

THEY PICKED A BAD WEEK TO STOP SNIFFING GLUE

The Obama Administration got stuck with a bad court date to have to try to convince a Judge the Jose Padilla suit against John Yoo should be dismissed. After all, we knew Yoo's memos were legally indefensible. But with the release of nine new OLC memos—including the memo eviscerating the Fourth Amendment, the two withdrawing that one and others, and, significantly, one of the memos pertaining to Padilla specifically ("authorizing" his military detention), the sheer cravenness of Yoo's legal work is in sharp relief this week.

Nevertheless, they did argue Judge White should dismiss the suit. Though it sounds like he wasn't impressed with their argument.

The judge, Jeffrey S. White of Federal District Court, explored the arguments of Mr. Padilla's lawyers thoroughly, but he appeared to be skeptical of elements of the government's argument.

And he referred to the 4th Amendment Evisceration memo specifically.

In fact, Judge White, who was appointed by President George W. Bush, even told the government's lawyers that Mr. Yoo's 2001 memorandum stating that the constitutional protections against unreasonable searches and seizures can be overridden was "a pretty scary position."

And there's a further problem with the Administration's position. They're arguing that it is not the place for the Courts to take recourse against a government lawyer gone bad—it's the role of the Executive.

But any recourse against a government lawyer "is for the executive to decide, in the first instance, and for Congress to decide," not the courts, she said.

Which suggests that the Administration thinks its puny OPR investigation against Yoo is an appropriate response.

The Obama Administration has already signalled that it doesn't plan real legal consequences for its lawyer for torture. And yet based on that, they want the Courts to butt out.

One more point. It appears that the Administration has not yet turned all the memos used to justify Padilla's treatment over (or at least not made them public).

Earlier last week, the Obama administration released nine "war on terror" memos – some written by Yoo, others by 9th U.S. Circuit Court of Appeals Judge Jay Bybee – shortly after White ordered the DOJ to clarify whether it wanted to submit them under seal in the Padilla case. However, the administration didn't release all of the memos referenced in Padilla's complaint, and White asked whether that meant he had to take Padilla's descriptions of those documents as true, for purposes of a motion to dismiss.

White characterized his inquiry on this subject as "50 percent curiosity, and 50 percent legal significance." The government once again revealed its awkward position in the litigation, since technically Yoo is being sued in his individual capacity. Thus the government is not a party, and has no discovery obligations.

"What's the harm in putting all of the memos on the Web site?" White asked.

"I have no idea what the harm would be,"

Mason said, adding that it is a policy decision made by officials in Yoo's former office.

It has already been a bad week for the Obama Administration to be making this argument. But apparently, they're still sitting on some of the opinions that could have made it worse.