

DOUGLASS CASSEL
CENTER FOR CIVIL AND HUMAN RIGHTS
301 NOTRE DAME LAW SCHOOL
Notre Dame, Indiana USA 46556
(574) 631-7895
Doug.Cassel@nd.edu

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“Padilla v. Yoo: “Lawfare” or Rule of Law?”

After enduring nearly two years of *incommunicado* isolation in a tiny cell, during which he was allegedly subjected to severe sensory deprivation and mental disorientation techniques, utilizing extremes of temperature, absolute light or dark for periods over 24 hours, loud banging at all hours of the night, noxious fumes, and shackling and manacling or contortion in painful stress positions for hours on end, while his interrogators threatened to kill him, US citizen Jose Padilla is now suing John Yoo, the former Justice Department lawyer whose legal advice authorized this regimen.

As a result, Padilla and his lawyers at the Yale Law School clinic are castigated by Yoo for waging “lawfare” – which Yoo calls “another dimension” of the terrorist war against the US. In a *Philadelphia Inquirer* op-ed, Yoo – whose legal opinion okaying this barbarity was so ill-advised that the Justice Department had to revoke it – complains that the Yale lawyers invent “novel” legal theories to harass him.

If their legal theories are indeed novel, Yoo has himself to thank: never before has the Justice Department sanctioned the infliction of prolonged, mind-altering brutality on a US citizen.

Still, suing a government lawyer for rendering legal advice, no matter how injudicious, gives pause. Such lawsuits could deter creative thinking by lawyers endeavoring to protect the public. If such suits are to be allowed at all, they should be confined to rare and extreme cases -- such as the John Yoo torture memos.

There are limits on what advice lawyers may give. After World War II, German government lawyers who wrote memos and orders depriving Russian prisoners of war of their Geneva Convention protections, and authorizing the forced disappearances of political prisoners under the “Night and Fog” decree, were convicted at Nuremberg.

If, like John Yoo, they had instead authorized torture of prisoners, would they have been any less guilty?

But what if the German lawyers had proposed only less serious violations? Although the suit against Yoo does not seek to convict him of a crime, it does aim to hold him civilly liable – for a symbolic one dollar in damages – not only for the torture, but also for his legal advice that allegedly led to violations of Padilla’s constitutional rights to counsel, access to court, due process of law, freedom of religion, rights to information and association, and his rights to be free from inhumane conditions of confinement, cruel and unusual punishment, coercive interrogations and improper military detention.

In pressing these wide-ranging claims, Padilla's lawyers face daunting legal obstacles. To begin with, no law authorizes their lawsuit. Padilla's claims rest directly on the Constitution. While the Supreme Court has authorized suits for damages based solely on violations of the Constitution, it does so sparingly -- when the violations are not otherwise subject to judicial or effective oversight, and even then, only if no special factors weigh against the wisdom of creating a new cause of action.

To date the Court has allowed constitutional damages claims (called *Bivens* claims for the case that invented them) only for violations of the Fourth Amendment right against unlawful search and seizure, the Fifth Amendment right against employment discrimination, and the Eighth Amendment right not to be subjected to cruel and unusual punishment by prison officials.

Thus, only one of Padilla's claims -- under the Eighth Amendment -- has arguable Supreme Court precedent. Some claims may fall on the ground that they are subject to judicial oversight in the criminal proceedings against him; others may be rejected because they deal with grey areas of national security law, where legal mistakes should not result in damages suits.

But Padilla should probably be allowed to take to trial at least his core claims -- that the torturous confinement and interrogation techniques violated his Fifth Amendment rights to due process, and possibly his Eighth Amendment rights. To the extent the prosecution in his criminal trial did not rely on any resulting coerced confession by Padilla, these alleged violations have not been subject to judicial oversight.

If Padilla overcomes this hurdle, others remain. Yoo may contend that he is entitled to absolute immunity, as are prosecutors when presenting their cases to a court. But Yoo more likely will be granted only the "qualified immunity" afforded to prosecutors when they advise police on interrogation techniques, or to the Attorney General when he authorizes national security wiretaps without a judicial warrant.

If Yoo is granted qualified immunity, then he can be held liable for his erroneous legal advice only if it violated "clearly established statutory or constitutional rights of which a reasonable person would have known." It plainly did: Yoo's memo provided legal authorization for torture.

But the issue is not so simple. Yoo's central legal rationale is that the President's powers as commander in chief give him constitutional license to override any law, including laws against torture, if he deems it necessary to wage a war. The courts may thus need to consider whether any reasonable lawyer could advise that the Constitution allows the President to disregard all law in wartime.

Finally, the government might decide to assert the "state secrets" privilege to quash Padilla's claims, on the ground that they cannot fairly be adjudicated without probing secret intelligence methods and communications.

Unless barred by the state secrets privilege, Padilla's suit will likely break new ground. Far from a case of "lawfare," it promises to strengthen the rule of law, by clarifying whether and when government lawyers can be held accountable for the potentially far-reaching consequences of ill-considered legal advice.

Doug Cassel's commentaries are generally broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM, and rebroadcast at 9 PM in the evening. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.

