# OBAMA DOJ DOUBLES DOWN ON PRESIDENT'S ABILITY TO DETAIN US CITIZENS WITH NO CHARGES

Back in February, Obama's DOJ stopped defending Donald Rumsfeld and others in Jose Padilla's Bivens suit against them (though we're still footing the bill for their pricey lawyers). At the time, it seemed DOJ might have concerns about the claims Rummy's crew wanted to make about the torture Padilla was suing for.

But DOJ just filed an amicus brief in Padilla's appeal. In it, they basically double down on the claim the President can deprive a citizen already detained in the US of all due process simply by engaging in some specious word games (in this case, by unilaterally labeling someone an enemy combatant).

Critically, the government is dodging the question of what happens in detention; as I'll show below, rather than addressing that torture, they simply engage in circular logic.

Remember why Padilla is suing: he's arguing that Rummy's crowd violated his constitutional rights by seizing him from a civilian jail, designating him an enemy combatant, using that designation to deprive him of due process, and while he was detained on those terms, torturing him. He's arguing the government violated his constitutional rights both by depriving him of due process and then torturing him. Illegal detention to enable illegal torture. The government wants to pretend they can separate those issues and argue just the basis for detention.

The government argues that allowing Padilla to sue for that treatment would infringe on national security.

> Where, as here, the claims principally implicate national security and war powers, courts have recognized that it is not appropriate to create a common-law damage remedy.

Once again, they're arguing that if the President says he did something—no matter how clearly unconstitutional—for national security reasons, citizens have no recourse against the President or his top aides.

After arguing "national security" as a threshold matter, the government then makes a threefold argument: Padilla should not have access to Bivens because Congress gave him another means of recourse—a habeas corpus petition (that doesn't address torture, but the government claims UMCJ addresses torture, even though the defendants here are civilians).

> Padilla had a congressionally-authorized mechanism for challenging the lawfulness of his detention. In the wartime context presented, the habeas process should preclude the creation of a Bivens remedy.

Then the government argues that since this very court—the Fourth Circuit—okayed Padilla's detention in 2005, it's clear Rummy must have qualified immunity because it was reasonable to think military detention of a citizen was cool.

> The issue here, for the purposes of qualified immunity, is not whether this Court's decision was correct, whether the Supreme Court would have agreed had it reviewed the decision, or whether the detention of Padilla was ultimately constitutional or appropriate as a matter of policy. The issue, rather, is whether the conclusion by three Judges of this Court upholding the detention rebuts any claim that the contrary view was clearly established at the time. It

> does.

The government's brief makes no mention of the Michael Luttig opinion cited in Padilla's appeal that suggested the government's legal treatment of Padilla was all about expediency, not justice, nor does it here mention the torture allegations.

Finally, it says Rummy shouldn't be held liable for Padilla's torture because *Iqbal* requires Padilla show further proof of personal involvement in his treatment.

But ultimately, all that is based on the notion that no one could have known detaining a US citizen with no due process was unconstitutional.

Now, as I said, the government tries to sever the relationship between Padilla's illegal detention and his treatment while in detention. Given my earlier speculation that the government withdrew from defending Rummy because Padilla is suing, in part, for the death threats he was subjected to in prison—treatment John Yoo found to be (and communicated to Jim Haynes, another defendant in this suit, to be) torture—I find the government's circular logic to be particularly telling.

To explain their failure to treat torture in their filing, they say 1) that the other defendants are addressing it and 2) they don't have to deal with it anyway because the President has said the US does not engage in torture (which is precisely what Bush said when torture was official policy):

> In this brief, we do not address the details of Padilla's specific treatment allegations, which have already been thoroughly briefed by the individual defendants.1
>
> 1 Notwithstanding the nature of Padilla's allegations, this case does not require the court to consider the

> definition of torture. Torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. See 18 U.S.C. § 2340A. Moreover, consistent with treaty obligations, the President has stated unequivocally that the United States does not engage in torture, see May 21, 2009 Remarks by the President on National Security.

Note that bit, though, where the government acknowledges that torture is illegal?

That's important, because they base their objections to the *Bivens* complaint in part on the possibility that a court could review Padilla's treatment—treatment he alleges amounts to torture, which the government accepts is illegal—and determine whether it was in fact torture and therefore illegal.

> Padilla also seeks damages in regard to the lawfulness of his treatment while in military detention. Thus, a court would have to inquire into, and rule on the lawfulness of, the conditions of Padilla's military confinement and the interrogation techniques employed against him. Congress has not provided any such cause of action, and, as the district court concluded (JA 1522), a court should not create a remedy in these circumstances given the national security and war powers implications.

And they're arguing Congress—which passed laws making torture illegal (to say nothing of the Constitution prohibiting cruel and unusual punishment)—didn't provide for a cause of action.

All this implicates the government's discussion

of Padilla's lack of access to lawyers, too. They claim he can't complain about not having access to the courts because he can't point to any claim he was prevented from making while deprived of his lawyers and access to law.

> Padilla's access to the courts claim (Br. 36) likewise fails. To properly allege such a claim, one must identify a legal claim that could not be brought because of the actions of the defendants. See Christopher v. Harbury, 536 U.S. 403, 412-15 (2002). Here, the only such claim was Padilla's habeas action, which he was able to litigate.

This, in spite of the fact that the Appeal notes the limits on his access to lawyers presented specific barriers for him to complain about his treatment.

> Padilla was told not to trust his lawyers and warned against revealing his mistreatment.

Now, frankly, I suspect this effort is all part of a strategy the government devised back in February, when they dumped Rummy.

Rummy needs them to make the threshold argument—that this is a national security issue, meaning the courts should butt out.

But the government seems to have clear awareness that Padilla alleges—with some basis in fact—to have been tortured and that it can't defend against the torture complaint because they know it was torture and know at least some of the named defendants knew it was torture (and note, the judge in Padilla's criminal case, as well as judges in other cases where the accused was tortured, always say the torture victim can make a *Bivens* complaint.)

But that's not stopping them from saying that, by applying an arbitrary label with no review, they should be able to ignore very clear

constitutional principles. And if it was okay for the government to use an arbitrary label in the past to completely ignore the Constitution, then it would be okay going forward to do the same.