



Written by [Joe Wolverton, II, J.D.](#) on May 4, 2012

Circuit Court Grants Qualified Immunity to Torture Memos' Author John Yoo

Jose Padilla's ongoing struggle to hold the government of the United States accountable for torture he allegedly received while being interrogated continued Wednesday as the United States Court of Appeals for the Ninth Circuit [granted qualified immunity to John Yoo](#), an official in the George W. Bush Justice Department.

During his time Deputy Assistant Attorney General, Yoo gained notoriety for authoring the [Torture Memos](#) wherein he advised the CIA and President Bush that the use of "enhanced interrogation techniques," such as prolonged sleep deprivation, binding in stress positions, and waterboarding was legally permissible based on Yoo's interpretation of the authority given the President to execute the War on Terror.

It is Yoo's recommendation of torture in these controversial memos that Padilla claims in his lawsuit led directly to his being subjected to the very techniques mentioned in the memos while he was detained as an enemy combatant at a Naval prison in Charleston, South Carolina.

As Padilla explains in the complaint:

Yoo set in motion Padilla's allegedly illegal interrogation and detention, both by formulating unlawful policies for the designation, detention and interrogation of suspected "enemy combatants" and by issuing legal memoranda designed to evade legal restraints on those policies and to immunize those who implemented them.

Born in Brooklyn and raised in Chicago, Padilla is accused by the government of the United States of being a member of al-Qaeda. It is asserted that he has actively participated in that organization since the late 1990s. He has been convicted of conspiring to further al-Qaeda's "global campaign of terror."

The government says that in late 2000, Padilla travelled to Afghanistan in order to receive training at the al-Farooq camp run by members of al-Qaeda.

In 2002, Padilla left Afghanistan and, after stopping in Pakistan, Egypt, and Switzerland, he arrived back home in Chicago on May 8. Upon arriving at Chicago's O'Hare International Airport, Padilla was arrested by FBI agents. After his interrogation by the FBI at O'Hare, Padilla was transferred to a federal detention facility in New York and was appointed counsel.

On June 9, 2002, acting pursuant to his authority under the AUMF, President George W. Bush classified Padilla as an "enemy combatant" and ordered then-Secretary of Defense Donald Rumsfeld to detain Padilla. In the detention order, President Bush insisted that Padilla had "vital intelligence and posed an





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ongoing threat to the national security of the United States.” Later that very day, Padilla was transferred from the civilian holding center to the Naval Consolidated Brig at Charleston, South Carolina.

Three years later, on November 17, 2005, Padilla was indicted on criminal terrorism charges in the U.S. District Court for the Southern District of Florida. After about two months, the Supreme Court authorized his transfer from the Naval Consolidated Brig back into civilian custody.

Finally, on August, 16, 2007, over five years after his arrest in Chicago, Padilla was convicted of one count of conspiracy to murder, kidnap, or maim persons overseas and two counts of providing material support to al Qaeda. He is presently serving a 17-year sentence for those crimes at the ADX Supermax Prison in Florence, Colorado.

In its decision granting Yoo qualified immunity, the Court held:

although during Yoo’s tenure at [Office of Legal Counsel] the constitutional rights of convicted prisoners and persons subject to ordinary criminal process were, in many respects, clearly established, it was not “beyond debate” at that time that Padilla — who was not a convicted prisoner or criminal defendant, but a suspected terrorist designated an enemy combatant and confined to military detention by order of the President — was entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal....

Further:

although it has been clearly established for decades that torture of an American citizen violates the Constitution, and we assume without deciding that Padilla’s alleged treatment rose to the level of torture, that such treatment was torture was not clearly established in 2001-03.

Qualified immunity protects government officials from liability for the violation of an individual’s federal constitutional rights. Such a shield is available to agents of the government (state or federal) whose actions, although later determined to be illegal, did not violate “clearly established law” in force at the time the questionable activity took place.

In plain language, the panel held first, that Jose Padilla — an American citizen — was likely not entitled to rights afforded all other citizens under the Constitution given his categorization of “enemy combatant;” and, second, that even if the treatment he received at the hands of agents of the American government amounted to torture, that definition wasn’t clearly established at the time he was being interrogated.

Thus, the Constitution only applies when the federal government wants it to apply and if a detainee is tortured, those who authorized the torture will be protected behind an impenetrable veil of immunity from liability.

It should be clearly understood that in the matter of *Padilla v. Yoo*, a federal court of the United States of America whose jurisdiction is granted by Congress published an opinion creating two classes of citizens: those entitled to due process and those who are enemy combatants. Next, it refuses to define torture or even to admit that the horrific measures advocated by Yoo in his memos qualified as torture.

As for Yoo, Jurist provided [a brief synopsis](#) of his legal problems since drafting the Torture Memos:

Yoo was a lawyer with the US Department of Justice (DOJ) Office of Legal Counsel (OLC) and is now a professor at the University of California Berkeley School of Law. He could have faced disbarment. In February 2010 the DOJ issued a ruling saying that Yoo was only guilty of “poor judgment” in



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writing the interrogation technique memos. In July 2009 Yoo appealed a district court ruling that permitted a lawsuit alleging his complicity in torture to proceed.

The investigation's into Yoo's conduct while at the DOJ included an inquiry conducted by the Justice Department's Office of Professional Responsibility (OPR). The OPR began investigating Yoo's work in 2004 and in July 2009 it issued [a final report](#) of the investigation that criticized Yoo for his legal justification for interrogation techniques such as waterboarding. In its findings, the OPR quotes [testimony Yoo gave to Justice Department investigators](#) where he defended his action, insisting that the "president's war-making authority was so broad that he had the constitutional power to order a village to be 'massacred' "

Finally, in 2009, Spanish Judge Baltasar Garzon Real [launched an investigation](#) of Yoo, former Attorney General Alberto Gonzalez, and four other Bush Administration officials for allegedly committing war crimes.

Several other cases alleging similar misconduct on the part of officials of the federal government in its prosecution of the "War on Terror" have been dealt with in like manner, protecting those agents of the federal government from liability under the theory of qualified immunity.

Regardless of the merits of José Padilla's specific allegations against the federal government or its charges of conspiracy against him (charges one judge called "light on facts"), the passage of the NDAA makes it clear that the government of the United States will not allow constitutional impediments to stand in the way of permitting the President to brand as an "enemy combatant" any citizen he suspects of possibly posing a threat to the security of the homeland and to torture that person until he talks.

Photo: Protesters confront John Yoo, the former Bush administration attorney who wrote legal memos used to support harsh interrogation techniques that critics say constituted torture, at

the University of California, Berkeley, on Aug. 17, 2009: AP Images



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