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The Prosecution of US War Criminals in Spain: The Justice Department "Objects"

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Spain is pursuing a case against former top U.S. officials who authorized the use of torture, including David Addington, Jay Bybee, Douglas Feith, William Haynes, John Yoo, and Alberto Gonzales. U.S. activist groups have been encouraging Spain in this endeavor.

The U.S. Department of Justice, Criminal Division, Office of International Affairs, has sent a 7-page letter to the Spanish court (PDF) in response to Judge Eloy Velasco Nunez's request for information. The letter does not provide any information but asks the Spanish court to submit all of its information to the United States "for further review and investigation, as appropriate." Remember, we are talking about the possible prosecution of people who openly confess to having written and signed documents that in many cases are now public, documents that clearly authorized torture (not to mention [and nobody is mentioning] aggressive war, lawless imprisonment, warrantless spying, etc), torture that is well documented as having occurred. This is not a case requiring any investigation, but rather simply a reversal in the DOJ's position on what is appropriate — or in the White House's position, since the DOJ openly takes all its orders from the President.

In the next paragraph, the DOJ's letter announces that there is no basis for a prosecution of any of the men named — which sort of gives away the game of guessing which "investigations" might be deemed "appropriate."

The letter then argues that bad apples (a couple of private contractors) have been prosecuted or investigated, that the CIA gets to keep its self-investigations secret, and that Congress, too, has concluded that all is well. Of course, this all misses the point. Prosecuting a couple of lowly torturers does not excuse the criminal actions of top officials authorizing torture. International law does not include a waiver for agencies that claim the right to secrecy. Congressional committees have reached very different conclusions from what the DOJ suggests. In fact, the DOJ's letter doesn't actually assert that the Senate Armed Services Committee reached any particular conclusions, just that it issued a report. The report is actually damning. The DOJ letter is signed by Mary Ellen Warlow, Director, and Kenneth Harris, Associate Director, Europe.

The Center for Constitutional Rights has produced a 17-page response to the U.S. letter: (PDF), and submitted it to the Spanish Court. Some highlights:

> "The U.S. Submission does nothing to alter the conclusion that the criminal case against the so-called "Bush Six" is properly before the Spanish court: it demonstrates that no competent jurisdiction is investigating or prosecuting the allegations in the complaint. The listed initiatives undertaken by the US

government in various fora, while indicating some small measure of concern with the “mistreatment” or “abuse” of detainees and the legal advice provided in relation to the treatment of detainees, are ultimately unresponsive and inapplicable to the allegations raised in the complaint pending in Spain.

There has been, and will be, no criminal investigation or prosecution into either the treatment of the named victims or the actions of the named defendants. There have not been and are not now any criminal investigations into the actions of senior Bush administration officials who participated in the creation or implementation of a detention and interrogation policy under which the plaintiffs and other individuals detained at Guantánamo, in Iraq, Afghanistan and in secret detention sites, were subjected to torture, cruel, inhuman and degrading treatment and other serious violations of international law.”
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“The US submission is misleading – and disingenuous – in its depiction of the significance of the OPR process: the U.S. Submission claims that there “exists no basis for criminal prosecution of John] Yoo or [Jay] Bybee” based on the revised findings of an Assistant Deputy Attorney General, David Margolis, who, after a review that lasted a matter of months and drew heavily on the responses to the July 2009 OPR report submitted by Bybee and Yoo, determined that neither man had committed professional misconduct. The findings of the OPR process – whether of misconduct or not – have no bearing on whether a basis exists for criminal prosecution. The OPR is a purely disciplinary process and is not in any way connected to criminal investigations or prosecutions.

As discussed in more detail below, the US submission also acknowledges that the Department of Justice has made a policy decision not to prosecute anyone who relied on the torture memos – including, apparently, the authors of those memos. The U.S. Submission acknowledges and confirms that “the Department of Justice has concluded that it is not appropriate to bring criminal cases with respect to any other executive branch officials, including those named in the complaint, who acts in reliance on these [the Yoo and Bybee] and related OLC memoranda during the course of their involvement with the policies and procedures for detention and interrogation.” 12 Such a policy decision demonstrates that the U.S. is unwilling, not unable, to investigate these crimes for which there is a sufficient factual basis and indeed, an obligation to investigate under, inter alia, the Convention Against Torture. Spain must not, and cannot, defer to a policy decision not to prosecute, and must not transfer a case to the United States that it has been told unequivocally will not be prosecuted.”…..

“Margolis is absolutely clear that the result of his rejecting the OPR‟s finding of professional misconduct, and replacing it with a finding that Yoo and Bybee exercised “poor judgment” is only that their cases will not be referred by the DOJ to the state bar disciplinary authorities;33 there is no suggestion, let alone possibility, that the result of Margolis‟s analysis could be what the US submission suggests, namely that there is no basis for criminal prosecution. The U.S. Submission is simply incorrect in stating that Margolis concluded that no “legal norms” were violated by Yoo or Bybee; Margolis did not examine criminal law precedents for holding lawyers criminally liable. The issue of criminal prosecution was wholly outside the mandate of the Margolis review, just as it was outside the OPR investigation.”
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“The U.S. Submission cites the prosecution of two civilian contractors as evidence that the U.S. Department of Justice can and will address the myriad accounts of torture and other serious violations committed against hundreds, if not thousands of individuals, held in U.S. detention centers across the globe. The fact that the only prosecutions that the Department of Justice can point to are of non-government employees is revealing of the fact that the Department

of Justice has, over the last nine years, decided to look the other way by not opening criminal investigations into the actions of US officials. Additionally, the investigation and prosecution of two civilian contractors for crimes committed in Afghanistan – both cases involving the death of a detainee – has essentially no bearing on whether the named defendants – 6 former high-level government employees, will be prosecuted for torture and other serious violations of international law.39

The U.S. submission appears to be under the mistaken impression that all it must do to satisfy the Spanish court that it should defer jurisdiction over this case is to demonstrate that the legal system in the U.S. could – theoretically – allow for prosecutions of the defendants. No doubt the U.S. legal system provides the jurisdiction for the prosecution of these individuals, whether under inter alia the Torture Statute (18 USC § 2340A) or the War Crimes Statute (18 USC § 2441)."

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"President Barack Obama has embraced a policy of impunity, when he says that we must "look forward, not back." One recent example demonstrates the culture of impunity that exists in the United States: former president George W. Bush confessed in his memoirs that he authorized the waterboarding – an act of torture – of individuals held in U.S. secret detention sites.52 Bush made this admission because he felt immune from prosecution; the lack of response by the Department of Justice to this admission, despite having formally and publicly acknowledged on various occasions, including before the United Nations, that waterboarding is an act of torture as a matter of law, demonstrates that Bush – like the defendants in this case – is right to feel safe from prosecution in the United States. There have been no prosecutions of mid or high level officials in the nine years since the first allegations of torture and other serious abuses surfaced.

The U.S. Department of Justice has actively blocked all forms of redress for victims of the U.S. torture program in the United States courts. To date, no victim of post-9/11 policies has been allowed to have his day in court. Indeed, to date, no victim has even received an apology from the Executive Branch. The Department of Justice has opposed every case brought by a former detainee or rendition-to-torture victim that has been brought against a former U.S. official in U.S. courts. In so doing, the U.S. has sought to ensure that there will be no accountability for torture.53 The immunity that the Obama Administration seeks for U.S. officials – as the Bush Administration did before it – creates a culture of impunity that leaves open the possibility that such egregious conduct occur again."

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David Swanson is the author of "War Is A Lie"

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