YOO, OPR, AND THE NINTH CIRCUIT

Scott Horton notes that the Obama Administration has made new sweeping arguments about why John Yoo should not be held responsible for authorizing torture used on Jose Padilla.

> The Holder Justice Department has filed a sweeping amicus brief in the *Padilla v. Yoo* case before the Ninth Circuit, seeking to make absolute the immunity granted Justice Department lawyers who counsel torture, disappearings, and other crimes against humanity. The case was brought by Jose Padilla, who claims that he was tortured as the direct result of memoranda written by Yoo, now a law professor at Berkeley. At this stage, the case does not address the factual basis of Padilla's claims, but documents that have been declassified by the Department of Justice make it clear that the charges have a firm basis in fact. Here's the portion of the opinion authored by a lifelong Republican, Bush-appointed judge that the Justice Department found so objectionable:
>
> > Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct….
>
> The Holder Justice Department insists that they are absolutely not responsible, and that they are free to act according to a far lower standard of conduct than that which governs Americans generally. Indeed, this has emerged as a sort of ignoble mantra for the Justice Department, uniting both the Bush and Obama administrations.

I'm most interested in this aspect of the

appellate argument (part of which Horton discusses).

> In arguing that a Bivens action should not be recognized here, we are not suggesting that the actions of a Department of Justice attorney advising the Attorney General, the President and/or other agencies should go unchecked. Congress has enacted 28 U.S.C. § 530B (also known as the "McDade Amendment"). Under Section 530B, Department of Justice attorneys, as well as other government attorneys, "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. State bar rules speak to 2 an attorney's ethical duties when advising a client. See, e.g., ABA MODEL RULES OF PROFESSIONAL CONDUCT, 2.1, 3.1. To the extent someone believes that a Department of Justice attorney has violated the applicable bar rules, under the McDade Amendment, they can file a complaint with the relevant state bar.
>
> In fact, complaints have been filed with the District of Columbia and Pennsylvania bars against defendant Yoo. Under the McDade Amendment, Yoo potentially could be subject to discipline if he violated any of the applicable rules and/or standards.
>
> In addition to potential discipline by a state bar, **Department of Justice attorneys are also subject to investigation by the Office of Professional Responsibility** ("OPR"), see 28 C.F.R. 0.39 and the Office of the Inspector General, 5 U.S.C. App. §8E. Section 1001 of the USA Patriot Act

> directs the Department of Justice Inspector General to review information and receive complaints alleging abuses of civil rights and civil liberties by Department of Justice employees. See Pub. L. 107-56, § 1001, 115 Stat. 391 (2001). **OPR and the Office of the Inspector General have broad investigatory powers and can recommend discipline and even criminal prosecution, where appropriate**. [my emphasis]

The government is arguing that Bivens isn't appropriate because there are other means of punishing Yoo's bad lawyering.

And they specifically invoke OPR investigations.

Now, in any case, this is an already well-worn Obama tactic. They have repeatedly done what they needed to do, legally, to ensure that the executive is the only one who gets to check the executive's power and (just as importantly) to prevent the Courts from reviewing executive branch actions.

But it's all the more interesting, given the delay of the OPR report which—Eric Holder told the Senate on November 18—would be out by the end of the month. Meaning, last month (and no, it's not coming out today either).

Had DOJ already released that OPR report, that passage would either say, "we've already recommended Yoo be disciplined and so basically agree with plaintiffs" or "well, we looked, but we think Yoo should skate and so this claim that there are other means of redress is really just BS."

Instead, DOJ is making a promise that OPR has the ability to discipline Yoo (in spite of the rather obvious problem that, since he's no longer a government employee, most of OPR's means of discipline are unavailable), without telling the Court whether it actually **will** discipline him.

The timing of the latest skirmishing over Yoo's future makes the delay of the OPR report all the more interesting.

> November 16: Opening brief for Yoo
>
> November 18: Court grants USG extension to file amicus brief until December 3
>
> November 18: Holder says the OPR report will be released by the end of November
>
> November 20: Padilla moves for extension on response—because of the timing of government brief—until January 15
>
> December 3: USG submits brief
>
> December 4 [today]: Still waiting on that OPR report

I could be misreading this, but we're in a holding pattern that seems to be a response to the Yoo schedule. (Though I don't expect DOJ is going to stall this until January.)

And then there's one more interesting point about these filings and the OPR report.

Remember that DOJ originally represented Yoo on this case. But back on July 9, the government revealed that Yoo would be hiring private counsel, who turned out to be Miguel Estrada. Here's ethics professor David Luban's explanation for why Yoo had to get private counsel.

> Georgetown University Law Center professor David Luban, an ethics expert who has also written about the torture controversy, said in an e-mail that he hadn't been tracking the case closely, but that the Justice Department's decision could indicate the government was litigating the Bush administration's position at the district court level, but is now rethinking whether to continue to maintain it. Or, he speculated, it might be that the OPR

> report will be issued soon and will recommend discipline.
>
> "That by itself would create a conflict of interest in DOJ defending his position in a closely related civil case," he wrote. "Even though OPR is a different subunit of DOJ, it's not a separate law firm."

That is, he argues the government could no longer defend Yoo after OPR had found Yoo to have acted improperly. And, in their amicus brief, they're now arguing (in part) that because OPR can conduct investigations into improper conduct and recommend discipline, Bivens shouldn't be available.

Like I said, I don't think DOJ is really going to stall all the way until January 15. But it does seem like these two efforts to hold Yoo accountable are now interrelated.