. anti-torture statute say? And what Reservations and Understandings did the Great Communicator and W sign when the US ratified the Convention Against Torture? Essentially, it comes down to what is "severe pain or suffering"? That's what JB and I need to grapple with. Sure, the techniques might be "degrading" or even "inhuman" or "cruel," but that doesn't make them illegal. And, hey, we're talking about the interrogation of armed enemies.

PP: Right, and the U.S. Code says if the mental or physical pain or suffering is *incidental* to lawful sanctions, then that doesn't make it torture. So, an EIT is not against the law. You're also thinking about how to operationalize whatever we advise General Gonzales and all the *Ober-*Generals, the upper-echelon guys who actually wear the military uniforms?

JY: He's not *General* Gonzales yet. All in due course, Dude. Thank God we don't have the ICC to worry about prosecuting our servicemen. But, there are enough sanctimonious litigation-prone public interest lawyers right here at home, rogue judges and prosecutors, not to mention that renegade judge in Spain and all the bleeding heart, chest-pounding liberals in Congress. They can all stir up trouble.

PP: But, Prof, our job is to give advice, not to foresee every excessive act, insubordination or error in judgment.

JY: Right. That's where JB's Con Law expertise comes in. We can draw circles around Section 2340A of the US anti-torture statute. That's the provision for fining, jailing or executing anyone who violates that statute or *conspires* to violate it. Actually, conspirators aren't subject to the death penalty. Hehe. But, JB and I think that prosecution under Section 2340A may be barred because enforcement of that statute would represent an unconstitutional infringement of the President's authority to conduct war. And under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.

PP: Not bad, my man.

----- Original Message -----

Subject:

Date: 2 Aug 2002 16:12:31

From: PP

To: JY

Hey, I just read JB's latest "top secret" memos to the Chief and the CIA. I assume you had a big hand in this. Awesome.

JY: Well, yeah. I signed my John Hancock in a separate letter to the Chief. How did you get a hold of JB's memos?

PP: Relax. It's not like I had to file a f**king FOIA request.

JY: I figured if the Norwegians could have a list of graduated offenses for what they termed "put[ting] another person into a state of helplessness, unconsciousness or any similar state" for certain periods of time (all the way up to death) and a focus on acts "carried out in a particularly painful way," then we could find a way to deconstruct the Convention Against Torture and our own 18 USC 2340 to define what's less than "severe pain or suffering." That's why we argue that anything less than "serious physical injury," such as organ failure, impairment of bodily function, or death, is not torture. Likewise, prolonged mental harm is harm that must last for "months or even years."

PP: Brilliant.

JY: Oh, and even better, is how the Israelis have gotten around their own Supreme Court prohibition on torture of terrorist suspects. Their security forces can apply "moderate physical pressure" against detainees when there's an urgent need to obtain information that could prevent an imminent terror attack or what they call "imminent, significant, physical harm to persons, where there is no other available means to prevent the harm." Looks like the CIA legal eagles are on board with that one.

PP: That's the ticking time bomb scenario.

JY: So, that's why in JB's memo you see a whole sh**load of permissible EIT's applied in "escalating fashion." (I'm rather proud of that phrase). Walling, facial slap, facial hold, cramped

confinement, wall standing, stress positions, sleep deprivation, insects placed in confinement box, and culminating with the waterboard.

PP: Uh-huh. Kinda like a menu of the Inquisition and Gestapo techniques all rolled into one. I see for the waterboard technique you guys recommend using a saturated cloth to restrict air flow from the mouth and nostrils, and a small canteen cup of water or a watering can with a spout. That's a variation on Torquemada's eight liters, huh? And, good that you say a doctor must be present. That's a time-honored safeguard. Of course, the 15th century docs didn't undergo Survival, Evasion, Resistance and Escape training. Haha. Damn, where did you pick up all this detailed knowledge about techniques?

JY: Research, dude. Scholarly research.

----- Original Message -----

Subject:

Date: 15 Aug 2002 19:02:11

From: PP

To: JY

Hey, Prof, you think you'll be able to survive on campus after your work is done here? I mean if these memos go public, you're not going to be very popular, even if you are just doing your job as a lawyer. I'll just go back to the firm, become partner. No sweat. But, the stakes are higher for you, no?

JY: Ah, yes, the People's Republic. I expect I'll get some glares from my Marxist colleagues and fellow travelers. It'll be like looking at panoramic displays of cavemen sitting around the campfire with their clubs. You know, tie-dye, bandanas and dope smoking. Just like the '60s, with the Vietnam War still to protest. But, my advocating unpopular ideas is protected by academic freedom. The Dean may not like what I wrote, but he's not going to make any public statement against me. That wouldn't be collegial. And his number two-in-waiting (she's preening to be Dean) is a real team player. Won't rock the boat. Typical liberal academic. All theory, no practical experience. As a feminist, she'd probably bristle at being called a Yes Man.

PP: Okay, but does the Dean have the last word? What about the Academic Senate? I hear that most of the activist faculty are outside the law school.

-----Original Message -----

Subject:

Date: 19 Aug 2002 16:28:53

From: JY

To: PP

I can live with the repulsion of lefties, the disdain of colleagues, the closing of social doors. But, loss of tenure and academic censure?

PP: I suppose some faculty leftist will argue that there's a difference between a scholar unconnected to levers of power *advocating* a policy on the one hand, and an Executive branch official *enabling* a policy on the other. The rhetoric will go something like: "When academics enter

the halls of power, and in that office they facilitate abhorrent behavior, they don't wash themselves of the implications of their enabling behavior by returning to academia.”

JY: Give me a break.

PP: And then their line will be that Academia may rightfully hold someone accountable for what they did in office. This is why academic freedom is no protection, whereas it *would* be a protection if the scholar had simply published a bunch of papers advocating the same policy. Publishing papers puts ideas out there that others equally distant from power can rebut. Writing a bunch of memos for the President, they will say, affords no such opportunity.

JY: What are lawyers for, Bro?

PP: Of course, if the Academic Senate really *did* entertain a motion of censure, that raises several problems. First, what is being censured? Your political views? Your political actions? Your freedom to hold and perform them? Or your scholarly work and its consequences? If the last, recall that very few of the members of the Academic Senate are legal experts, and they would be straying outside their expertise to judge your work, even if they thought it was wrong.

JY: Yeah, I can hear the demands now: “Isolate him, in a sinecure without classes, students, or intellectual exchange.” This is a variation of what the Japanese euphemistically call Career Design Rooms, more popularly known as “chasing-out rooms” where the *madogawa zoku* (“window seat tribe”) of unneeded workers spend their days. If they can’t be fired, they get a terminal assignment with no duties, no authority, and no interaction with colleagues. Once upon a time, New York City sent hard-to-fire school teachers to a “rubber room.”

PP: No way.

JY: Or they’ll want to put me in a glass cage. “Don’t fire him. Why not learn from him instead? Students should ask him, point blank: ‘What were you thinking? Can you explain your justification?’ And we can keep him here as a reminder: ‘Never again!’”

PP: Oh man.

JY: Any protests of my fitness to teach law would just be the campaign of a radical community intolerant of views that don't accord with their own. Ye Olde Reign of the Moral Thought Police. Drive out those who think that Pinochet was good for Chile (but not those who favor Castro). Those who support the Israeli settlers (but not those who support Hamas). And those who think illegal immigrants are law-breakers who need to be expelled (but not those who think they should be allowed to stay because the borders were drawn up by imperialists). Those who think the police need bigger weapons (but not those who say they should be disarmed). The list goes on. And, certainly make sure that anyone who ever dealt with the rulers of Myanmar or Sri Lanka, who shook hands with Putin or Pol Pot are never allowed to teach again.

PP: Well put, Prof.

JY: I thought that tenure was fought for by John Dewey and colleagues of the original AAUP to protect scholarly pursuits against political intrusion. To me that means *any* political intrusion. And I can express these views because I have academic freedom.

PP: Here's something to toss back at these hypocrites who sing the praises of academic freedom and tenure: If the University disciplines you, then it also has to discipline all the self-defined progressives, get them to stop justifying the abuses of self-proclaimed leftist regimes. Equal opportunity censure for so-called "coddling the most destructive elements and endangering everyone else." Then, no one would have the ability to use academic smokescreens long enough to complete their "activities" and run for cover. If the Academic Senate is unwilling or unable to face the double standards within its ranks of what constitutes a "worthy" cause, the structures of tenure and claims to academic freedom are just demands of the privileged for cushy jobs and special rights to escape justice.

JY: Bro, you been smoking weed?

----- Original Message -----

Subject:

Date: 22 Aug 2002 10:28:43

From: PP

To: JY

And, of course, you'll be an awesome faculty advisor to the Federalist Society. That will allow you to keep your sanity with students who will appreciate your views about separation of powers and a restrained judiciary.

JY: Dude, I will do better than that. I'll launch a Veterans' Law Practicum or something. Ya know, support the troops, take care of vets who got in harm's way. I'll team up with some JAG Officer. Someone who's served in Gitmo; legal advisor to investigators pursuing leads in the war on terror; maybe a prosecutor at the Office of Military Commissions. Hell, even a defendants' JAG Off. Or someone who represented wounded troops. This'll take the focus off my past "odious acts" and demonstrate my motivation was all about saving our troops—and The Homeland.

PP: Brilliant idea, Prof. Get some JAG Off to work under you. Reach out to wounded vets. You could probably partner with a big firm *pro bono* assistance program. This could be a hard sell for the Kirkland & Ellis Foundation, but I'll see what I can do.

JY: Sweet. There might even be an endowed chair. I imagine some of the Old Guard will retire and someone needs to fill those chairs.

PP: How big is the chair's endowment? ☺ Haha. Sorry, I'm being gross.

JY: I can bide my time. Weather the storm. They are welcome to picket my office, leaflet my classes, and perform any other legal aspects of free speech that disagrees with mine. And if it gets too hot, I could make far more money at Hoover or Chapman.

----- Original Message -----

Subject:

Date: 24 Aug 2002 17:13:31

From: PP

To: JY

Hey, get this. I checked out the U's guidelines and they're pretty broad: "Endowed chairs are reserved for distinguished scholars and teachers. Chairs may be used to honor a distinguished colleague or to attract to the campus a valuable new member of the faculty. An administrative endowed chair provides funds in support of teaching, research, and service activities of the department, research unit, school, or college."

JY: Nice. And, as has become almost the norm in my University's operations, the decision to award me the chair would be made with very limited or no outside consultation. I'll be sure to have a word with the Dean or Acting Dean. They would hold at bay objections by my colleagues and even the Chancellor. No one on the law faculty will publicly denounce me. At least no one who counts—tenured and tenure-track.

PP: No doubt.

JY: In essence, the only viable ground for my dismissal would be commission of a criminal act that leads to conviction in a court of law and "which clearly demonstrates unfitness to continue as a member of the faculty." Now, what are the chances of me being put on trial?

PP: Agreed. We're not in a position to execute orders or to make policy. We answer questions or charges put to us by the Attorney General or Vice President, and even the President. Opinions delivered in the employment of a political administration can be expected to have a slant that suits the leadership's philosophy. In the execution of our jobs with the Administration, we are employed to provide legal opinions. OLC attorneys are nonpartisan and are specifically tasked with "providing authoritative legal advice" to the President.

JY: Some day the Republicans may lose the Presidency and the Democrats will be in charge. Would our critics want to see Republicans in their *next* administration conducting investigations of the Dems? I hope that this will close down any campaign to try and use criminal and ethics charges to carry out political fights against the policy of a past administration.

PP: Correct. This is still a government of laws. And its strength is in giving equal protection even to those whose actions one finds most reprehensible. Look at the ACLU for Chrissake. Liberals are always lauding the fact that that outfit is an equal opportunity defender of Constitutional rights. You should be judged professionally on your scholarly accomplishments alone.

JY: Of course the Human Rights Warriors will say: "Let the international courts deal with him. Alas, if, like George W. Bush, he uses U.S. power and a selective avoidance of international travel to avoid being seized and held accountable in an international court of law, that is a refusal to allow the process to work, a refusal to let the true arbiters of human rights violations assess his claims. If he is unrepentant, he should expect to be exonerated by the international legal apparatus. If he is not willing to subject himself to court proceedings, then he is refusing to allow the process to work, a refusal antithetical to foundational legal precepts. As such, it forces the university to do what others at this point cannot—hold him accountable. Why do we have a law school when this is our new standard of justice?"

PP: Now, who's the one been smoking dope?

----- Original Message -----

Subject:

Date: 11 Sep 2002 09:11:00

From: JY

To: PP

We must look forward, not backward, Bro.
They'll never get me.