

JAY BYBEE'S COLLEAGUES SAY OLC LAWYERS COULDN'T KNOW THAT TORTURE WAS TORTURE IN 2001-2003

The 9th Circuit has overturned a District court ruling holding that Jose Padilla could sue John Yoo for the torture and illegal detention that Yoo's OLC work authorized.

While the decision sucks, I'm not so surprised by it, even coming from the purportedly hippie 9th Circuit.

In fact, I'm particularly interested in the way the opinion applies the *Ashcroft v. Al Kidd* standard about whether the conduct alleged—now obviously recognized to be illegal—was considered as such “beyond debate” at the time of that conduct.

We therefore hold that Yoo must be granted qualified immunity, and accordingly reverse the decision of the district court.

As we explain below, we reach this conclusion for two reasons. First, although during Yoo's tenure at OLC 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. Id.
Second, 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.

The circuit, in other words, argued that a poor little OLC lawyer serving in the 2001 to 2003 time frame might genuinely consider the treatment that Padilla received to be legal at the time.

And remember, a number of the memos cited in the complaint were signed by then OLC head, now 9th Circuit Judge Jay Bybee.

- A January 22, 2002 memorandum to Gonzales signed by then-Assistant Attorney General Jay Bybee but allegedly drafted by Yoo on the Application of Treaties and Laws to al Qaeda and Taliban Detainees.
- A February 26, 2002 memorandum to Haynes signed by Bybee but allegedly created by Yoo on Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan.

[snip]

- An August 1, 2002 memorandum to Gonzales, again signed by Bybee but allegedly created

by Yoo, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, concluding that an interrogation technique must cause damage that rises "to the level of death, organ failure, or the permanent impairment of a significant body function" in order to be considered torture.

- A second memorandum produced during August 2002 addressing the legality of particular interrogation techniques that the CIA wished to employ.

Oh good. We don't have to question the competence of anyone on the 9th Circuit now, given that the 9th Circuit has judged that it was not beyond debate that Inquisition torture methods were torture when now-9th Circuit judges were signing off on claims they weren't.