

RUMMY LAWYERS UP ... TO DEFEND ORDERING DEATH THREATS?

Josh Gerstein reports that the government has withdrawn from defending Donald Rumsfeld and others in the Jose Padilla suit Judge Richard Mark Gergel dismissed the other day. (h/t MD)

The Justice Department under President Barack Obama has quietly dropped its legal representation of more than a dozen Bush-era Pentagon and administration officials – including former Defense Secretary Donald Rumsfeld and aide Paul Wolfowitz – in a lawsuit by Al Qaeda operative Jose Padilla, who spent years behind bars without charges in conditions his lawyers compare to torture.

Charles Miller, a Justice Department spokesman, confirmed Tuesday that the government has agreed to retain private lawyers for the officials, at a cost of up to \$200 per hour. Miller said “conflicts concerns” prompted the decision. He did not elaborate.

One private attorney involved in the case, who asked not to be named, said the Obama administration apparently concluded “its duty to represent the defendants zealously, which includes the duty to argue any and all defenses, can’t be discharged for reasons of policy and other government interests.”

That’s mighty interesting. Because the last time DOJ withdrew from defending such a high profile defendant was John Yoo, in the partner lawsuit in this case, in which Padilla is suing Yoo for his horrible OLC memos. The DOJ withdrew from defending Yoo just two weeks before DOJ finished the OPR Report (on July 29, 2009) finding grave

problems with the OLC memos John Yoo wrote authorizing torture. The very memos Padilla sued Yoo about.

Which makes this observation from Gerstein and Stephen Gillers all the more interesting.

Legal ethics experts said the Justice Department's withdrawal could stem from qualms about a full-throated defense of Padilla's treatment while in military custody. His lawyers claim that Padilla's captors in the brig subjected him to abuse including sensory deprivation, prolonged isolation, **imminent death threats**, forced drugging and interference with his practice of Islam.

"Some of the [defendants] may have wanted to make more extreme arguments about the legality of their conduct than the Justice Department was willing to accept," said Stephen Gillers, a professor of law at New York University. [my emphasis]

That same OPR Report would virtually prohibit DOJ from helping Rummy and others defend the claim that death threats used on Padilla were legal. After all, we know that mock burials—a kind of death threat—were just about the only thing that John Yoo said was illegal!

Now, as it happens, Judge Collyer, in the ACLU's FOIA case, appears to have made a really ridiculous argument that DOJ's declassification of that reference to mock burial does not amount to an acknowledgment that Yoo judged death threats, more generally, to be illegal. And the death threats used against Rahim al-Nashiri at least allegedly are still being investigated.

But it would be mighty interesting if this were all about death threats. Padilla's lawyers are suing because—among other reasons—Rummy ordered up treatment that included death threats. And that's the only thing our Department of Justice

has deemed illegal.