

# US Justice Department report clears authors of Bush torture memos

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A US Justice Department report released Friday has exonerated the Bush administration lawyers whose secret memos justified waterboarding and other forms of torture by CIA interrogators.

The ethics report of the Office of Professional Responsibility (OPR) said that John C. Yoo, 42, and Jay S. Bybee, 56, authors of the August 2002 and March 2003 “torture memos,” had used “poor judgment” and flawed legal reasoning. However, the report concluded they were not guilty of “professional misconduct” and would face no sanctions. Yoo and Bybee worked in the Justice Department’s Office of Legal Counsel (OLC), advising the White House.

The OPR report’s conclusions demonstrate that Barack Obama, despite pledges during his election bid to “ban” torture, is in fact committed to a defense of the criminal practices of his predecessor. As Yoo and Bybee walk free, the Obama administration is also blocking the prosecution of those at the highest levels of the Bush administration who authorized and sanctioned brutal torture methods in violation of international law.

The two were quick to praise their exoneration. John Yoo, who now teaches law at the University of California at Berkeley, commented Friday, “I am heartened that [Justice Department official David] Margolis understood that our work in the immediate months after 9/11 was done in good faith, under demanding pressures, to protect our nation from more terrorist attacks.”

Jay Bybee now serves as a justice on the 9<sup>th</sup> US Circuit Court of Appeals. His attorney Maureen Mahoney stated, “We can only hope that the department’s decision will establish once and for all that dedicated public officials may have honest disagreements on difficult matters of legal judgment

without violating ethical standards.”

In the report issued Friday, David Margolis, assistant deputy attorney general and a career lawyer at the Justice Department, rejected the conclusions of an earlier report issued by the OPR, which had concluded that Yoo and Bybee had demonstrated “professional misconduct” and provided legal advice on torture to the White House in possible violation of international and federal laws on torture. The December 2008 report had recommended referral of their cases to state bar associations, which could have revoked their law licenses.

Margolis’s review of the 2008 report was ordered by Eric Holder, attorney general in the Obama administration. Margolis based his reversal of judgment on Yoo and Bybee in part by alluding to the alleged pressures of an imminent terror threat at the time the memos were written, accepting the framework of the Bush administration’s “war on terror” to justify his stance.

Margolis wrote, “Among the difficulties in assessing these memos now, over seven years after their issuance, is that the context is lost.” The first memo, drafted in August 2002, came shortly after the capture of suspected Al Qaeda operative Abu Zubaydah. Margolis argued that the memos’ justification of torture—and the unprecedented powers granted to the president to authorize it—need to be seen in light of anti-terror atmosphere being whipped up by the Bush administration at the time.

OPR head Mary Patrice Brown disagreed with Margolis’s assessment, stating: “Situations of great stress, danger and fear do not relieve department attorneys of their duty to provide thorough, objective and candid legal advice, even if that advice is not what the client wants to hear.”

In its December 2008 report, the OPR had determined that Yoo “committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.” Bybee, the report concluded, “committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.”

In fact, the memos were penned to argue that the Bush administration had unrestrained executive powers, providing the president with authority to authorize torture. The memo signed by then Deputy Assistant Attorney General John Yoo, dated March 14, 2003, one week before the launch of the Iraq war, was aimed at providing a justification for the torture of future captured prisoners.

The memo also specifically asserted that the president had the authority to override US and international law as part of the war on terror: “Any construction of criminal laws that regulated the President’s authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions whether Congress had intruded on the President’s constitutional authority.”

The memo also argued that the Constitution’s prohibition against “cruel and unusual punishment” does not apply to “alien combatants held abroad” and that US law cannot restrict the interrogation of any “enemy combatant” held by the military, since interrogation is part of the president’s commander in chief powers. Many of the memo’s arguments are further structured to apply to anyone, including American citizens held in the US.

The memos laid the groundwork for the torture of an unknown numbers of prisoners captured in the wars in Iraq and Afghanistan and held at US secret prison sites around the world. In addition to waterboarding, “enhanced interrogation techniques” have included threats of death, sleep deprivation, extreme variations of light, temperature and sound, and the use of psychotropic drugs.

The Yoo memo made the legally unfounded argument that such torture methods do not constitute torture unless they inflict pain equivalent to “major organ failure.”

The memo also argued that if a government

interrogator were charged with committing torture he could argue self defense: “If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate a criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network.”

The Obama Justice Department has now determined that the composition of such rationalizations of torture and violation of constitutional rights did not even rise to the level of “professional misconduct.” Implicit in Margolis’s decision as well is that the government officials who authorized these crimes are to be protected and shielded from prosecution.

In the wake of the Justice Department’s closing the probe into Yoo and Bybee, several Democrats expressed their disagreement. Senator Patrick Leahy of Vermont, chairman of the Senate Judiciary Committee, said he had been “deeply offended” by the torture memos and planned to hold a hearing February 26. In a statement on his Web site, Leahy wrote, “I have serious concerns about the role each of these government lawyers played in the development of these policies.”

The Democratic Party, in fact, is complicit in the crimes of the Bush administration. Democratic Congressional leaders were briefed by Bush officials on the torture practices and violations of democratic rights and supported them.

The Obama White House has explicitly defended the Bush administration policies of indefinite detention, extraordinary rendition and military tribunals. There is every reason to believe that such torture methods continue to this day in the expansion of the war in Afghanistan. Further, Obama has upheld the Bush doctrine of preemptive war—a policy that goes unchallenged by both big business parties.

*This author recommends:*

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