

Padilla v. Yoo: Obama administration backs appeal of Bush torture memo author

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Obama administration lawyers under the direction of Attorney General Eric Holder are once again supporting the dismissal of a civil case brought by a victim of illegal detention and torture during the Bush administration.

On December 3, Department of Justice attorneys filed an *amicus curiae* “friend of the court” brief on behalf of John Yoo, the notorious draftsman of Bush’s “torture memos,” in the Ninth Circuit Court of Appeals, which reviews federal court decisions in the western United States.

The brief urges a reversal of District Judge Jeffrey S. White’s refusal to dismiss the case brought against Yoo by Jose Padilla, the US citizen held incommunicado and tortured for over two years after his arrest at Chicago’s O’Hare Airport.

Earlier this year, Obama administration lawyers supported the dismissal of suits brought by victims of CIA “extraordinary renditions” (See “Obama administration defends torturers”), targets of government eavesdropping (See “Obama administration seeks to block lawsuit over illegal wiretapping”), and detainees transported from the Middle East to US military bases in Afghanistan (See “Obama moves to block court access for detainees in Afghanistan”).

And once again the centerpiece of the Obama administration’s argument is the claim that courts have no power to review executive decisions—even incarceration without due process and accompanied by torture—when justified in the name of the “war on terror.” This attack on the fundamental checks and balances underlying the US Constitution apes the police-state arguments used by former attorneys general John Ashcroft and Alberto Gonzalez, and other Bush administration lawyers, to justify their attacks on democratic rights following the September 11 attacks.

US agents first arrested Padilla on May 8, 2002 as a “material witness” for a New York grand jury. A month later, on the eve of the hearing on his motion for release, Ashcroft held a sensational press conference, accusing Padilla of planning “to build and explode a radiological dispersion device, or ‘dirty bomb,’ in the United States.”

Bush designated Padilla an “enemy combatant”—a category with no legal precedent—and he was shipped to a South Carolina brig. After two-and-a-half years of legal challenges mounted on his behalf by lawyers not even allowed to meet or

communicate with their client, in November 2005 the “enemy combatant” designation was abruptly dropped and Padilla was transferred to a civilian jail, an action taken to head off an imminent Supreme Court ruling on the constitutionality of his detention.

New criminal charges were then filed that had no connection to the original allegations. Padilla was tried with two other men in Florida, and was unjustly convicted of conspiracy and providing material support for terrorism. He is now serving a 17-year sentence while he appeals his conviction. (See “US ‘enemy combatant’ Jose Padilla sentenced to 17 years in prison”).

Padilla sued Yoo, who presently teaches law at the University of California’s Boalt Hall, in San Francisco federal court. Yoo brought a motion to dismiss the case last March, which also was supported by Obama administration lawyers. (See “Obama administration backs immunity for author of Bush torture memos”).

Last June, however, the motion to dismiss was denied by Judge White, a 2002 George W. Bush appointee.

Judge White’s ruling detailed Padilla’s two-and-a-half years in the brig. Conditions included “extreme and prolonged isolation,” “deprivation of light and exposure to prolonged periods of artificial light,” “extreme and deliberate variations in the temperature of his cell,” “threats to cut him with a knife and pour alcohol into the wounds,” “threats to kill him immediately,” “administering ... psychotropic drugs against his will,” “shackling and manacling for hours at a time,” “uncomfortable and painful (or ‘stress’) positions,” “introduction into his cell of noxious fumes that caused pain to the eyes and nose,” “loud noises at all hours of the night,” “constant surveillance, including during the use of toilet facilities and showers,” “denial of access to the Koran,” and “deprivation of medical care for serious and potentially life-threatening ailments,” among other acts of barbarism.

Judge White reviewed the principal documents Yoo had prepared to give the Bush administration pseudo-legal justification for Padilla’s treatment, including an October 23, 2001 memorandum that “the Fourth Amendment [the provision of the Bill of Rights that prohibits unreasonable searches and seizures] does not apply to domestic military operations

designed to deter and prevent further terrorist attacks,” and that just as “wartime destruction of property does not involve a ‘taking’ under the Fifth Amendment, it seems safe to conclude that the Court would not apply the Fourth Amendment to domestic military operations.”

Judge White also cited a January 9, 2002 memorandum outlining Yoo’s analysis that treatment of Al Qaeda and Taliban members is “not governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs.”

Following a meeting of Bush’s war council in July 2002, in which Yoo and others “discussed in great detail how to legally justify pressure techniques proposed by the CIA, including waterboarding, mock burial, and open-handed slapping of suspects,” according to Judge White, Yoo prepared his infamous August 1, 2002 “torture memo.”

“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,” Yoo wrote. “For purely mental pain or suffering to amount to torture ... it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”

Finally, Judge White cited a March 14, 2003 memorandum that approves the use of mind-altering drugs during interrogations. This document states that Yoo “had received assurances from the Criminal Division of the Justice Department that prosecutions would not be brought against interrogators, reinforcing the point that even federal officials who committed war crimes or torture under federal criminal statutes would escape responsibility for their crimes.”

“The Court notes the irony,” Judge White wrote, “of [Yoo’s] position: essentially, the allegations of the complaint are that Yoo drafted legal cover to shield review of the conduct of federal officials who allegedly deprived Padilla of his constitutional rights. Now, Yoo argues that the very drafting itself should be shielded from judicial review. Padilla’s allegations here are that the creation of such legal cover was itself an unconstitutional exercise of power.”

Judge White denied the motion to dismiss, ruling that “Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct.”

Urging the Ninth Circuit to reverse this common-sense, democratic ruling, the Obama administration brief argues, “There can be little question that the claims here directly implicate war powers of the President, with respect to the military’s detention and treatment of those determined to be enemies during an armed conflict, that have never been the subject of money-damages actions in our nation’s long history.”

“Padilla was detained by the military upon the decision of President Bush to designate him an ‘enemy combatant,’” the brief adds. “He claims that the military detention was unconstitutional and seeks money damages from Yoo for having advised that it was lawful.... If enforced, [Padilla’s

claims] would create a large shadow over sensitive matters of military discretion.”

The Obama administration lawyers do not mention that the suit actually seeks nominal damages of \$1 along with a declaration that his detention and torture were illegal.

On the subject of torture, the Obama administration lawyers added that “a court would have to inquire into what the conditions of Padilla’s military confinement were and as to what interrogation techniques were employed against him.”

In other words, the courts have no power to review the claim of a US citizen—seized while lawfully walking through an airport, and thrown into a brig for more than two years of torture, without access to an attorney, much less a court of law—all because the executive branch declares the action related to an undefined, never-ending “war on terror.”

As a substitute for meaningful judicial review based on the claims of unlawful detention and torture victims, the Obama lawyers offer the following pathetic alternative: “That is not to say that the actions of a Department of Justice attorney providing advice should go unchecked. Department of Justice attorneys, if they abuse their authority, are subject to possible state and federal bar sanctions.”

There is no “federal bar,” and Yoo does not maintain a license to practice law in California, as professors are not required to do so. Regardless, an administrative procedure undertaken against one’s professional license is a far cry from a lawsuit brought by a person who actually suffered through years of wrongful confinement and torture.

The Obama administration position could not be more clear. Despite slogans of “change” bandied about during last year’s presidential campaign, Obama’s Department of Justice embraces the same policies articulated in the Yoo memoranda: that military measures, unbridled either by the Constitution’s Bill of Rights or by the Geneva Conventions, can be used against anyone the executive branch labels a “terrorist,” even US citizens on US soil.



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