The abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority. This report is a product of the Committee’s inquiry into how those unfortunate results came about.

[T]he [Department of Defense] … oversees military Survival Evasion Resistance and Escape (SERE) training. During the resistance phase of SERE training, U.S. military personnel are exposed to physical and psychological pressures (SERE techniques) designed to simulate conditions to which they might be subject if taken prisoner by enemies that did not abide by the Geneva Conventions. As one … instructor explained, SERE training is “based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War) of prisoners over the last 50 years.”
Members of the President’s Cabinet and other senior officials attended meetings in the White House where specific interrogation techniques were discussed. Secretary of State Condoleezza Rice, who was then the National Security Advisor, said that, “in the spring of 2002, CIA sought policy approval from the National Security Council (NSC) to begin an interrogation program for high-level al-Qaida terrorists.” Secretary Rice said that she asked Director of Central Intelligence George Tenet to brief NSC Principals on the program and asked the Attorney General John Ashcroft “personally to review and confirm the legal advice prepared by the Office of Legal Counsel.” She also said that Secretary of Defense Donald Rumsfeld participated in the NSC review of CIA’s program.

**Department of Justice Redefines Torture**

On August 1, 2002, … the Department of Justice’s Office of Legal Counsel (OLC) issued two legal opinions. The opinions were issued after consultation with senior Administration attorneys, including then-White House Counsel Alberto Gonzales and then-Counsel to the Vice President David Addington. Both memos were signed by then-Assistant Attorney General for the Office of Legal Counsel Jay Bybee. One opinion, commonly known as the first Bybee memo, was addressed to Judge Gonzales and provided OLC’s opinion on standards of conduct in interrogation required under the federal torture statute. That memo concluded:

> [F]or an act to constitute torture as defined in [the federal torture statute], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture …, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.

The other OLC opinion issued on August 1, 2002 …, which responded to a request from the CIA, addressed the legality of specific interrogation tactics. While the full list of techniques remains classified, a publicly released CIA document indicates that waterboarding was among those analyzed and approved. … Before drafting the opinions, Mr. Yoo, the Deputy Assistant Attorney General for the OLC, had met with Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, to discuss the subjects he intended to address in the opinions. In testimony before the House Judiciary Committee, Mr. Yoo refused to say whether or not he ever discussed or received information about SERE [interrogation] techniques as the memos were being drafted. When asked whether he had discussed SERE techniques with [Attorney General] Judge Gonzales, Mr. Addington, Mr. Yoo, Mr. Rizzo or other senior administration lawyers, DoD General Counsel Jim Haynes testified that he “did discuss SERE techniques with other people in the administration.” NSC Legal Advisor John Bellinger said that “some of the legal analyses of proposed interrogation techniques that were prepared by the Department of Justice… did refer to the psychological effects of resistance training.”
In fact, Jay Bybee the Assistant Attorney General who signed the two OLC legal opinions said that he saw an assessment of the psychological effects of military resistance training in July 2002 in meetings in his office with John Yoo and two other OLC attorneys. Judge Bybee [who is now on the federal bench] said that he used that assessment to form the August 1, 2002 OLC legal opinion that has yet to be publicly released. Judge Bybee also recalled discussing detainee interrogations in a meeting with Attorney General John Ashcroft and John Yoo in late July 2002, prior to signing the OLC opinions. Mr. Bellinger, the NSC Legal Advisor, said that “the NSC’s Principals reviewed CIA’s proposed program on several occasions in 2002 and 2003” and that he “expressed concern that the proposed CIA interrogation techniques comply with applicable U.S. law, including our international obligations.”

On October 2, 2002, Jonathan Fredman, who was chief counsel to the CIA’s CounterTerrorist Center, attended a meeting of GTMO [Guantanamo] staff. Minutes of that meeting indicate that it was dominated by a discussion of aggressive interrogation techniques including sleep deprivation, death threats, and waterboarding, which was discussed in relation to its use in SERE training. Mr. Fredman’s advice to GTMO on applicable legal obligations was similar to the analysis of those obligations in OLC’s first Bybee memo. According to the meeting minutes, Mr. Fredman said that “the language of the statutes is written vaguely… Severe physical pain described as anything causing permanent damage to major organs or body parts. Mental torture [is] described as anything leading to permanent, profound damage to the senses or personality.” Mr. Fredman said simply “It is basically subject to perception. If the detainee dies you’re doing it wrong.”

Lieutenant Colonel Diane Beaver, GTMO’s Staff Judge Advocate wrote an analysis justifying the legality of the techniques, though she expected that a broader legal review conducted at more senior levels would follow her own.

Military Lawyers Raise Red Flags and Joint Staff Review Quashed

In early November 2002, in a series of memos responding to the Joint Staff’s call for comments on GTMO’s request, the military services identified serious legal concerns about the techniques and called for additional analysis. The Air Force cited “serious concerns regarding the legality of many of the proposed techniques” and stated that “techniques described may be subject to challenge as failing to meet the requirements outlined in the military order to treat detainees humanely…” The Air Force also called for an in-depth legal review of the request. [The] CITF’s [Department of Defense Criminal Investigative Task Force] Chief Legal Advisor wrote that certain techniques in GTMO’s October 11, 2002 request “may subject service members to punitive articles of the [Uniform Code of Military Justice],” called “the utility and legality of applying certain techniques” in the request “questionable,” and stated that he could not “advocate any action, interrogation or otherwise, that is predicated upon the principle that all is well if the ends justify the means and others are not aware of how we conduct our business.”
The Chief of the Army’s International and Operational Law Division wrote that techniques like stress positions, deprivation of light and auditory stimuli, and use of phobias to induce stress “crosses the line of ‘humane’ treatment,” would “likely be considered maltreatment” under the UCMJ [Uniform Code of Military Justice], and “may violate the torture statute.” The Army labeled GTMO’s request “legally insufficient” and called for additional review.

The Navy recommended a “more detailed interagency legal and policy review” of the request. And the Marine Corps expressed strong reservations, stating that several techniques in the request “arguably violate federal law, and would expose our service members to possible prosecution.” The Marine Corps also said the request was not “legally sufficient,” and like the other services, called for “a more thorough legal and policy review.”

Captain Dalton, who was the [military Joint Chiefs of Staff] Chairman’s Legal Counsel, said that she had her own concerns with the GTMO request and directed her staff to initiate a thorough legal and policy review of the techniques. That review, however, was cut short. Captain Dalton said that General Myers returned from a meeting and advised her that [Department of Defense General Counsel] Mr. Haynes wanted her to stop her review, in part because of concerns that people were going to see the GTMO request and the military services’ analysis of it [italics added]. Neither General Myers nor Mr. Haynes recalled cutting short the Dalton review, though neither has challenged Captain Dalton’s recollection. Captain Dalton testified that this occasion marked the only time she had ever been told to stop analyzing a request that came to her for review [italics added].

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[2 of 5] Nuernberg Military Tribunal

Vol. 3, page 31 (5 March 1947)
<http://www.mazal.org/archive/nmt/03/NMT03-T0031.htm>

A. Opening Statement for the Prosecution

BRIGADIER GENERAL TAYLOR: This case is unusual in that the defendants are charged with crimes committed in the name of the law. These men, together with their deceased or fugitive colleagues, were the embodiment of what passed for justice in the Third Reich.

Most of the defendants have served, at various times, as judges, as state prosecutors, and as officials of the Reich Ministry of Justice. All but one are professional jurists; they are well accustomed to courts and courtrooms, though their present role may be new to them.

The defendants and their colleagues distorted, perverted, and finally accomplished the complete overthrow of justice and law in Germany. They made the system of courts an integral part of dictatorship. They established and operated special tribunals obedient
only to the political dictates of the Hitler regime [italics added]. They abolished all semblance of judicial independence. They brow-beat, bullied, and denied fundamental rights to those who came before the courts. The “trials” they conducted became horrible farces, with vestigial remnants of legal procedure which only served to mock the hapless victims.

This conduct was dishonor to their profession. Many of these misdeeds may well be crimes.

… [T]he defendants are accused of participation in and responsibility for the killings, tortures, and other atrocities which resulted from, and which the defendants know were an inevitable consequence of, the conduct of their offices as judges, prosecutors, and ministry officials. … In this responsibility, the share of the German men of law is not the least. They can no more escape that responsibility by virtue of their judicial robes than the general by his uniform.

The defendants are charged with using their offices and exercising their powers with the knowledge and intent that their official act[s]: would result in the killing, torture, and imprisonment of thousand of persons in violation of international law….

In summary, the defendants are charged with judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing the emptied forms of legal process for persecution, enslavement, and extermination.

[3 of 5] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Padilla v. Yoo

633 FEDERAL SUPPLEMENT 2d 1005
(N.D. Cal. 2009)

Author’s Note: Padilla seeks only one dollar in damages. His essential quest is to obtain a court judgment characterizing the defendant’s conduct as illegal, and thus the subject of a civil damage suit.

Certain editorial enhancements, such as underlining, have been added for reader convenience. All bolding is in the original opinion. Most citations have been omitted.

Court’s Opinion: JEFFREY S. WHITE, District Judge.

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT’S MOTION TO DISMISS

INTRODUCTION

Now before the Court is the motion to dismiss … for failure to state a claim upon which relief can be granted [which was] filed by Defendant John Yoo (“Yoo”). …

[War] will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and
political rights. To be more safe, they at length become willing to run the risk of being less free.


The issues raised by this case embody that same tension between the requirements of war and the defense of the very freedoms that war seeks to protect. … This lawsuit poses the question addressed by our founding fathers about how to strike the proper balance of fighting a war against terror, at home and abroad, and fighting a war using tactics of terror. “Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”

BACKGROUND

Plaintiff Jose Padilla (“Padilla”) is a United States citizen who was designated an enemy combatant during the last administration’s “war on terror” and who was detained in a military brig in South Carolina for three years and eight months. Padilla alleges that he was imprisoned without charge, without the ability to defend himself, and without the ability to challenge the conditions of his confinement. Padilla also alleges that he has suffered gross physical and psychological abuse upon the orders of high-ranking government officials as part of a systematic program of abusive interrogation which mirror the abuses committed at Guantanamo Bay.

… [Pursuant to his allegations] [o]n or about May 8, 2002, Padilla was arrested at the Chicago O’Hare International Airport pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York. Padilla was transported to New York where he was held in custody in a federal detention facility. On June 9, 2002, while a motion was pending to vacate the material witness warrant, President George W. Bush (“President Bush”) issued an order that declared Padilla an “enemy combatant” and directed Secretary of Defense Donald Rumsfeld (“Rumsfeld”) to take him into protective custody. The President found that Padilla was closely associated with al Qaeda, was engaged in conduct that constituted hostile and war-like acts, and represented a “continuing, present and grave danger to the national security of the United States, and [therefore] that detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.” That same day, Padilla was taken into custody by Department of Defense officials and transported to the Consolidated Naval Brig in Charleston, South Carolina.

Padilla was thereafter detained without being charged, was subjected to extreme isolation, including isolation from both counsel and from his family, and was interrogated under threat of torture, deportation and even death. He was placed in solitary confinement in a tiny cell in an otherwise empty wing of the military brig. Padilla alleges that he was “subjected to a systematic program of unlawful interrogation methods and conditions of
confinement, which proximately and foreseeably caused [him] to suffer extreme isolation, sensory deprivation, severe physical pain, sleep deprivation, and profound disruption of his senses, all well beyond the physical and mental discomfort that normally accompanies incarceration.” While he was detained, government officials subjected Padilla to [extreme] interrogation tactics….

From June 9, 2002 until March 4, 2004, government officials also denied Padilla all contact with anyone outside the military brig, including his family and legal counsel. For ten months after Padilla’s transfer to military detention, the government denied Plaintiff Estela Lebron (“Lebron”), Padilla’s mother, any information about her son. After almost a year of uncertainty, a Pentagon official brought Ms. Lebron a brief greeting card from her son letting her know that he was still alive. Beginning on March 4, 2004, Padilla was permitted contact with his habeas attorney while his petition was pending before the U.S. Supreme Court. The permitted contact was sporadic and subject to severe restrictions, including recording of conversations and review by government officials of all legal correspondence.

[Defendant] Yoo currently is a professor of law. At the time of Padilla’s detention, Yoo was a Deputy Attorney General in the Office of Legal Counsel (“OLC”) under the administration of George W. Bush and was “the de facto head of war-on-terrorism legal issues” and a “key member of a small, secretive, and highly-influential group of senior administration officials know as the ‘War Council.’” As such, Yoo admittedly “shaped government policy” in the “war on terrorism.” ([Id. [Padilla’s complaint] at ¶ 15, citing Yoo’s book “War By Other Means.”]) Padilla alleges that Yoo personally was involved in the decision to designate him as an enemy combatant and that Yoo lay the groundwork for the treatment of enemy combatants under military detention. As Yoo relates in his book, he “developed an extra-judicial, ex parte assessment of enemy combatant status followed by indefinite military detention, without notice of opportunity for a hearing of any sort ... completely preclud[ing] judicial review of the designation.” Padilla also alleges that the policies Yoo drafted included “the decision to employ unlawfully harsh interrogation tactics” and “pressure techniques proposed by the CIA” against individuals designated as enemy combatants. Padilla further alleges that the policy of employing harsh interrogation tactics against enemy combatants “proximately and foreseeably led to the abuses suffered by Padilla.”

According to Padilla, Yoo abused his position by formulating unlawful practices and policies for the designation, detention and interrogation of suspected enemy combatants, and by drafting memoranda designed to evade legal restraints and to immunize those who implemented them. Padilla asserts that Yoo has publicly acknowledged that he “stepped beyond his role as a lawyer to participate directly in developing policy in the war on terrorism. He shaped government policy” and in his role as “the de facto head of war-on-terrorism legal issues, [Yoo] wrote and promulgated a series of memoranda.” These memoranda include:

(a) a memorandum dated October 23, 2001 from Yoo to White House Counsel Alberto R. Gonzales (“Gonzales”) and Department of Defense General Counsel William J. Haynes (“Haynes”) on the Authority for Use of Military Force to Combat Terrorist Activities Within the United States, which concluded, among other things, that “the Fourth Amendment does not apply to domestic military operations designed to deter and
prevent further terrorist attacks [underlining added],” and concluded that just as “wartime destruction of property does not involve a ‘taking’ under the Fifth Amendment, it seems safe to conclude that the Court would not apply the Fourth Amendment to domestic military operations against foreign terrorists ... In any event, both rights would give way before the Government’s compelling interest in responding to a direct, devastating attack on the United States, and in prosecuting a war successfully against international terrorists—whether they are operating abroad or within the United States [underlining added].”

(c) a draft memorandum dated January 9, 2002 from Yoo to Haynes on the Application of Treaties and Laws to al Qaeda and Taliban Detainees, which outlines Yoo’s analysis that treatment of al Qaeda and Taliban members are “not governed by the bulk of the Geneva Conventions [textbook §9.6.B.], specifically those provisions concerning POWs.” The complaint alleges that this memo “was designed to justify the Executive’s already concluded policy decision to employ unlawfully harsh interrogation tactics;”

(d) a memorandum dated January 22, 2002 to Gonzales on the Application of Treaties and Laws to al Qaeda and Taliban Detainees, signed by former Assistant Attorney General Jay Bybee (“Bybee”) but drafted by Yoo, which concluded that certain [other] international treaties do not protect members of the al Qaeda and Taliban organizations;

(e) a memorandum dated February 26, 2002 to Haynes on Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan, signed by Bybee, which Padilla alleges, upon information and belief, was authored by Yoo;

(g) a memorandum dated June 27, 2002 from Yoo to Assistant Attorney General Daniel J. Bryant of the Office of Legislative Affairs on the Applicability of 18 U.S.C. Sec. 4001(a) to Military Detention of United States Citizens, which specifically addressed the transfer of Padilla into military detention;

(h) a memorandum dated August 1, 2002 to Gonzales on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-23404 [US anti-torture statute, implementing the UN Torture Convention, textbook §9.7.D.], signed by Bybee but authored by Yoo, which concluded, among other things, that “an act to constitute torture, ... it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death [underlining added]. For purely mental pain or suffering to amount to torture ..., it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.” The complaint alleges that this memo “was designed to remove legal restraints on interrogators so as to justify the Executive’s already concluded policy decision.” The complaint also alleges that this memorandum was crafted “with the specific intent of immunizing government officials from criminal liability for participating in practices that Defendant Yoo knew to be unlawful;”
(j) an opinion dated March 14, 2003, … reinforcing the point that even federal officials who committed war crimes or torture under federal criminal statutes would escape responsibility for their crimes.”

The complaint also alleges the Yoo reviewed and approved a memorandum dated November 27, 2002 by Haynes which recommended that Secretary of Defense Rumsfeld approve for use by the military a range of aggressive interrogation techniques not permitted by the military interrogation field manual.

Based on the factual contentions in the complaint, Padilla alleges that Yoo proximately and foreseeably injured Mr. Padilla by violating numerous clearly established constitutional and statutory rights including, but not limited to, the following:

(a) **Denial of Access to Counsel.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be deprived of his right of access to legal counsel.…

(b) **Denial of access to Court.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be deprived of his right of access to court.…

(c) **Unconstitutional Conditions of Confinement.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be subjected to illegal conditions of confinement and treatment that shocks the conscience in violation of Mr. Padilla’s Fifth Amendment rights to procedural and substantive due process, as well as his Eighth Amendment right to be free of cruel and unusual punishment, including torture, outrages on personal dignity, and humiliating and degrading treatment.

(d) **Unconstitutional Interrogations.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be subjected to coercive and involuntary illegal interrogations, both directly and through unlawful conditions of confinement designed to aid the interrogations, all in violation of Mr. Padilla's Fifth Amendment rights to procedural due process, freedom from treatment that shocks the conscience, and freedom from self-incrimination, as well as his Eighth Amendment right to be free from cruel and unusual punishment, including torture, outrages on personal dignity, and humiliating and degrading treatment.

(e) **Denial of Freedom of Religion.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be deprived of his right to the free exercise of religion guaranteed under the First Amendment to the U.S. Constitution, as well as the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

(f) **Denial of the Right of Information.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be deprived of his right to information guaranteed under the First Amendment to the U.S. Constitution.

(g) **Denial of Right to Association.** Acting under color of law and his authority as a federal officer, Defendant caused Mr. Padilla to be deprived of his right to association with family and others.…

(h) **Unconstitutional Military Detention.** Acting under color of law and his authority as a federal officer, Defendant violated Mr. Padilla’s right to be free from military detention.…

  (i) **Denial of the Right to Be Free from Unreasonable Seizures.** Acting under
color of law and his authority as a federal officer, Defendant violated Mr. Padilla’s right to be free from unreasonable seizures....

(j) Denial of Due Process. Acting under color of law and his authority as a federal officer, Defendant violated Mr. Padilla's Fifth Amendment right not to be detained or subjected to the collateral effects of designation as an “enemy combatant” without due process of law.

ANALYSIS

1. Threshold Question of Federal Remedy.

c. Substantive Areas of Law Do Not Counsel Hesitation.

Yoo also advocates that this Court should abstain from adjudication because the Court should leave review of his legal memoranda and the conduct which followed to the coordinate branches of government based on substantive areas of law raised by the memoranda. The Court notes the irony of this position: essentially, the allegations of the complaint are that Yoo drafted legal cover to shield review of the conduct of federal officials who allegedly deprived Padilla of his constitutional rights. Now, Yoo argues that the very drafting itself should be shielded from judicial review. Padilla’s allegations here are that the creation of such legal cover was itself an unconstitutional exercise of power. Thus, the question posed by the present motion is whether an alternative [executive] branch of government, under the circumstances, should be tasked with prescribing the scope of relief available to Padilla.

Yoo argues that special factors counsel hesitation due to the specific substantive areas of law involved in this matter. First, Yoo contends that the courts should not review the designation of Padilla as an enemy combatant because Congress passed the Authorization for Use of Military Force Joint Resolution, authorizing the President to make such a designation, and thereby relegated the issue of designation specifically to the legislative and the executive branches of government. Second, Yoo contends that the Court should show the proper deference to executive discretion in times of war. Next, Yoo contends that the Court should abstain from reviewing the alleged constitutional violations presented in this matter because the claims necessarily would uncover government secrets, thereby threatening national security. Lastly, Yoo argues the courts should deny review of this matter because the allegations involve issues relating to foreign affairs and foreign relations, matters specifically designated to control by the coordinate branches of government.

iii. Effect on National Security.

Next, Yoo contends that failure to restrict judicial review of candid advice to the Executive regarding national security issues would jeopardize national security. Essentially, ... Yoo contends that national security should be considered a “special factor counselling [sic] hesitation” ... because the discovery sought in this [civil] matter would likely uncover material information potentially damaging to national security. The Court disagrees. First, during the course of this case, all of the documents drafted by Yoo mentioned in the complaint have become public record. Second, although it “exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government, ...
litigation [may be] be necessary to ensure that officials comply with the law.” [Ashcroft v. Iqbal, 129 S.Ct. at 1953 (finding that while it is important to prevent unwarranted litigation from interfering with the proper functioning of the government, “the law provides other legal weapons designed to prevent unwarranted interference” such as beginning discovery with lower level government officials before determining whether a case can proceed to allow discovery related to higher level government officials) (Breyer, J. dissenting).

The judiciary, as always, is tasked with the difficult task of balancing the need for information in a judicial proceeding and the coordinate branches of government’s prerogative in guarding state secrets, which may ultimately affect national security. Courts must balance in each instance, recognizing that “the Executive’s national security prerogatives are not the only weighty constitutional values at stake: while ‘[s]ecurity depends upon a sophisticated intelligence apparatus,’ it ‘subsists, too, in fidelity to freedom’s first principles [including] freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.’”

iv. Effect on Foreign Affairs and Foreign Relations.

Lastly, Yoo argues that concerns about foreign relations should bar the creation of a … remedy under the present circumstances, citing [two cases, including] Arar v. Ashcroft, 532 F.3d at 177-78 [textbook §5.C.3(c)].

These cases do not support the position Yoo advances. By contrast, this case involves claims about American officials’ treatment of an American citizen within its own boundaries. The treatment of an American citizen on American soil does not raise the same specter of issues relating to foreign relations. The Court is not persuaded by the decisions not to find a … remedy in instances in which foreign nationals are allegedly subjected to unconstitutional treatment abroad. The courts’ concerns about the creation of remedies for foreign nationals and the courts’ intrusion into the affairs of foreign governments finds no application in the particular circumstances raised by the case of allegations of unconstitutional treatment of an American citizen on American soil.

Therefore, the Court finds that Padilla has stated a claim upon which relief can be granted under Bivens [v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)].

C. Qualified Immunity.

1. Legal Standard for a Finding of Qualified Immunity.

Yoo also argues that he is entitled to qualified immunity on all claims. The doctrine of qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have known.” “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”

A court should then address the question “whether, under that clearly established
law, a reasonable [official] could have believed the conduct was lawful.” This inquiry must be undertaken in the light of the specific context of the case. In deciding whether the plaintiff’s rights were clearly established, “[t]he proper inquiry focuses on whether ‘it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted’ ... or whether the state of the law [at the time] gave ‘fair warning’ to the officials that their conduct was unconstitutional.” Although the inquiry is undertaken in the specific context of the case, the fact that no case has found a constitutional violation under the exact facts alleged does not imply that the law is not clearly established. When there is no specific, binding precedent on the exact question, the Ninth Circuit looks “to all available decisional law, including the law of other circuits and district courts.”


a. Causation.

Yoo argues that Padilla fails to set forth a constitutional violation on the basis that there is nothing in the complaint that establishes that Yoo personally participated in or caused any violation of Padilla’s constitutional rights. Yoo argues that the personal participation inquiry “must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation.”

Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct. ... For example, ...in Anoushiravani v. Fishel [not a reported case], the court denied a motion to dismiss against two Department of Homeland Security attorneys who advised customs agents that they could constitutionally refuse to release seized property. 2004 WL [Westlaw database] 1630240. The district court held that the attorneys could be liable for their personal participation in the deprivation of constitutional rights because the seizures were a foreseeable result of their legal advice.

Here, Padilla alleges that in Yoo’s highly-influential position, he participated directly in developing policy on the war on terror. The complaint specifies that in Yoo’s role as an advisor in the President’s War Council, he drafted legal opinions which lay out the legal groundwork for assessing the designation of individual enemy combatants and legitimized the unconstitutional treatment of those individuals once detained. According to the complaint, Yoo admits that he “personally reviewed the material on Padilla to determine whether he could qualify, legally, as an enemy combatant, and issued an opinion to that effect.”

According to the complaint, Attorney General John Ashcroft relied on Yoo’s opinion in recommending to the President that Padilla be taken into military custody. Again, based on Yoo’s legal opinion and Ashcroft’s recommendation, the complaint alleges that President Bush issued an order dated June 9, 2002 declaring Padilla an enemy combatant and directing Rumsfeld to take Padilla into military custody, and the President stated that these actions were “consistent with U.S. law and the laws of war.” Yoo allegedly has represented that “he had security clearance to, and in fact did, ‘read the intelligence reports on Mr. Padilla before purporting to provide legal authority for Mr. Padilla’s designation and detention.” Yoo also advised executive officials that military detention of an American citizen seized on American soil was lawful because, he
claimed, the Fourth Amendment had no application to domestic military operations in this context [underlining added]. Following a meeting of the War Council in July 2002 in which Yoo and fellow Council members “‘discussed in great detail how to legally justify’ ‘pressure techniques proposed by the CIA,’ including waterboarding, mock burial, and open-handed slapping of suspects, [Yoo] wrote his August 1, 2002 memo, which stated that acts of interrogation would not constitute torture unless they caused pain ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.’”

Padilla alleges, on information and belief, that Yoo intended or was deliberately indifferent to the fact that Mr. Padilla would be subjected to the illegal policies [Yoo] set in motion and to the substantial risk that Mr. Padilla would suffer harm as a result. [Yoo] personally recommended Mr. Padilla’s unlawful military detention as a suspected enemy combatant and then wrote opinions to justify the use of unlawful interrogation methods against persons suspected of being enemy combatants. It was foreseeable that the illegal interrogation policies would be applied to Mr. Padilla, who was under the effective control of the U.S. Southern Command—the same military authority that controlled Guantanamo—and was one of only two suspected enemy combatants held at the Brig.

In light of these allegations, the Court finds Padilla has alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla’s constitutional rights. Compare Iqbal, 129 S.Ct. at 1951 (Court rejected that “bare assertions” in a complaint that high-ranking government officials knew about unconstitutional treatment and therefore caused it are not entitled to “the assumption of truth”). Here, in contrast, Padilla alleges with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla alleges were unlawful.

b. Substantive Constitutional Rights.

In addition to his contention that Padilla has failed to plead Yoo’s personal participation in the alleged constitutional wrongs, Yoo argues that Padilla has failed to state a cause of action for three of the substantive constitutional claims: (1) the right of access to courts because there was no court claim Padilla was unable to bring due to Yoo’s conduct; (2) any rights under the Eighth Amendment because the Amendment does not apply unless there is a criminal conviction; and (3) the right against compelled self-incrimination under the Fifth Amendment because Padilla does not allege that he made any incriminating statements that were used against him in a criminal case.


Once the Court finds that the facts would show the violation of a constitutional right, the next inquiry is to determine “whether the right was clearly established.” Yoo argues that because no federal court has afforded an enemy combatant the kind of constitutional protections Padilla seeks in this case, there was no violation of Padilla’s clearly established constitutional rights. The Court finds this argument unpersuasive.

First, the basic facts alleged in the complaint clearly violate the rights afforded to citizens held in the prison context. The complaint alleges that military agents entered a civilian jail, seized a citizen from the civilian justice system, transported him to a military brig, detained him there indefinitely without criminal charge or conviction, deprived him
of contact with anyone, including attorneys or family, removed the basic ability to practice his religion, and subjected him to a program of extreme interrogations, sensory deprivation and punishment over a period of three years and eight months. The specific designation as an enemy combatant does not automatically eviscerate all of the constitutional protections afforded to a citizen of the United States....

Second, Yoo argues that the status of enemy combatant is not itself novel, but that courts have never attributed the level of constitutional rights sought in this action to this unique type of detainee. The Court finds this argument similarly unpersuasive. The fact that a unique type or designation of a detainee has come into being does not obliterate the clearly established minimum protections for those held in detention.

Similarly, this Court finds that although the legal framework relating to the designation of a citizen as an enemy combatant was developing at the time of the conduct alleged in the complaint, federal officials were cognizant of the basic fundamental civil rights afforded to detainees under the United States Constitution. ... The Court [thus] finds that the complaint alleges conduct that would be unconstitutional if directed at any detainee, and therefore finds that the rights allegedly violated were clearly established at the time of the alleged conduct. Hydrick, 500 F.3d at 1001; see also United States v. Lanier, 520 U.S. 259, 271 (1997) (“There has never been a ... case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages.”)

The Court finds that Padilla alleges a violation of his constitutional rights which were clearly established at the time of the conduct. Further, based on the fact that the allegations involve conduct that would be unconstitutional if directed at any detainee, a reasonable federal officer could have believed the conduct was lawful. Therefore, Yoo is not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Yoo’s motion to dismiss the First Amended Complaint. The motion is denied as to all claims with the exception of the claim for violation of Padilla's rights under the Fifth Amendment against compelled self-incrimination. ... The remainder of the motion to dismiss is DENIED. The Court HEREBY provides Plaintiffs leave to amend to allege a factual basis for the dismissed claim. Plaintiffs shall file an amended complaint, if any, by July 10, 2009. Defendant Yoo shall have twenty days thereafter to file his responsive pleading.

IT IS SO ORDERED.

[4 of 5] Dissecting Torture

Joerg W. Knipprath*

LOS ANGELES & SAN FRANCISCO DAILY JOURNAL, p.6
(May 04, 2009)
With the debate over torture heating up and producing all manner of unfocused fury, it would be wise to consider what questions should be asked. Let me propose several.

What is torture? Is a legal definition of torture the only relevant consideration? How does torture differ from other forms of coercion? Is torture always and in every case prohibited? If not, what considerations might make torture acceptable?

Under what circumstances, if any, would a government official who engages in torture that is not otherwise excused, be able to avoid liability for his actions? What if the official acted on the advice of others and was mistaken about whether this was torture? What about the official who gave the advice? What about officials who knew and ordered, tacitly accepted or failed to supervise to prevent the torture?

Torture has a legal meaning that was very carefully dissected in memos from Jay Bybee in 2002, John Yoo in 2003 and Steven Bradbury in 2005. Torture is defined in statutes and treaties, and reservations and understandings to those treaties. The statutes define torture as an “act committed by a person ... specifically intended to inflict severe physical or mental suffering upon another person within his custody.” The intensity and severity of the injury is what separates torture from other physical force, psychological manipulation or verbal insults. Any criminal or civil liability for torture requires findings of a very technical nature. Indeed, the Convention Against Torture even distinguishes between torture and "less severe" (but also prohibited) cruel, inhuman or degrading treatment.

Legally, then, torture is wholly aberrant and unusually harsh behavior with grave long-term consequences. This distinction of torture (and cruel treatment) from more commonplace moderate chastisement is important, as it also serves a necessary function of allowing society to express degrees of outrage over a range of behavior. Nothing serves to blur judgment like misuse of words. Calling things torture beyond a narrow category of truly horrendous behavior cheapens the meaning of the word. The concept becomes a counterfeit of the real thing.

It is illuminating to look at some historical practices. The Japanese conducted medical experiments in 1945 on live and unanaesthetized American prisoners of war, including operations (e.g., lung removal, heart stoppage, amputations) detailed by, among others, Thomas Easton of The Baltimore Sun. According to a DIA [Defense Intelligence Agency] report from 1992, North Korean, Russian and Czech doctors performed similar experiments on American POWs in the Korean War. As punishment for an escape attempt, the North Vietnamese intentionally broke the arm of one of John McCain's prison mates, Col. Bud Day, and then left part of the bone sticking out and placed him in a misshapen cast so that the arm would heal in a manner that would prevent him from ever flying again.

More recently, one might consider the manner of jihadis who saw off the heads of screaming prisoners with dull instruments. Or, Saddam Hussein’s use of shredders to dispose of opponents. Closer to home, one might think about the people on Sept. 11, who, as a result of the terrorist attack, had to decide among being crushed, being roasted alive or jumping from a skyscraper. One U.S. case talks about removal of teeth with pliers, breaking of bones and ribs and severe beating of the genitals with metal pipes. Another focuses on cutting off fingers and electric shocks to the testicles. A third deals with
frequent beatings, pistol-whipping and electric shocks. Such acts are the baseline for torture.

On the other end is shoving or even slapping[?]. While that may be physically uncomfortable, even abusive, it is not cruel and inhuman, much less torturous. Now consider waterboarding, the controversial technique that, under carefully timed and controlled conditions, simulates drowning. It lasts for a fraction of a minute and has no lasting physical effects. A number of journalists have volunteered to undergo the procedure, with Christopher Hitchens of Slate even doing so a second time 20 minutes later, to see whether he could last longer than the first time. It is also used to train at least some members of the U.S. armed forces to deal with interrogation.

Which does waterboarding more closely resemble, slapping or extracting the lung without anesthesia and then manually stopping the heart? Saying that all are torture does not allow us to make a distinction between practices that are clearly not of a kind. As a matter of common sense, anything a journalist voluntarily undertakes and quickly repeats to “improve his score” is not torture. Unpleasant, yes; torture, no. The law, too, must recognize those distinctions to hold people to account appropriate to their conduct.

Whatever torture might be, are there ever circumstances under which it might be used? One might take the position that, for reasons of ethics or religion, such as an appeal to the innate dignity of every human being, torture is never permitted. That is more likely if there is no fancifully broad definition of torture. That is the current legal approach with its narrow definition of torture. The broader the general proscription, the more likely it must be subject to modification or disregard in specific circumstances. Were the definition of torture to become more expansive, an absolute ban would become less sustainable in the real world.

Other, more broadly defined, prohibited methods of interrogating detainees, such as those that “shock the conscience,” are situation-focused. The law considers the purpose of the treatment, e.g., to get intelligence for national security, to obtain a confession of a crime or simply to punish; the need for the information in time and seriousness of subject matter; the willpower, personality, and training of the detainee; the failure of alternative means; the risks of error and the care and deliberation taken to reach the decision.

While an absolute legal ban on coercive interrogations of any kind is readily viewed as an ethical position, a more flexible approach is not necessarily unethical. What constitutes ethical behavior in a particular situation is not always resolved by appeals to universal principles that provide a guide for the ordinary situation. The obvious general prohibition against intentionally killing another human being does not apply in cases of self-defense or war. But that exception in turn may not apply if the act of self-defense was not reasonable or, in war, the enemy soldier had raised a white flag. But, if the white flag is a ruse, the exception to the exception does not apply. General standards apply usually, but special conditions may make the general standard inapplicable. That which is not ethical in the usual circumstance, may become ethical, and that which is usually ethical may become profoundly unethical. Exceptional circumstances, such as necessity, create their own law.

So it is with interrogations. Waterboarding, whether or not it is torture, might not be ethical if done indiscriminately to any detainee, for the purpose of punishment, or in the absence of a considered determination of need. But that judgment might change under
special circumstances. The much-derided memos by Yoo, Bybee and Bradbury emphasize the importance of considering the situation that triggers the treatment. The latter, especially, very carefully discusses the specific facts of the case for which he is giving advice. Whether one ultimately agrees with them that waterboarding and similar tactics are not torture (or even acts that "shock the conscience") under legal definitions, the memos make it clear that those tactics were applied only under carefully considered unusual circumstances and strictly controlled conditions. The writers make careful and reasoned arguments, each for their assigned task, under the law and facts presented to them. That was their job. Beyond that, it is up to Americans to decide how broadly we want to define torture and how categorically we want to prohibit any kind of interrogation technique more coercive than a plea for help.

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**5 of 5** SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (September 2001–October 2003)

Central Intelligence Agency
Inspector General
Top Secret (when issued)
Doc #: 2003-7123.IG (7 May 2004)

**CONCLUSIONS** [p. 100–101]

252. OGC [Office of General Counsel] worked closely with [the] DoJ [Department of Justice] to determine the legality of the measures that came to be known as enhanced interrogation techniques (EITs). OGC also consulted with White House and National Security Council officials regarding the proposed techniques. Those efforts and the resulting DoJ legal opinion of 1 August 2002 are well documented [italics added]. That legal opinion, was based, in substantial part on OTS [Office of Technical Services] analysis and the experience and expertise of non-Agency personnel and academics concerning whether long-term psychological effects would result from use of the proposed techniques.

253. The DoJ legal opinion upon which the Agency relies is based upon technical definitions of “severe” treatment and the “intent” of the interrogators, and consists of finely detailed analysis to buttress the conclusion that Agency officers properly carrying out EITs would not violate the Torture Convention’s prohibition of torture [textbook, p. 544], nor would they be subject to criminal prosecution under the U.S. torture statute [textbook, p. 546] [italics added]. The opinion does not address the separate question of whether the application of standard or enhanced techniques by Agency officers is consistent with the undertaking, accepted conditionally by the United States regarding Article 16 of the Torture Convention, to prevent “cruel, inhuman or degrading treatment or punishment.”
254. Periodic efforts by the Agency to elicit reaffirmation of Administration policy and DoJ legal backing for the Agency’s use of EITs—as they have actually been employed—have been well advised and successful. However, in this process, Agency officials have neither sought nor been provided a written statement of policy or a formal signed update of the DoJ legal opinion, including such important determinations as the meaning and applicability of Article 16 of the Torture Convention. In July 2003, the DCI [Director of Central Intelligence Agency] and the General Counsel briefed senior Administration officials on the Agency’s expanded use of EITs. At that time, the Attorney General affirmed that the Agency’s conduct remained well within the scope of the 1 August 2002 DoJ legal opinion [italics in this paragraph added].

255. A number of Agency officers of various grade levels who are involved with detention and interrogation activities are concerned that they may at some future date be vulnerable to legal action in the United States or abroad and that the U.S. Government will not stand behind them [italics added]. Although the current detention and interrogation Program has been subject to DoJ legal review and Administration political approval, it diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups. In addition, some Agency officers are aware of interrogation activities that were outside or beyond the scope of the written DoJ opinion. Officers are concerned that future public revelation of the CTC [Counterterrorist Center] Program is inevitable and will seriously damage Agency officers’ personal reputations, as well as the reputation and effectiveness of the Agency itself.

259. The Agency failed to issue in a timely manner comprehensive written guidelines for detention and interrogation activities. Although ad hoc guidance was provided to many officers through cables and briefings in the early months of detention and interrogation activities, the DCI Confinement and Interrogation Guidelines were not issued until January 2003, several months after initiation of interrogation activities and after many of the unauthorized activities had taken place. [Reacted text.]

260. [Reacted text.] Such written guidance as does exist to address detentions and interrogations undertaken by Agency officers [reacted text] is inadequate. The Directorate of Operations Handbook contains a single paragraph that is intended to guide officers. [Reacted text.] Neither this dated guidance nor general Agency guidelines on routine intelligence collection is adequate to instruct and protect Agency officers involved in contemporary interrogation activities. [Reacted text.]

261. During the interrogations of two detainees, the waterboard was used in a manner inconsistent with the written DoJ legal opinion of 1 August 2002. DoJ had stipulated that its advice was based upon certain facts that the Agency had submitted … observing, for example, that “… you (the Agency) have also orally informed us that although some of these techniques may be used with more than once [sic], that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions.” One key Al-Qa’ida terrorist was subjected to the waterboard at least
183 times [reacted text] and was denied sleep for a period of 180 hours. In this and another instance, the technique of application and volume of water used differed from the DoJ opinion.

¶ 262., which cannot be copied from the original document, provides that comprehensive medical attention was provided to the above detainee(s).

266. The Agency faces potentially serious long-term political and legal challenges as a result of the Detention and Interrogation Program, particularly its use of EITs and the inability of the U.S. Government to decide what it will ultimately do with terrorists detained by the Agency.

[End of Web File]