

IT'S NOT YOO, IT'S THE HISTORY

If you had to guess the first several words that Miguel Estrada would use to argue that John Yoo should not be held accountable for his bad lawyering, what would those words be? (Answer below the fold.)

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If you guessed, "On September 11, 2001," you'd be absolutely correct.

On September 11, 2001, members of the al Qaeda terrorist organization hijacked commercial airliners and crashed them into the Pentagon and World Trade Center, destroying the latter and killing nearly 3000 civilians. In the aftermath of this unprecedented attack, the President of the United States and his advisers grappled with how to faithfully apply Supreme Court precedents developed in the context of conventional warfare to a changed world in which America's enemies no longer wore uniforms or targeted only the military. Defendant-Appellant John Yoo, then a Deputy Assistant Attorney General in the Department of Justice, provided legal advice to the President about some of the rules governing the detention and treatment of such unlawful enemy combatants.

Based on evidence that Plaintiff-Appellee Jose Padilla had entered the United States to conduct terrorist operations for al Qaeda, the President determined that Padilla satisfied the criteria for enemy-combatant status.

Invoking both his own constitutional powers and the authority granted by Congress to “use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States,” Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), the President ordered Padilla’s detention. Three-and-a-half years later, Padilla was transferred from military to civilian custody and convicted of conspiracy to commit terrorist acts abroad. In this civil suit, Padilla and his mother seek to hold Yoo personally liable for the President’s determination that Padilla is an enemy combatant, as well as the treatment he allegedly received from other federal officials while in military custody.

Now, I’ll have more to say about this brief after I go walk the dog. But for now, I wanted to point to not just the myth-making around 9/11, but also to the way that Estrada turns Yoo in a mere advisor simply struggling to faithfully apply Supreme Court precedent, to the way that laws are described as rules, and to the way that poor John Yoo and President Bush were just helpless before the evidence here, regardless of how they had screwed with the rules about what constituted evidence.