COURT ALLOWS PADILLA SUIT AGAINST YOO TO PROCEED

There was a significant new opinion released in the NDCA late Friday (h/t Lindy and Fatster) in the case of *Jose Padilla v. John Yoo*. The decision is devastating to Yoo and to the thought by the Obama Administration that the American legal system is going to blithely allow them to simply "move forward" and leave behind, and out of sight, the malevolence, malfeasance and depravity of senior Bush/Cheney legal officials in relation to their torture regime.

Yoo might be having a bad day when a Federal judge starts his analysis of your immunity claim by citing Alexander Hamilton from the Federalist Papers. And that is exactly what Judge Jeffrey S. White of NDCA District Court has done:

> [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 Federalist No. 8, at 44 (Alexander Hamilton) (E.H. Scott ed., 1898).]

First, a little background is in order. The plaintiff is Jose Padilla, an American citizen arrested with great fanfare on May 8, 2002, on a material witness warrant, by the Bush Administration as being a "dirty bomb" suspect. As the "material witness" warrant was a sham, Bush (through Rumsfeld) quickly designated Padilla an "enemy combatant" and placed him in the custody of the Department of Defense, the military, and locked him up indefinitely in the US Naval brig in Charleston, South Carolina. Padilla was 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.

The defendant is the notorious John Yoo, Bush torture lawyer extraordinaire. Yoo, of course, is currently a law professor at the University of California Berkeley and was, at the times material to the complaint, Deputy Attorney General in the Office of Legal Counsel for the Bush/Cheney Administration. Padilla states, and the court accepted as fact, that Yoo:

> …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." 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.
> …
> 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." (Citations

> omitted).

In a nutshell, Jose Padilla is suing Yoo for being the protagonist in writing legal cover that got Padilla detained indefinitely without due process and tortured to the point of mental insanity. John Yoo responded to Padilla's complaint with the tried and true, and uncommonly successful, ploy of filing a Rule 12(b)(6) Motion to Dismiss based upon qualified immunity. Taking a huge cue from his Chief Judge, Vaughn Walker, Judge Jeffrey White has taken the absurdity of the government (yes the DOJ is still representing Yoo) position apart at the seams and thrown it in their face. Judge White has ruled that all of Padilla's claims, save one, may proceed forward. And he lays the wood to the Bush/Cheney torture regime and their depraved contortion of the law, and the Constitution, in the process.

It is an extremely well written opinion, and I highly recommend you read the whole thing if so inclined. The first item that struck me is how Judge White has sidestepped the recent *Iqbal* decision. Just as I though might be the case, *Iqbal* is shaping up to be nowhere near the problem many thought; instead, Federal judges like Jeff White and Vaughn Walker are affirmatively using it as authority to permit civil liberties cases by finding exactly the conditions necessary to satisfy *Iqbal*. When the trial court affirmatively complies with that process, and that is what was done here, and *still* finds the grounds for a valid cause of action, it is going to be very hard for an appellate court to undercut the decision.

Next, the court undertakes a detailed analysis of the criteria necessary for a valid *Bivens* claim and, wonder of wonders, finds Padilla's claims sufficient. The discussion by White where he finds a valid *Bivens* claim is long, covering pages 12 through 28 of the opinion but, to put it mildly, is a work of art. Like Vaughn Walker in *al-Haramain* and *Jewel et. al*, Jeffrey White has taken the supposed strength of Yoo's defense

and narrowed it, defined it and filleted it open. And, as with the *Iqbal* portion, he has done so in a manner that is designed to withstand the rigors of appellate scrutiny. John Yoo ought to be *very* concerned about this.

In the third and last major section of the opinion (starting on page 29), Judge White specifically dissects Yoo's bleating qualified immunity assertion.

> 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." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "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." Pearson v. Callahan, 129 S. Ct. 808, 815 (2009).

The last part – "when they perform their duties reasonably" – is the key here. As you might guess, Mr. Padilla does not think that John Yoo performed his duties reasonably (neither do I). This has always been the threshold that the blithering idiot main stream media keeps spewing cannot be reached. Guess what, Judge White is a little more sanguine and thinks reasonable people could find that John Yoo was unreasonable. The court described the standard applicable to consideration:

> A court should then address the question "whether, under that clearly established law, a reasonable [official] could have believed the conduct was lawful." Id. This inquiry must be undertaken in the

> light of the specific context of the case. Saucier, 533 U.S. at 194. 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." Clement v. Gomez, 298 F.3d 898, 906 (9th Cir. 2002) (quoting Saucier, 533 U.S. at 202).

At this point, it should be noted that the court here is *not* finding that Yoo's conduct violated Padilla's rights as alleged in the amended complaint, only that Padilla has stated a sufficient cause of action that may be responded to and on which the case may proceed forward with discovery and determination on the merits. But the words and discussion in the decision leave little doubt that the court believes there are solid cognizable claims against Yoo:

> Indeed the "requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." Johnson, 588 F.2d at 743-44; see also Kwai, 373 F.3d at 966 (same).
>
> Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct.

There you have it, governmental lawyers like Yoo, Bradbury, and Gonzales can be held liable for the foreseeable consequences of unprofessional work. This language must be

doubly disturbing to Yoo et. al coming right before the imminent release of the reportedly scathing OPR Report.

Padilla alleges, among a whole page of detailed and descriptive allegations contained on page 33 of the opinion, 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.

Judge White held:

> 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.

Nice, tight and sweet words and, again, devastating to the interests of John Yoo and similarly situated torture attorneys. Oh, and one other thing, Judge White eviscerated the inane argument that because Padilla was not convicted of anything at the time, he was not entitled to Eighth Amendment protections against cruel and unusual punishment. This argument,

Scalia's rambling to Lesley Stahl notwithstanding, has been flat out silly from the start, and many of the commenters here have pointed out the obvious arguments against it for some time now. That said, it is good to see it dispatched in writing by a Federal judge:

> Yoo contends that because Padilla was not convicted of a criminal offense at the time of his military detention, the Eighth Amendment prohibition against cruel and unusual punishment does not apply to him. However, "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish." Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982). "[C]onstitutional questions regarding the conditions and circumstances of [the] confinement [of detained persons not convicted of a crime] are properly addressed under the due process clause of the Fourteenth Amendment, rather than the Eighth Amendment's protection against cruel and unusual punishment." City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983). However, "[i]n light of the Supreme Court's observation that the due process rights of pretrial detainees are 'at least as great as the Eighth Amendment protections available to a convicted prisoner,' we have recognized that, even though the pretrial detainees' rights arise under the Due Process Clause, the guarantees of the Eighth Amendment provide a minimum standard of care for determining their rights." Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1120 (9th Cir. 2003) (internal citations omitted).

Exactly right; thank you Judge White. Now there was one minor claim by Padilla that did not survive White's scrutiny, and, under the factual

circumstances, White is probably correct to bounce it. That claim was that Yoo had violated Padilla's Fifth Amendment right against self incrimination. White reasoned that because there is no allegation in the complaint that Padilla was ever made to be a witness against himself or that his statements were admitted as testimony against him in his criminal case, he did not state a claim for violation of the Self-Incrimination Clause of the Fifth Amendment. Again, a minor claim in the scope of the complaint and an arguably correct denial of it.

One last thought. It appears to me, whether consciously or unconsciously, Judge White has fashioned his opinion with a very determined eye to having it stand up on appeal, and specifically in the Supreme court. From the outset of his discussion, White framed it in terms of the auspices of *Hamdi v. Ashcroft*, 504 US 507 (2004). *Hamdi* was one of the very first opinions from The Supremes reeling in the unitary executive acting under Article II and the AUMF. The really notable thing about Hamdi, however, is the separate opinion authored by Nino Scalia berating the Bush/Cheney detention and treatment of American citizens in the war on terror, naming Padilla expressly.

Scalia, relying heavily on *Ex parte Milligan*, 4 Wall. 2, 128–129 (1866) said:

> In my view this seeks to revise Milligan rather than describe it. Milligan had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President's suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus. The Court's categorical language about the law of war's inapplicability to citizens where the courts are open (with no exception mentioned for citizens who were prisoners of war) was contained in its

discussion of the first point. See 4 Wall., at 121. The factors pertaining to whether Milligan could reasonably be considered a belligerent and prisoner of war, while mentioned earlier in the opinion, see id., at 118, were made relevant and brought to bear in the Court’s later discussion, see id., at 131, of whether Milligan came within the statutory provision that effectively made an exception to Congress’s authorized suspension of the writ for (as the Court described it) “all parties, not prisoners of war, resident in their respective jurisdictions, … who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired,” id., at 116. Milligan thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called “belligerents” or “prisoners of war.”

But even if Quirin gave a correct description of Milligan, or made an irrevocable revision of it, Quirin would still not justify denial of the writ here. In Quirin it was uncontested that the petitioners were members of enemy forces. They were “admitted enemy invaders,” 317 U.S., at 47 (emphasis added), and it was “undisputed” that they had landed in the United States in service of German forces, id., at 20. The specific holding of the Court was only that, “upon the conceded facts,” the petitioners were “plainly within [the] boundaries” of military jurisdiction, id., at 46 (emphasis added). But where those jurisdictional facts are not conceded—where the

> petitioner insists that he is not a belligerent—Quirin left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.
> …
> Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla.

Everybody always assumes that Anthony Kennedy is the point of attack for success on these issues in the Supreme Court, and I do not disagree that he is a target. But I do not think he is the only one and, irrespective of his excited informal chatter with Lesley Stahl of 60 Minutes, I think, because of the *Hamdi* framing, and other intricacies, Antonin Scalia is square in the sights of Jeffrey White and his opinion in *Padilla v. Yoo*. Once again, a NDCA judge has set up a beautiful piece of work designed to not only survive review in the 9th Circuit (and I think it will), but also with the foresight to play in the Supremes. It is a beautiful thing.

All in all, it is a fantastic decision, once again the Federal judges in the 9th Circuit and NDCA come riding to rescue of the United States Constitution when our Federal government and legislature will not. It is a reminder of the simple beauty of the balance and separation of powers the Framers left us, and the importance that each branch passionately protect all citizens' rights. Maybe someday Barack Obama will get his finger out of the political winds and stop protecting and excusing the gross malfeasance of the authoritarian state and protect the Constitution instead. Hope springs eternal.