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Why the 9th Circuit got *Padilla* wrong

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Torture is wrong and those who engage in it should be held liable. This proposition should be unassailable, but on May 2, the 9th U.S. Circuit Court of Appeals came to the opposite conclusion in *Padilla v. Yoo*. Reversing the federal district court, the 9th Circuit held that Jose Padilla could not sue John Yoo for money damages even

though Yoo's actions led to Padilla's torture.

Jose Padilla, an American citizen, was apprehended at Chicago's airport in May 2002 and held as an enemy combatant until January 2006. During this time, he was charged with no crime, indicted by no grand jury, and convicted by no jury. The government claimed the authority to hold an American citizen indefinitely as an enemy combatant.

In June 2004, five justices of the Supreme Court clearly indicated that this was impermissible. Padilla had filed suit seeking his release via a writ of habeas corpus. The Court, in a 5-4 decision, dismissed on venue grounds. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Padilla's habeas petition had been filed in federal district court while he was in New York. Subsequently, he was transferred to a military prison in South Carolina and the Court held that he had to bring his habeas petition in the federal district court where he was held. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer dissented and clearly stated that it was illegal to hold Padilla, an American citizen apprehended in the U.S., without criminal charges.

Additionally, in the companion case, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Antonin Scalia stated that an American citizen could not be held as an enemy combatant until and unless Congress suspended the writ of habeas corpus pursuant to Article I, Section 9 of the Constitution. Despite five clear votes on the Court for Padilla, the Bush administration continued to hold him as an enemy combatant. In fact, the Bush administration only changed course and charged Padilla with a crime when the Supreme Court was poised to hear Padilla's suit again.

While being held as an enemy combatant, Padilla was subjected to what was euphemistically called "extreme interrogation." As the 9th Circuit explained, Padilla's complaint alleged that he was subjected to "extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with his ability to practice his religion; and incommunicado detention for almost two years, without access to family, counsel or the courts."

Padilla sued John Yoo, who was the deputy assistant attorney general in the Office of Legal Counsel in the Department of Justice. The complaint alleged that Yoo's conduct, including memos he wrote, were responsible for the abuses that Padilla suffered. In fact, Yoo, now a law professor at the UC Berkeley, wrote a book defending exactly these actions.

SPECIAL REPORT

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Tuesday, May 15, 2012

Government

Budget proposal hits trial courts hard

Gov. Jerry Brown called for cutting the judiciary's budget by \$544 million, a worst-case scenario for the branch that if enacted could result in widespread layoffs and reductions in services, as well as inflame tensions over spending.

Law Practice

Jones Day latest to gain from Dewey's collapse

Bruce Bennett, a prized get when Dewey & LeBoeuf LLP set about luring rainmakers to the law firm with outsized compensation guarantees, is joining the Los Angeles office of Jones Day.

Bankruptcy

Family farmers sustain blow

The U.S. Supreme Court dealt family farmers in California a blow by ruling Monday that they're responsible for paying the capital gains taxes on farm assets sold after filing for Chapter 12 bankruptcy.

Corporate

Network traffic company names first GC

Silicon Valley-based network traffic management company Gigamon Systems LLC has appointed its first general counsel, the company announced Monday.

Solo and Small Firms

San Francisco boutique expands

Miller Law Group PC, one of the state's largest women-owned labor and employment groups, has opened a Los Angeles office, hiring a veteran employment litigator from Seyfarth Shaw as shareholder.

Law Practice

Vinson opens San Francisco office

The Houston-based firm already has an office in Palo Alto. The San Francisco office is expected to focus on litigation.

[The decision] misses the point: even if American citizens detained as enemy combatants do not have the same rights as convicted prisoners, surely they have the right to not be tortured.

Yoo moved to dismiss Padilla's suit, among other grounds, based on qualified immunity. Government officers sued for money damages are protected by qualified immunity for their discretionary acts unless they violate clearly established law that the reasonable officer should know. The district court denied Yoo qualified for immunity and he appealed.

This should be an easy case: what was done to Padilla was unconstitutional and anyone should know that, let alone a deputy assistant attorney general of the United States. But the 9th Circuit, in an opinion by Judge Ray Fisher, came to an opposite conclusion. The court gave two reasons for ordering Padilla's suit dismissed.

First, the 9th Circuit said that "the Supreme Court had not, at the time of Yoo's tenure at OLC, declared that American citizens detained as enemy combatants had to be treated at least as well, or afforded at least the same constitutional and statutory protections, as convicted prisoners." This, though, misses the point: even if American citizens detained as enemy combatants do not have the same rights as convicted prisoners, surely they have the right to not be tortured. In fact, Judge Fisher's opinion recognizes this when he states: "We agree with the plaintiffs that the unconstitutionality of torturing a United States citizen was 'beyond debate' by 2001."

Thus it is the second reason given by the court that was the key to its decision. The court stated: "Yoo is entitled to qualified immunity, however, because it was not clearly established in 2001-03 that the treatment to which Padilla says he was subjected amounted to torture." The court said that there was a debate as to what constitutes torture and that there were not cases on point specifically holding that what the government did to Padilla constituted torture. Judge Fisher stated: "We assume without deciding that Padilla's alleged treatment rose to the level of torture. That it [was] torture was not, however, 'beyond debate' in 2001-03. There was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate, as well as the judicial decisions discussed above, 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."

But reading the allegations in Padilla's complaint leaves no doubt that by any definition what was done to him was torture. As the 9th Circuit recognized, Padilla was subjected to, among other things, "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; incommunicado detention, including denial of all contact with family and legal counsel for a 21-month period; 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.'" The complaint alleged that Padilla suffered "severe physical pain" and "profound disruption of his senses and personality."

It is incomprehensible that the 9th Circuit could say that this would not clearly have been regarded as torture from 2001-2003 or that any reasonable government official would not recognize it as such. At the very least, the intentional infliction of pain on a prisoner is there very definition of torture. Although there may not have been specific cases on point stating that this was torture, the Supreme Court has been clear that there need not be a case on point in order to say that there is clearly established law for purposes of qualified immunity.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court held that qualified immunity did not protect prison guards who tied a prisoner to a hitching post and left him in the sun, even though there was no prior decision holding that this was cruel and unusual punishment. The Court said that a case on point would be sufficient to

Criminal

Lawsuit filed over death penalty initiative

An advocacy group representing law enforcement and victims' rights positions wants to remove an initiative seeking to abolish the death penalty in California from the November ballot.

Lawyer pleads guilty, returns client money

A disbarred attorney pleaded guilty Monday to three counts of felony grand theft in relation to illegal payments he took from clients.

Labor/Employment

Nursing company settles federal wage claims

A Downey-based health care company will pay \$654,082 to 108 current and former nurses to settle claims it violated the Fair Labor Standards Act, the U.S. Department of Labor announced Monday.

Judges and Judiciary

Obama nominates LA magistrate for Central District

The Obama administration nominated Los Angeles-based U.S. Magistrate Judge Fernando M. Olguin on Monday to be a federal judge in California's Central District.

Alternative Dispute Resolution

Keeping arbitration disputes 'under the radar'

Don't take "private" arbitrations for granted: confidentiality is not required by law. By **Hon. Robert A. Baines (Ret.)** of JAMS

Constitutional Law

Why the 9th Circuit got Padilla wrong

Even if an American citizen detained as an enemy combatant doesn't have the same rights as a prisoner, surely they have the right not to be tortured. By **Erwin Chemerinsky** of University of California, Irvine School of Law

Intellectual Property

Tupac's 'performance' and copyright

Tupac's recent appearance shed light on another type of artist. By **Zia Modabber** of Katten Muchin Rosenman LLP

Probate

Accessing safe deposit boxes after death

What happens to the contents of a safety deposit box when the owner is gone? By **Mark J. Phillips** of Goldfarb, Sturman & Averbach

Intentional interference with expected inheritance

A new tort is coming to a California court near you. By **Chuck Teixeira**

show clearly established law, but was not necessary. To require a case on point would mean that the most egregious conduct by government officers would be protected by qualified immunity if no one had ever done it before. What was done to Padilla was far worse than what occurred in *Hope v. Pelzer*, and there the Court denied qualified immunity.

There are times when most of all what we need from our judges is humanity and common sense. Both were seriously lacking in the 9th Circuit's holding that John Yoo could not sued for the role he played in causing Jose Padilla's torture. Hopefully, the 9th Circuit will grant en banc review and reverse this decision. What was done to Padilla was cruel, inhumane, and torture by any definition. Those responsible should be held liable.

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Intellectual Property

Intellectual Ventures, Nvidia acquire 500 patents

Intellectual Ventures LLC and Nvidia Corp. announced Monday they had partnered to purchase approximately 500 mobile technology patents from IPWireless Inc.

Obituaries

Retired judge dies

John C. Rayburn Jr., a former assistant U.S. attorney in Los Angeles and Santa Ana who also served as a magistrate judge in the Central District, has died.

Mergers & Acquisitions

Dealmakers

A roundup of recent M&A and financing activity and the lawyers involved.

Litigation

LA civil courtrooms start to shed reporters

Beginning today, Los Angeles County Superior Court no longer will provide stenographic court reporters for civil trials in an attempt to save money.

Intellectual Property

Apple wins ruling in patent battle with Samsung

Apple Inc. will get another chance to block the sale of Samsung Electronics Co. Ltd. 's tablet computer because an appeals court ruled Monday that a San Jose federal judge wrongly denied a preliminary injunction in a patent lawsuit.

Judicial Profile

Steven C. Suzukawa

Court of Appeal Justice 2nd District (Los Angeles)

Entertainment & Sports

Social media complicates Olympians lives

Swimmer Michael Phelps, gymnast Kerri Strug and track and field star Carl Lewis gained celebrity status, thanks to the Olympics. But lawyers say the digital world has complicated that transition for up-and-coming athletes and artists.