“QUIET LOBBYING CAMPAIGN” FOR SOCOM: HOLLYWOOD MOVIE, PRESIDENT’S CAMPAIGN SLOGAN

[youtube]http://www.youtube.com/watch?v=ZnlPgo9TaGo[/youtube]

Coming so quickly on the heels of Lt. Col. Daniel Davis documenting the depraved level of lying that characterizes the primary mode of action for many at the top levels in our military, it’s galling that Admiral William McRaven would take to the front page of today’s New York Times to advance his efforts—hilariously and tragically labeled by the Times as a “quiet lobbying campaign”—to gain an even freer hand for the Special Operations Command, which he heads.

Never forget that it was from within Special Operations that Stanley McChrystal shielded Camp NAMA, where torture occurred, from the International Committee of the Red Cross. Never forget that it was Special Operations who instituted the dark side of the COIN (counterinsurgency) campaign in Afghanistan that relied on poorly targeted night raids that imprisoned and tortured many innocent civilians. Never forget that Dick Cheney and Donald Rumsfeld bypassed the normal chain of command to work directly with Stanley McChrystal when he headed JSOC, sending McChrystal on missions not reported to area command. This relationship with Cheney and Rumsfeld had a strong effect on JSOC, as noted by Jeremy Scahill:

> Wilkerson said that almost immediately after assuming his role at the State Department under Colin Powell, he saw JSOC being politicized and developing a close relationship with the executive

> branch.

Among the military commanders being bypassed by Cheney and Rumsfeld was the head of SOCOM, the position that McRaven (who was McChyrstal's deputy when most of McChrystal's war crimes were carried out) now occupies, but this same attitude of teaming with the executive branch to bypass the regular defense chain of command has survived intact.

Today's article in the Times opens this way:

> As the United States turns increasingly to Special Operations forces to confront developing threats scattered around the world, the nation's top Special Operations officer, a member of the Navy Seals who oversaw the raid that killed Osama bin Laden, is seeking new authority to move his forces faster and outside of normal Pentagon deployment channels.
>
> The officer, Adm. William H. McRaven, who leads the Special Operations Command, is pushing for a larger role for his elite units who have traditionally operated in the dark corners of American foreign policy. The plan would give him more autonomy to position his forces and their war-fighting equipment where intelligence and global events indicate they are most needed.

At least the Times does pay a short homage to the quaint, old way of the chain of command as it currently exists:

> While President Obama and his Pentagon's leadership have increasingly made Special Operations forces their military tool of choice, similar plans in the past have foundered because of opposition from regional commanders and the State Department. The military's

> regional combatant commanders have feared a decrease of their authority, and some ambassadors in crisis zones have voiced concerns that commandos may carry out missions that are perceived to tread on a host country's sovereignty, like the rift in ties with Pakistan after the Bin Laden raid.

See that? We're only four paragraphs into the story, and we have two Osama bin Laden references and an admission that the Obama administration has decided that Special Operations comprises their "tool of choice".

But in the end, the real reason that dark JSOC missions are now favored is that they are not subject to Congressional oversight. Going back to the Scahill article linked above:

> The military intelligence source said that when Rumsfeld was defense secretary, JSOC was deployed to commit some of the "darkest acts" in part to keep them concealed from Congress. "Everything can be justified as a military operation versus a clandestine intelligence performed by the CIA, which has to be informed to Congress," said the source. "They were aware of that and they knew that, and they would exploit it at every turn and they took full advantage of it. They knew they could act extra-legally and nothing would happen because A, it was sanctioned by DoD at the highest levels, and B, who was going to stop them? They were preparing the battlefield, which was on all of the PowerPoints: 'Preparing the Battlefield.'"
>
> The significance of the flexibility of JSOC's operations inside Pakistan versus the CIA's is best summed up by Senator Dianne Feinstein, chair of the Senate Select Committee on Intelligence. "Every single intelligence operation and covert

> action must be briefed to the Congress," she said. "If they are not, that is a violation of the law."

So make no mistake that in asking for a freer hand, McRaven is seeking to institutionalize within SOCOM the free-wheeling, law-free sort of action that has characterized JSOC since McChrystal ran it as Cheney and Rumsfelds' secret dark army.

With all that as background, now we can see how tragically funny the description from the Times of McRaven's lobbying campaign is. Yeah, a "quiet" campaign relies on a Hollywood movie (opening in only 11 days!) starring active duty Special Operations forces. When I tweeted about that point last night, Marcy added that one of the Obama campaign's re-election slogans also will rely on Special Operations:

> Vice President Joe Biden today told a crowd of re-election campaign donors in Ft. Worth, Texas, that the best way to sum up President Obama's first term in "shorthand" is with nine succinct words: "Osama bin Laden is dead and General Motors is alive."

There can be no doubt that this quiet little campaign will succeed. The Obama administration and Congress have both demonstrated that the last thing they want is public oversight of the darkest missions in our Great War on Terror. What's probably the most remarkable thing here is that there is even any public notice of giving SOCOM a freer hand. Move along, the public has no part in this discussion.

4TH CIRCUIT: ENEMY COMBATANTS CAN'T COMPLAIN ABOUT HAVING BEEN MADE ENEMY COMBATANTS

As you've probably heard, the 4th Circuit rejected Jose Padilla's suit against Donald Rumsfeld on Tuesday. Both Lyle Denniston and Steve Vladeck have good summaries of the decision, which basically says the courts can't grant damages for constitutional abuses not otherwise covered by law until such time as Congress sees fit to cover them in law:

> The factors counseling hesitation are many. We have canvassed them in some detail, but only to make a limited point: not that such litigation is categorically forbidden by the Constitution, but that courts should not proceed down this highly problematic road in the absence of affirmative action by Congress. If Congress were to create a damages remedy here, we would trust that the legislative process gave due consideration to the broader policy implications that we as judges are neither authorized nor well-positioned to balance on our own.

But if that's not circular enough reasoning for you, here's a more disturbing one—one which may have troubling implications given the recent codification of indefinite detention.

The 4th Circuit Opinion hews closely to the argument the government made in its amicus brief which, as I described last year, itself engaged in circular logic. It effectively invoked national security to say that the court couldn't consider Padilla's deprivation of due process. And then having bracketed off the lack of due

process that got him put in the brig with no access to lawyers, they effectively punted on the torture complaint.

> 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.

That is, Padilla can't sue both because Congress has made it illegal but not provided a cause of action here and … national security!

Effectively, then, the government shielded torture by shielding the initial lack of due process from all oversight under national security and therefore depriving Padilla of recourse once he lost his access to due process.

In my opinion, the 4th Circuit brief actually magnifies this problem. Check out the language in these two passages:

> Special factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention.
>
> [snip]
>
> With respect to detainees like Padilla, Congress has provided for limited judicial review of military commission decisions, but only by the District of Columbia Circuit Court of Appeals, and only after the full process in military courts has run its course. 10 U.S.C. § 950g. And to the extent that the Supreme Court in Boumediene v. Bush, 553 U.S. 723 (2008), permitted further judicial examination of the detention of enemy combatants, it did so using the limited tool of the constitutionally guaranteed writ of habeas corpus—not an implied and open-ended civil damages action. See id. at 797. [my emphasis]

That is, the 4th Circuit did not consider whether American citizens with no other recourse could sue under Bivens for having been turned into enemy combatants precisely to deprive them of their rights. Rather, it considered whether "enemy combatants held in military detention" and "detainees like Padilla" had access to Bivens. It thereby ignored the most fundamental part of the process, where the Bush Administration removed Padilla, a citizen, from civilian detention with access to due process, and made him an enemy combatant.

The 4th Circuit denies Padilla the ability to sue for being deprived of his constitutional right to due process by considering him not as a citizen deprived of his constitutional rights, but as a detainee whose constitutional rights had already been suspended.

Which makes the final passages of this opinion all the more nauseating. Having premised their entire decision not on Padilla's rights as a

citizen, but on his rights as an enemy combatant (even seemingly referring to him as a detainee, in the present tense), they then argue that there would be no incremental harm for Padilla between being a citizen convicted of a felony through due process and being an enemy combatant.

> It is hard to imagine what "incremental" harm it does to Padilla's reputation to add the label of "enemy combatant" to the fact of his convictions and the conduct that led to them.

This entire suit is about the magical power that term "enemy combatant" has to put an American citizen beyond the realm of due process (and, in Padilla's case, to be tortured precisely because he has lost due process). That is precisely the logic the judges use throughout this opinion. And yet they simply can't imagine what the difference between being a citizen—even one convicted of multiple felonies—and being an enemy combatant is?

And then there are the larger implications of this. In a world where indefinite detention is now codified into law, in a world where Padilla has always delimited the possible applications of claimed authority to hold American citizens captured in this country as enemy combatants, the circuit that covers CIA's and JSOC's actions—not to mention the two military brigs, Charleston and Quantico, that would be the most likely places to detain American citizens—just accorded that term, "enemy combatant," magical status. Once applied to an American citizen, the 4th Circuit says, the Executive Branch is absolved of any infringements of a citizen's constitutional rights, even the infringements of constitutional rights used to get him into that magic status in the first place.

DESPITE METAPHYSICAL IMPOSSIBILITY, US GOVERNMENT REPEATEDLY ATTEMPTS RETROACTIVE CLASSIFICATION

On Friday, I noted that the New York Times had dutifully repeated information from military sources who had provided them with a "classified" report (pdf) on how cultural differences between NATO troops and Afghan troops are resulting in increasingly frequent killings of coalition troops by coalition-trained Afghan troops. On Friday morning, the Times put up a correction, noting that the Wall Street Journal had published an article about the May 12, 2011 report on June 17, 2011.

I mentioned in my Friday post that the Wall Street Journal article included a link to what was said to be a copy of the report, but that the link was now dead. It is quite curious that the Journal article would have that link, as the opening sentence mentions that the report is classified. In comments on the post, Marcy Wheeler posed the question of whether the study "was intentionally buried after the WSJ story? Maybe that's what NYT's claim that it is classified is about?" So, in other words, was the study retroactively classified because of the Wall Street Journal article?

With only a little searching after reading both the New York Times and Wall Street Journal articles, I found what appeared to be a complete copy (pdf) of the same report (or at least a copy with the same title and number of pages), clearly stamped "UNCLASSIFIED" at the top and bottom of each page. Several hours after my post was published, the Times added a second correction to their story:

> The article also referred incompletely to the military study's secrecy. While it was classified, as the article reported, it was first distributed in early May 2011 as unclassified and was later changed to classified. (The Times learned after publication that a version of the study has remained accessible on the Internet.)

So it turns out that Marcy's hunch was correct. The report initially was published as unclassified and then later classified, in a clear case of retroactive classification. There is perhaps just a hair of wiggle room in the Times' statement that "a version of the study has remained accessible on the internet", providing for the remote possibility that there are differences between the "classified" version provided to the times and the complete version on the internet, but that seems highly unlikely. The copy on the internet is almost certainly a copy from the time period when the study clearly was unclassified.

This sequence of events also is confirmed somewhat in the Wall Street Journal article itself:

> The study was originally unclassified, but military officials in Kabul said Thursday that it has been recently classified "secret" by the U.S. Central Command in Florida at the request of coalition officials in Afghanistan. On Thursday, despite its new classification, the report was available on a publicly accessible military knowledge-sharing website.

The Journal's use of a dead link, however, would lead a current reader to believe that even the "publicly accessible" version was no longer public, making their discussion of classification difficult to parse.

The publication date of the Journal article last June is a Friday, so it seems possible that Central Command decided to classify the report in response to inquiries about it as the Journal neared publication. On Saturday, January 21, I requested comment from a press contact in Central Command with whom I have previously corresponded, but have not yet gotten a reply.

Today, Marcy included me in an email conversation with J. William Leonard, who previously served as the Director of the National Archives' Information Security Oversight Office and before that as Deputy Assistant Secretary of Defense for Security and Information Operations. The question posed to Mr. Leonard was whether the retroactive classification of the report was properly carried out. Leonard's response noted that since "the purpose of classification is to preclude unauthorized disclosure", that is "a metaphysical impossibility for information whose disclosure was authorized in the first place."

So why would the government try to retroactively classify the report? In this case, the first explanation that comes to mind is that the report is embarrassing to NATO (primarily American) troops with the litany of ANSF complaints contained in the report. In other cases, as I will note below, the government has used retroactive classification as a tool in either silencing or prosecuting whistleblowers.

Here is more of Leonard's response on the issue of retroactive classification:

> Fortunately, from a policy perspective, there are no direct provisions to retroactively classify something that was unclassified and was properly put into the public domain which is what DoD did in this case when, as the WSJ article states: "the report was available on a publicly accessible military knowledge-sharing website" which from all appearances is a DoD sponsored website.

> First, to retroactively classify such a document defies common sense. Second, the purpose of classification is to preclude unauthorized disclosure, a metaphysical impossibility for information whose disclosure was authorized in the first place. Finally, to do so can also undermine national security because even if the information is truly sensitive, the government simply draws increased attention to the information by such ham-fisted actions.

Looking further into the general issue of retroactive classification, we see that it was used to silence Sibel Edmonds in 2004. There is also a stern letter from Henry Waxman (pdf) to Donald Rumsfeld on retroactive classification of documents earlier that same year.

In this post on the blog for the Project on Government Oversight, we see discussion of retroactive classification in the government's prosecution of Thomas Drake:

> The document that relates to one of the counts of violating the Espionage Act that Drake is charged with was not even classified when it was in his possession. "In support of its willful retention charges, including Count Two, the government alleges that "[c]lassified information had to contain markings identifying the level at which it was classified," according toa motion filed by Drake's lawyers to dismiss Count Two. But, but, but…
>
> > Evidence recently produced by the government reveals that the allegedly classified "Regular Meetings' document contained clear 'markings' that it was an 'unclassified" document. According to a March 22, 2010 memorandum prepared by the lead NSA investigator in this case –

> which was produced to the defense just three weeks ago — the allegedly classified "Regular Meetings" document was posted on the National Security Agency intranet, called "NSANet," and it was marked "UNCLASSIFIED//FOR OFFICIAL USE ONLY" in the header and footer.

Further along in the post, POGOBlog notes that retroactive classification also was used against Franz Gayl and Robert MacLean.

In a particularly ridiculous exercise, the government also prevented Carol Rosenberg from mentioning Joshua Claus' name when she was reporting on testimony about his crimes at Guantanamo, even though she was able to point out that his name was publicly available and tied to the events being reported.

What is particularly galling about attempting metaphysical impossibilities in retroactively classifying material is that Leonard has pointed out that improper classification is a violation that should be treated on an equal level with improper disclosure:

> Classifying information that should not be kept secret can be just as harmful to the national interest as unauthorized disclosures of appropriately classified information.
>
> In fact, the executive order governing classification treats unauthorized disclosures of classified information and inappropriate classification of information as equal violations, subjecting perpetrators to comparable administrative or other sanctions in accordance with applicable law.

Don't hold your breath, though, if you expect a prosecution, firing, or even a reprimand for

anyone attempting metaphysical impossibilities when it comes to government officials retroactively classifying information.

INTELLIGENCE AIDE FLYNN RE MCCHRYSTAL: "EVERYONE HAS A DARK SIDE"

[youtube]http://www.youtube.com/watch?v=WX0MPcN08Zc[/youtube]

As Marcy pointed out yesterday, Rolling Stone has published an excerpt from Michael Hastings' new book *The Operators*. As she predicted, I am unable to refrain from commenting on it. The polarizing figure of Stanley McChrystal has always intrigued me. The way that McChrystal's "Pope" persona was embraced by a large portion of the press never made sense to me, given how deeply McChrystal was involved as the primary agent behind the "success" of David Petraeus' brutal night raids and massive detention program in Iraq. For those paying attention, it was known as early as 2006 that McChrystal's JSOC was at the heart of the abuses at Camp Nama and even that he was responsible for preventing the ICRC from visiting the camp.

In preparing for the short passage from Hastings that I want to highlight, it is important to keep in mind that McChrystal's mode of operation when heading JSOC was to bypass both the normal chain of command and Congressional oversight by working directly for Dick Cheney and Donald Rumsfeld. From Jeremy Scahill:

> While JSOC has long played a central role in US counterterrorism and covert operations, military and civilian officials who worked at the Defense and

> State Departments during the Bush administration described in interviews with *The Nation* an extremely cozy relationship that developed between the executive branch (primarily through Vice President Dick Cheney and Defense Secretary Donald Rumsfeld) and JSOC. During the Bush era, Special Forces turned into a virtual stand-alone operation that acted outside the military chain of command and in direct coordination with the White House. Throughout the Bush years, it was largely General McChrystal who ran JSOC.

Next, we need to consider the figure of Michael Flynn, whom Hastings quotes. Flynn served under McChrystal in a number of positions related to intelligence gathering. From his biography:

> Major General Michael T. Flynn assumed duties as the Chief, CJ2, International Security Assistance Force, with the additional appointment as the CJ2, US Forces – Afghanistan on 15 June 2009. Prior to serving in this capacity, he served as the Director of Intelligence, Joint Staff from 11 July 2008 to 14 June 2009. He also served as the Director of Intelligence, United States Central Command from June 2007 to July 2008 and the Director of Intelligence for Joint Special Operations Command from July 2004 to June 2007, with service in Operations ENDURING FREEDOM (OEF) and IRAQI FREEDOM (OIF). Major General Flynn commanded the 111th Military Intelligence Brigade from June 2002 to June 2004. Major General Flynn served as the Assistant Chief of Staff, G2, XVIII Airborne Corps at Fort Bragg, North Carolina from June 2001 and the Director of Intelligence, Joint Task Force 180 in Afghanistan until July, 2002.

Both the New York Times and Esquire articles

linked above on torture at Camp Nama discuss events primarily from early 2004. From Flynn's biography, that coincides with his duty as heading the 111th Military Intelligence Brigade and being promoted to Director of Intelligence for all of JSOC. Given those roles, it seems impossible that Flynn could have been unaware of what took place at Camp Nama, as he would have been assessing the information gleaned from interrogations there at the very least. It's likely he spent a lot of time there. From the Esquire article:

> To this day, Jeff has no idea of the true names of his superior officers. His supervisor was a colonel who called himself Mike, although Jeff is sure that wasn't his real name.

Perhaps Jeff was mistaken. As Hastings notes, Flynn wasn't always particularly good at mission security:

> Living up to his scatterbrained reputation, Flynn accidentally left his e-mail address on the report. He received, he said, "thousands of e-mails" commenting on it.

The final bit of preparation for Flynn's quote is to consider Dick Cheney's famous "dark side" quote. As seen in the trailer above, the quote made its way into being the most enduring catchphrase regarding US torture. Cheney's remarks came on September 16, 2001 on *Meet the Press*:

> We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world

> these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.

So now the stage is set. Hastings is sitting around a table at a bar with McChrystal, a number of McChrystal's subordinates and many of their wives. This is the team that for all intents and purposes has served as Cheney's dark side in carrying out his work "in the shadows of the intelligence world" and Flynn himself has headed much of that intelligence effort. The key segment from the Hastings excerpt:

> I didn't want to miss my train. The conversation drifted back to public images and profiles. "Everyone has a dark side," Flynn said, seemingly referring to McChrystal.

At least one other person at the table seemed to take that remark in the same way I do, as a reference to torture:

> "Mike, don't tell him that," said Flynn's wife, Lori, sitting across the table.

Sorry Lori, we already know about McChrystal's dark side.

Not everyone agrees with this view of McChrystal and Flynn. Spencer Ackerman has a very different description of when and how these two interacted with Camp Nama:

> Although no public investigation has ever been conducted into the abuses at Nama, McChrystal reportedly said "This is how we lose," when he toured the facility for the first time. He assigned his top intelligence officer, then-Brig. Gen. Michael Flynn, to professionalize JSOC interrogations. Flynn reached out to trained interrogators throughout the

> U.S. bureaucracy and even to around the world to provide instruction.

It appears that the Obama administration shares this more benign view of Flynn, who was promoted to Assistant Director of National Intelligence in October. What does it say about our country that someone in such a high office operates under the assumption that "Everyone has a dark side", and, from the what can be seen of his record, appears to operate on that side when he feels that it is necessary.

CHENEY TELLS THE SEVENTH CIRCUIT IT WOULD ERODE MILITARY DISCIPLINE TO LET COURTS SECOND GUESS CHENEY'S TORTURE DECISIONS

Remember that letter a bunch of former Directors of Central Intelligence wrote begging Obama to kill an investigation into George W Bush-approved CIA torture?

Poppy, the father of the President who authorized that torture, had the good grace not to sign onto the letter.

These things tend to look like stunts when someone with that kind of personal conflict signs on.

Which is why this amicus brief from all former Secretaries of Defense, submitted in the Vance

v. Rumsfeld suit suing Donald Rumsfeld for torture inflicted on two contractors in Iraq, is so farcical. (h/t Lawfare) Right there between "Frank C. Carlucci III, Secretary of Defense from 1987 to 1989" and "William S. Cohen, Secretary of Defense from 1997 to 2001" comes "Richard B. Cheney, Vice President of the United States from 2001 to 2009, and Secretary of Defense from 1989 to 1993."

Otherwise known as the architect of the torture program for which Dick's first important boss, Rummy, is now being sued.

As you might expect from a brief submitted by David Rivkin, the argument in the brief itself isn't any more credible. It does two things. First, it argues that if Vance were allowed to sue under Bivens for being tortured by his own government, then it would break down military discipline that requires—and affords Vance as recourse, they claim—members of the military to report detainee abuse up the chain of command. We saw how well that worked for Joe Darby and a bunch of Gitmo whistleblowers. And of course these former Secretaries of Defense are arguing that military discipline will guarantee that the entire chain of command would be able to hold its civilian leadership accountable for illegal orders to torture civilians. Never mind that those former Secretaries pretty much admit there is little means under the UMCJ to actually punish civilian leaders (the whole brief ignores that some of the torturers were also civilians), as distinct from the members of the military whose punishment the brief lays out in some detail—for breaking the law.

> With respect to civilian officials and employees, the process of investigation would have vindicated Plaintiffs' rights by, at a minimum, providing "a forum where the allegedly unconstitutional conduct would come to light," Bagola v. Kindt, 131 F.3d 632, 643 (7th Cir. 1997) (citing Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicky, 487 U.S. 412 (1988)), and review

> of Plaintiffs' constitutional claims, with the possibility of review by the U.S. Supreme Court, 10 U.S.C. § 867A(a).

Military discipline that must be preserved would guarantee that the Lynndie Englands were held accountable. And that, for these former Secretaries of Defense, is enough, I guess.

Of course, all this only works because of the brief's other strategy: to simultaneously suggest that this was not torture (that is, something clearly prohibited by law), calling it consistently "mistreatment." Even while ignoring that *Ashcroft v. al-Kidd* requires the showing of obviously prohibited behavior, like torture.

> The panel majority's narrow framing of its holding—that it extends only to conduct of the nature alleged by Plaintiffs, Slip op. 58-59—is yet another attempt to craft "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking." Stanley, 483 U.S. at 682. But this "would itself require judicial inquiry into, and hence intrusion upon, military matters," and "the mere process of arriving at correct conclusions would disrupt the military regime." Id. at 683-84. Moreover, this limitation is arbitrary; in no case has Bivens' availability turned on the gravity of the alleged deprivation.
>
> A final consequence is the likelihood that, fearing personal liability, those officials charged with ensuring the Nation's security "would be deterred from full use of their legal authority." Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2087 (2011) (Kennedy, J., concurring).

It's not that Rummy (and Cheney, though Cheney and his colleagues don't say this) should have and in fact did know that torture was illegal, this brief pretends (as al-Kidd mistakenly, IMO, pretends that Ashcroft had no way of knowing what material witness detention allowed).

Rather, you simply can't question military matters, at all, never ever, even in cases of gross violations of law, because that's a slippery slope that will erode military discipline.

The military discipline that ensures that Secretaries of Defense—and Vice Presidents—will never held accountable for their crimes.

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.

THE OSAMA BIN LADEN TRAIL SHOWS WATERBOARDING DIDN'T WORK

The AP has confirmed that intelligence leading to the courier that in turn led to Osama bin Laden came from Khalid Sheikh Mohammed and—as I surmised earlier—Abu Faraj al-Libi while in CIA custody. But partly because of the language AP uses to describe this—and partly because the wingnuts love torture—many are drawing the wrong conclusion about it. Here's what the AP says:

> Current and former U.S. officials say that Khalid Sheikh Mohammed, the mastermind of the Sept. 11, 2001 terrorist attacks, provided the nom de guerre of one of bin Laden's most trusted aides. The CIA got similar information from Mohammed's successor,

> Abu Faraj al-Libi. Both were subjected to harsh interrogation tactics inside CIA prisons in Poland and Romania.

Note what AP says: KSM provided the courier's nom de guerre. The CIA got similar information from al-Libi. And they were tortured. The AP does not say torture led to this information.

Here's what a senior administration official said last night about when they got the intelligence on the courier.

> Detainees gave us his nom de guerre or his nickname and identified him as both a protégé of Khalid Sheikh Mohammed, the mastermind of September 11th, and a trusted assistant of Abu Faraj al-Libbi, the former number three of al Qaeda who was captured in 2005.
>
> Detainees also identified this man as one of the few al Qaeda couriers trusted by bin Laden. They indicated he might be living with and protecting bin Laden. But for years, we were unable to identify his true name or his location.
>
> Four years ago, we uncovered his identity, and for operational reasons, I can't go into details about his name or how we identified him, but about two years ago, after months of persistent effort, we identified areas in Pakistan where the courier and his brother operated. [my emphasis]

In other words, while the CIA may have learned the courier's nickname earlier, they didn't learn his true name until "four years ago"—so late 2006 at the earliest. And they didn't learn where the courier operated until around 2009.

From these dates we can conclude that either KSM shielded the courier's identity entirely until close to 2007, or he told his interrogators that there was a courier who might be protecting bin

Laden early in his detention but they were never able to force him to give the courier's true name or his location, at least not until three or four years after the waterboarding of KSM ended. That's either a sign of the rank incompetence of KSM's interrogators (that is, that they missed the significance of a courier protecting OBL), or a sign he was able to withstand whatever treatment they used with him.

With al-Libi, the connection between whatever torture he experienced and this intelligence is less clear (since he was first detained in 2005), but even with al-Libi, it appears clear he either never revealed the courier's real name or only did so after he had been in custody for a year, and almost certainly until after he arrived in Gitmo.

Update: Putting the AP's reporting here together with the DAB, it seems like al-Libi did give up the name, perhaps earlier than reported. But still not waterboarding.

Either these men didn't know the true name of their protégé and assistant (which is highly unlikely), or they managed to withhold that information even under torture.

In fact, two people who normally would be crowing about the success of torture are not now doing it. Donald Rumsfeld suggests the discovery of OBL came from intelligence gained at Gitmo (therefore, not in Poland or Romania). And while Cheney assumes enhanced interrogation aka torture led to OBL, he admits he doesn't know where the intelligence came from; given that he was ordering up propaganda reports along the way to justify his torture program, yet can't claim definitively that the intelligence came from it, is a pretty good tell that he can't say it did.

If KSM and al-Libi revealed details about the courier (and al-Libi's Gitmo file suggests he did; KSM's, which is dated two years earlier, does not), they shielded the most important information about him for years.

All of which sort of makes you wonder whether

the FBI's KSM expert could have gotten it out of KSM had he ever interrogated him.

LIAR CALLS ACCESS JOURNALIST A POT

Even before Tom Ricks handed his blog over to Bob Woodward to rip Donald Rumsfeld a new asshole, Ricks shared this quote from H.R. Haldeman about Rummy as a way to introduce Rummy's dismissal of Ricks' *Fiasco* and Woodward's books.

> So in my research on the Vietnam War I was paging through H.R. Haldeman's diaries to see what he says about General Creighton Abrams and was surprised to come across his comment about a former defense secretary we all know: "typical Rumsfeld, rather slimy maneuver." (657)

As Ricks said, pot, kettle.

But proving there is no honor among thieves (and that you can't use too many cliches before noon), Rummy has now hit back at Woodward.

> Former Defense Secretary Donald Rumsfeld's chief of staff accused *Washington Post* reporter Bob Woodward on Tuesday of practicing "access journalism," and said that Woodward has been repeatedly accused of "tilting the facts," "misleading remarks," "disingenuous statements," and placing "book sales above journalism."
>
> Keith Urbahn, who is also Rumsfeld's official spokesperson, made the accusations in a statement to reporters in response to Woodward's scathing

> critique of Rumsfeld's recently released memoir, *Known and Unknown*.
>
> [snip]
>
> Urbahn accused Woodward of favoring his sources and granting them anonymity in exchange for access, while pushing his own storyline ahead of the facts.
>
> "The well known story about Bob Woodward is that he practices what is derided as 'access journalism,' whereby he favors those who provide him with information and gossip and leak against their colleagues," he said in a statement, which was also posted on Rumsfeld's Facebook page. "Those who refuse to play along, such as Donald Rumsfeld, then pay the price."

Another cliche: "I'm rubber and you're glue…"

Now, as I suggested yesterday, for all of Woodward's faults, I was floored when I saw how meticulously Woodward kept his notes as exhibited at the Libby trial. Plus, his post yesterday was really well documented. Not to mention we all know Rummy's a pathological liar.

So I'm really just sharing Rummy's response because I am loving watching these crotchety old Nixon-era zombies go after each other.

Plus, I secretly have my fingers crossed that Cheney will join in any moment now.

BOB WOODWARD, BLOGGER

Let me just say, without qualification, that of the high profile journalists whose techniques were discussed or entered as evidence in the

Scooter Libby trial, Bob Woodward had the best note taking. Judy Miller, Matt Cooper, Bob Novak, Andrea Mitchell (and, I'm sure, Marcy Wheeler)? They all were put to shame by Bob Woodward's exactitude and organization in the way he recorded his interactions with government officials.

Which is why I find it so amusing to see Woodward take to Tom Ricks' blog to rip Donald Rumsfeld's memoir to pieces. Woodward knows he has the documentation to back up his critique and he cites the notes of his October 23, 2003 and July 7-8, 2006 interviews with Rummy in detail. Here's the cattiest example:

> Near the end of the Oct. 23, 2003 interview — page 39 of my transcript — this interchange took place, illustrating the worst and the best of him:
>
> > Rumsfeld: "And you lie, you told people I stuck a finger in your chest. I never stuck a finger in your chest."
> >
> > Woodward: "Yes, sir, yes, yes."
> >
> > Rumsfeld: "I never touched your chest."
> >
> > Woodward: "I swear you did."
> >
> > Rumsfeld: "Did I?"
> >
> > Woodward: "Yeah, you did."
> >
> > Rumsfeld: "Physically?"
> >
> > Woodward: "You did, physically, it wasn't hostile you were illustrating a point."
> >
> > Rumsfeld: "Good."
> >
> > Woodward: "I explained that. I thought you scored a very good point."
> >
> > Rumsfeld: (laughter)

> > Woodward: "Which was about surprise and off balance."
> >
> > Rumsfeld: "Oh yes, I did. I remember that you're right …Yeah, right, you are right …I said you got to get a little off balance – I've done that. He's right, I'm wrong."
>
> He had moved from calling me a liar to acknowledging that my memory was correct and his wrong. He probably should have been more tentative at both the front end and the back end, but there it was, Rumsfeld in full.

Meanwhile, Woodward exposes Rummy's own inconsistent claims about his notes.

> "I don't have notes," Rumsfeld insisted. "I don't have any notes." His memoir cites his personal handwritten notes dozens of time.

Sure, Woodward does this, in part, to ensure no one questions the accuracy of his own books as authoritative narratives of—among other things—the timeline leading up to the Iraq war. He also seems, in part, to be protecting Bush.

And sure, there are tidbits where the old Woodward shines through, even in his own self-reporting.

> On January 9, 2002, four months after 9/11, Dan Balz of *The Washington Post* and I interviewed Rumsfeld for a newspaper series on the Bush administration's response to 9/11. According to notes of the NSC, on September 12, the day after 9/11, Rumsfeld again raised Iraq saying, is there a need to address Iraq as well as bin Laden?
>
> When Balz read this to Rumsfeld, he blew

> up. “I didn’t say that,” he said, maintaining that it was his aide Larry DiRita talking over his shoulder. His reaction was comic and we agreed to treat it as off the record. But Balz persisted and asked Rumsfeld what he was thinking. [bold original; underline emphasis mine]

But I gotta say, for a newbie blogger, Woodward sure took the medium.

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.