

Obama administration backs immunity for author of Bush torture memos

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In legal arguments before a federal court in San Francisco Friday, the Obama administration stepped in to defend one of most notorious figures in the Bush administration, John Yoo, author of legal memoranda used to justify torture and indefinite detention without trial as part of the "war on terror."

The intervention makes clear that the Obama administration opposes any serious effort to shed light on the attacks against democratic rights carried out by its predecessor or to hold any officials of the previous administration accountable for their actions. Moreover, its court interventions amount to a defense of the Bush administration's assertions of quasi-dictatorial presidential powers.

Friday's court hearing before US District Judge Jeffrey White concerned a civil suit brought by Jose Padilla, the US citizen who was imprisoned without charges for more than three years in a US Navy brig after Bush designated him an "enemy combatant."

Padilla is now in federal prison, serving a 17-year sentence after being convicted on trumped-up conspiracy charges that had nothing to do with the sensationalized claims of the Bush administration that he was the leader of a plot to detonate a radioactive "dirty bomb" in an American city.

He has filed suit against numerous Bush administration officials, charging that his detention at the Navy brig, during which he was held in isolation and tortured, violated his constitutional rights. Yoo is being sued as the author of the legal opinion that upheld the arbitrary presidential authority under which Padilla was being held.

The Bush administration vigorously defended Yoo and the legal opinions he issued and sought to have the case thrown out on the grounds that US government employees cannot be sued for actions taken in the course of their official duties.

Immunity from lawsuits over official acts is an accepted US legal principle, but there is a broad exception for known criminal acts and abuses of power. Under the precedent set by the Nuremberg Trials after World War II, "just following orders" is not an adequate legal defense, particularly for those who were in a position to give the orders or define how they were to be interpreted. Yoo's position in 2001 as an attorney at the Justice Department's Office of Legal Counsel, which produces the official legal rationale for executive actions, clearly fits that description.

Padilla is not seeking either release from his current imprisonment or significant monetary damages. His claim against Yoo, for instance, is for \$1, but his suit seeks a declaration from the federal government that his three-year ordeal in the Navy brig was illegal. "Plaintiffs seek to vindicate their constitutional rights," his lawyers argue, "and ensure that neither Mr. Padilla nor any other person is treated this way in the future."

Justice Department lawyers told the court Friday that despite the changeover from Bush to Obama, there would be no change in the legal position of the government in this case. Their declarations came in response to written questions issued by Judge White the day before, asking whether the position taken by Yoo's attorneys had been "fully vetted" by the new administration.

One government lawyer, Mary Mason, told Judge White that permitting the lawsuit against Yoo to go forward could make government employees unwilling to do their jobs. These employees might decide that "I'm not designating you an enemy combatant, and I'm not going to interrogate you, because I might get sued," she argued.

Several memos drafted by Yoo in 2001 and 2002 were released by the Justice Department earlier this week as part of discovery in the lawsuit. The memos include extraordinary assertions of presidential authority to override the Constitution and the Bill of Rights in the

name of the "war on terror," including suspension of the First and Fourth amendments and the use of the military against civilian targets within the United States. [See "US Justice Department memos: the specter of military dictatorship"]

Judge White, appointed to the federal bench by George W. Bush, took Yoo's assertion of quasi-dictatorial presidential authority far more seriously than the Justice Department lawyers who appeared before them. He called Yoo's arguments in one 2001 memorandum "a pretty scary position," and seemed reluctant to throw out Padilla's suit, despite Mason's argument that the torture memorandums had been largely withdrawn before the end of the Bush administration.

The following exchange gives the flavor of the arguments: "We're not saying we condone torture," Mason said. But whether a government lawyer could be sued for condoning torture "is for the executive to decide, in the first instance, and for Congress to decide," not the courts.

Judge White asked, "You're not saying that if high public officials commit clearly illegal acts, a citizen subject to those acts has no remedy in this court?" Mason responded by citing the position take by the Bush Justice Department last year that the courts should not interfere in wartime decision-making by the executive branch.

Heather Metcalf, an attorney for Padilla, noted that Yoo had served on the "war council" that set Bush administration policy for the treatment of prisoners, and that one of the specific purposes of his memorandums was to shield officials from future liability for their encroachments on constitutional rights. "Defendant Yoo," she said, "must not take refuge in the legal no man's land that he helped to create."

After the court session, a Justice Department spokesman, Matt Miller, sought to downplay the political significance of the intervention. "This administration has made no secret that we disagree with many of the previous administration's legal policies on national security issues," he said. "Nevertheless, we generally defend employees or former employees of the department in litigation filed in connection with their official duties."

Yoo himself is a completely unrepentant defender of both torture and unchecked executive authority. In an interview with the *Orange County Register*, he said that he doesn't "think he would have made the basic decisions differently," adding that he would have polished the arguments more if he had known the memorandums would be made public. "When you are in the government,

you have very little time to make very important decisions," he said. "You don't have the luxury to research every single thing and that's accelerated in war time."

Apparently his legal "research" did not include the text of the Constitution, which clearly gives Congress decision-making power over "captures" in wartime, and entirely ignored the Constitution's Bill of Rights.

The position taken by the Obama administration in the Yoo lawsuit is consistent with its efforts in a whole series of court cases involving national security and democratic rights, where the Obama Justice Department has essentially adopted the Bush administration's standpoint as its own. This includes assertion of the "state secrets" privilege to suppress lawsuits against illegal kidnappings by the CIA ("rendition") and illegal surveillance by the National Security Agency.

Last week government lawyers opposed a request for US District Judge Vaughn Walker in San Francisco to consider whether legislation passed last year by Congress goes too far in authorizing blanket legal immunity for telecommunications companies that cooperated in warrantless surveillance of US citizens. A spokesman for the Justice Department declared the 2008 legislation—for which Senator Barack Obama voted—is "the law of the land, and, as such, the Department of Justice defends it in court."

So clear is the continuity between the Bush and Obama administrations in this area that the *Wall Street Journal* published an editorial Friday, headlined, "Obama Channels Cheney," hailing the new administration's stand on warrantless wiretapping. "The Obama Justice Department has adopted a legal stance identical to, if not more aggressive than, the Bush version," the newspaper's right-wing editorial board gloated.



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