

Appeals Court backs immunity for Bush administration torture policy

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In a decision that effectively bars prosecution of any federal official for the widespread torture and abuse in the “war on terror” over the past decade, the Ninth Circuit Court of Appeals has ruled that former Bush administration official John Yoo is immune from liability for his role in providing a legal cover for the torture.

The convoluted legal reasoning comes from the reputedly most liberal of the US Circuit Courts of Appeal, the intermediate level of the federal courts between district courts and the Supreme Court. The three-judge panel includes two judges appointed by Bill Clinton and one appointed by George W. Bush.

The panel ruled 3-0 on the appeal of a decision by a district court that allowed Jose Padilla, an American citizen jailed since 2002, to sue Yoo for the “gross physical and psychological abuse” that Padilla suffered during three years of military detention. Padilla was arrested in 2002, then declared an “enemy combatant” by President Bush, and transferred to military custody at a South Carolina naval brig.

After he won a lower-court ruling against his indefinite detention without trial, the Bush administration transferred Padilla to civilian jurisdiction and successfully prosecuted him on terrorism charges in a trial where all testimony about his torture in military custody was barred. He is now serving a 17-year prison term, which a separate appeals court ruling declared to be too lenient.

Padilla sued Yoo personally for his role in writing the Justice Department memos that the Bush administration used to provide guidance on the treatment of prisoners at CIA secret prisons, at Guantanamo Bay, and at military detention facilities. Padilla asked for symbolic damages of \$1 and a legal declaration that his treatment by the military and the Bush administration had been a

violation of the US Constitution.

A similar suit by Padilla against former defense secretary Donald Rumsfeld was thrown out by the Fourth Circuit Court of Appeals, a more conservative appeals court, earlier this year.

The ruling by the panel of the Ninth Circuit is a travesty of legal reasoning. It finds that even accepting Padilla’s description of his treatment in the South Carolina military brig as true, there is no basis for holding any official accountable.

The techniques used against Padilla included, by his account: “prolonged isolation; deprivation of light; exposure to prolonged periods of light and darkness, including being periodically subjected to absolute light or darkness for periods in excess of twenty-four hours; extreme variations in temperature; sleep adjustment; threats of severe physical abuse; death threats; administration of psychotropic drugs; shackling and manacling for hours at a time; use of stress positions; noxious fumes that caused pain to eyes and nose; loud noises; withholding of any mattress, pillow, sheet or blanket; forced grooming; suspensions of showers; removal of religious items; constant surveillance; incommunicado detention, including denial of all contact with family and legal counsel for a 21-month period; interference with religious observance; and denial of medical care for serious and potentially life-threatening ailments, including chest pain and difficulty breathing, as well as for treatment of the chronic, extreme pain caused by being forced to endure stress positions.”

According to the opinion, written by Judge Raymond C. Fisher, while the judges conceded that such treatment does constitute torture, they claimed that during the period in question there was a “debate” over the definition of torture that had not yet been resolved.

“In light of that debate,” the opinion states, “we cannot say that any reasonable official in 2001-03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.”

The “debate” cited by the Ninth Circuit was not a legitimate legal question, but one manufactured by the Bush administration lawyers, who sought to legitimize practices long banned both under international law and longstanding US legal principles.

It was during this period that Yoo, then with the Office of Legal Counsel at the Justice Department, drafted a memo saying the brutal interrogation methods amounted to torture only if they caused the same level of pain as “organ failure, impairment of bodily function or even death.” Even waterboarding, defined as torture by the US Code of Military Justice for more than a century, was permissible under this standard.

A similar “debate” is now taking place over whether the US president has the right to order an American citizen killed—as in the assassination of Anwar al-Awlaki in Yemen last year—even though no US administration before Obama’s has ever claimed that power.

Yoo himself made reference to this issue in a cynical op-ed column in the *Wall Street Journal* celebrating his victory in the Ninth Circuit decision. He blasted the Obama administration for (in his opinion) failing to defend his position aggressively enough, and warned that Obama and his aides could find themselves in the dock for authorizing drone missile strikes if they failed to uphold the immunity of federal officials.

Another factor in the Ninth Circuit ruling is that a second high-ranking Bush Justice Department official, implicated with Yoo as a co-author of torture memoranda, is now a sitting justice on the Ninth Circuit itself. Jay Bybee was appointed to the circuit court position by Bush in 2003. Senate Democrats, then in the minority, declined to filibuster his nomination. After his role in the torture memos came to light, there has been no effort to impeach the sitting federal judge, and his colleagues on the Ninth Circuit have now barred any civil lawsuit against him.

The Obama administration has spearheaded the whitewash of the Bush administration’s torture policies. An internal review by the internal affairs unit of the Justice Department found that Yoo and Bybee

were guilty of professional misconduct in drafting the torture memos, but this ruling was overturned by higher-ranking officials in the Obama administration.

This is in keeping with the broader Obama policy of blocking all prosecution of the CIA and military personnel, or the higher-level political appointees, who were involved in abuse and torture of prisoners, even in cases where prisoners died while in custody.

Not a single government official has been prosecuted for any abuses committed against prisoners since 2001, nor for any abuses committed against the democratic rights of American citizens.

Padilla’s attorney, Jonathan Freiman, said he was considering an appeal to the Supreme Court, which has already heard an appeal of a similar ruling by the Fourth Circuit Court of Appeals. In an e-mail to the press, Freiman said, “Incommunicado detention, brutal treatment and death threats do not represent American values and are universally condemned. Hopefully no one else will face the horror that Mr. Padilla and his family have faced. The law should guarantee that, and the Ninth Circuit erred in concluding that Mr. Yoo’s actions were not ‘beyond debate’.”



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