JOHN YOO: MUCH MORE, AND MUCH LESS, THAN A "MERE LAWYER"

> Yoo casts himself here as a mere lawyer, but he was much more (and much less).

So reads the Padilla response to Yoo's efforts to dismiss Padilla's suit against him.

Padilla's team goes on to argue why the 9th Circuit must allow Padilla's suit against Yoo for violation of his constitutional rights to continue.

> The district court's order should be affirmed. First, the court properly concluded that an American citizen seized from a civilian jail and subjected to years of military detention and torture has a remedy under Bivens. The habeas statute does not extinguish a damages remedy: while habeas can stop an unconstitutional detention from continuing, it cannot remedy an unlawful detention that has already occurred-and provides no relief to a torture victim. Bivens deters unconstitutional conduct, and the Supreme Court long ago affirmed that this deterrence is, if anything, more important when a defendant—even the Attorney General—invokes national security in an effort to preclude judicial review. The need to deter the military imprisonment and tortre of Americans in America strongly counsels providing Padila with a remedy for the serious, systematic and willful constitutional violations.
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> Second, the district court properly rejected Yoo's claim to lack causal responsibility.. He set the constitutional violations in motion: as a member of the War Council, he

> formulated policies of extra-judicial detention and brutal interrogation visited upon Padilla; then, as a government attorney, he provided interrogators with the legal cover they demanded before implementing those policies.
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> Third, it has long been clearly established that military agents cannot seize a citizen from a civilian jail, transport him to a military prison, detain him there indefinitely and incommunicado without criminal charge or conviction, and subject him to a program of brutal interrogations, sensory deprivation, and inhuman conditions. Y 00 contends that all those rights became unclear when the Executive labeled Padila an "enemy combatant," but no reasonable official could have believed that the Executive's unilateral labeling of a citizen would allow it to transgress core freedoms long recognized by the Supreme Court.

They go onto to explain why lawyers' conduct must not be immune from liability.

> If merely being a government lawyer insulates Yoo's conduct from liability, then there is no limit to what government lawyers fired up with personal "zeal" can counsel: the construction of secret and lawless interrogation sites in American cities, dragnets based entirely on race or religion, the summary execution of American citizens on American streets.

And note that Yoo tried to dismiss precedents that are directly on point in this suit.

> Y00 does not cite any case holding that lawyers cannot be held liable for giving knowingly false advice. Instead, he

> protests that a case cited by Plaintiffs involved "claims against government lawyers for providing intentionally incorrect legal advice." Br.32 (citing Donovan, 433 F.2d at 744-45). Padilla alleges exactly that-that Y00 intentionally misrepresented the law to shield policies that he helped formulate and set in motion, providing legal cover for unconstitutional policies. Like Y00, the government lawyers in Donovan claimed that they had provided advice "in good faith" and that their opinion was based on a reasonable legal belief. But the defendants' assertions of good faith were factual issues for the jury, not matters for the court even on summary judgment.

Padilla's team then goes on to remind of the German lawyers prosecuted for war crimes.

Perhaps the most interesting argument in here, though, is the reference to a State Department document asserting that victims of domestic torture have access to Bivens.

> Congress has criminalized torture, see 18 U.S.C. § 2340, the President has signed and the Senate has ratified the Convention Against Torture, 6 U.S.T. 3314, under which "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war. . .may be invoked as a justification of torture," and the Executive has not only prohibited the use of sensory deprivation, cruel and degrading torture, and physical or mental torture, Army Reg. 190-8 (criminalizing acts "intended to inflict severe physical or mental pain or suffering"), but plainly stated that a Bivens remedy is available to domestic torture victims like Padilla, see U.S. Written Response to Questions Asked by U.N. Committee Against Torture

> ir 5 (Apr. 28,2006), available at http://www.state.gov/g/drl/rls/68554.hrm .8 **[ed note, this should be: http://www.state.gov/g/drl/rls/68554.htm]**

The State reference goes to a passage which reads:

> U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. Besides the general rights of appeal, these can include any of the following, depending on the location of the conduct, the actor, and other circumstances:
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> [snip]
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> Suing federal officials directly for damages under provisions of the U.S. Constitution for "constitutional torts," *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979);

And in a footnote to the passage above, Padilla's lawyers note,

> After losing in the district court, Y00 switched from DOJ lawyers to private lawyers, but the DOJ then filed an amicus brief. It conveniently fails to mention the Executive's on-the-record statements regarding the availability of a Bivens remedy.

That is, even the Executive admits Bivens offers a remedy in the case of torture.

There is, however, no mention of the OPR report—neither the fact that it is supposed to be due out any day, nor the fact that it has been delayed just long enough to make it

unavailable to Padilla's lawyers for this response. They do, however, include material that might as well come from the OPR report, as it describes how Yoo's actions violated normal procedures for OLC.

> Moreover, the allegations here raise a strong inference that Y00 and his fellow policymakers knew that the policies were unconstitutional and took steps to ensure their implementation despite their ilegality. The War Council was a secretive body. ER229P15. Y00′ s participation in it was outside the scope of-and created ethical conflict with-his OLC role. ER229PP15, 16. After the CIA made it clear that line-level officials would not engage in brutal interrogations without legal cover, the members of the War Council, including Y00, "discussed in great detail how to legally justify" those harsh techniques. ER233P28. Y00 then drafted legal memoranda "with the specific intent of immunizing government officials from criminal liability for participating in practices that [he] knew to be unlawful," ER234P31, "remov[ing] legal restraints on interrogators," ER233P29, and "justify[ing] the Executive's already concluded
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> policy decision to employ unlawfully harsh interrogation tactics." ER233P29; see also ER232PP22,23. Violating normal procedures, the memoranda were "deliberately withheld from other agencies in order to control the outcome and minimize resistance." ER232P25.

There's much more in the response (including a great deal on Yoo's selective use of Milligan and Qirin that hearkens back to Mary's post on those cases).

But here's the rub. Within a week, we may finally see the OPR report describing the ways

in which Yoo was acting as much more, and much less, than a mere lawyer. Of course, the OPR report will then claim that such conduct deserves no real punishment.

I am curious whether the 9th will agree.