JUDGE: PADILLA CAN'T SUE FOR TORTURE BECAUSE JUSTIFICATION FOR HIS TORTURE WAS BASED ON TORTURE

Here's the main thrust of Judge Richard Mark Gergel's decision to dismiss Jose Padilla's Bivens suit against Donald Rumsfeld and other high level Bush officials who denied him his Constitutional rights.

> The Court finds that "special factors" are present in this case which counsel hesitation in creating a right of action under Bivens in the absence of express Congressional authorization. These factors include the potential impact of a Bivens claim on the Nation's military affairs, foreign affairs, intelligence, and national security and the likely burden of such litigation on the government's resources in these essential areas. Therefore, the Court grants the Defendants' Motion to Dismiss (Dkt. Entry 141) regarding all claims of Plaintiffs arising from the United States Constitution.

Basically, the "special factors" in this case mean Padilla can't sue for having been tortured and denied counsel.

Now that's not all that surprising. That's been one of the favored ways of making Bivens claims go away.

But what's particularly interesting is the implicit argument in Gergel's opinion that Abu Zubaydah's torture was one of those "special factors." Between the long passage where Gergel lays out the "special factors" as the guideline governing his decision and where he argues that

those special factors require dismissal of the case, he includes this passage:

> In analyzing this substantial body of case law relating to Bivens claims, it is useful to soberly and deliberately evaluate the factual circumstances of Padilla's arrival and the then-available intelligence regarding his background and plans on behalf of Al Qaeda. Padilla arrived in Chicago nearly eight months after September 11, 2001 with reports that he was an Al Qaeda operative with a possible mission that included the eventual discharge of a "dirty bomb" in the Nation's capital. (Dkt. Entry 91-2 at 4) He also had reportedly engaged in discussions with Al Qaeda operatives about detonating explosives in hotels, gas stations and train stations. (Jd. at 5). He was also thought to possess significant knowledge regarding Al Qaeda plans, personnel and operations. (Dkt. Entry 91-23 at 8-9).
>
> Based on the information available at the time, which reportedly included information from confidential informants previously affiliated with Al Qaeda, the President of the United States took the highly unusual step of designating Padilla, an American citizen arrested on American soil, an enemy combatant. (Dkt. Entry 91-3).

Note how the judge doesn't cite a source here for the claim that Padilla's designation "reportedly included information from confidential informants;" the source for that sentence is just Bush's designation itself, which has the section on sources redacted. But earlier he referenced Michael Mobbs' declaration which included the following footnote describing these sources.

> Based on the information developed by U.S. intelligence and law enforcement

> activities, it is believed that the two detained confidential sources have been involved with the Al Qaeda terrorist network. One of the sources has been involved with Al Qaeda for several years and is believed to have been involved in the terrorist activities of Al Qaeda. The other sources is also believed to have been involved in planning and preparing for terrorist activities of Al Qaeda. It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of the information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

Gergel doesn't say it, but we all know that one of those "confidential informants" is Abu Zubaydah and the other is probably Binyam Mohamed. Presumably, Zubaydah was the one "being treated" with drugs. And given the reference to US law enforcement, he is also presumably the one who recanted his statements about Padilla.

But more importantly, Gergel doesn't say, but we know, that both Zubaydah and Mohamed had been subjected to extreme sleep deprivation—and possibly a great deal more—by the time they made their statements tying Padilla to terrorism.

Gergel also doesn't say that other cases based on Mohamed's torture-induced testimony had been dismissed.

Gergel also doesn't acknowledge that the federal conspiracy charges of which Padilla was convicted have nothing to do with the charges laid out in these documents related to his designation as an enemy combatant; that doesn't stop Gergel from emphasizing that Padilla is a "convicted terrorist."

Nevertheless, his discussion of Padilla's designation using torture-induced evidence, appearing as it does right between his establishment of "special factors" as the guiding principle and his dismissal of the suit betrays that this torture-induced evidence is a key part of these "special factors."

That background, though, makes it clear why Gergel thought those special factors should trump Padilla's constitutional rights.

> Padilla's counsel would likely seek information on intelligence methods and interrogations of other Al Qaeda operatives. All of this would likely raise numerous complicated state secret issues. A trial on the merits would be an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges. This massive litigation would have been authorized not by a Congressionally established statutory cause of action, but by a court implying an action from the face of the American Constitution.3
>
> 3 Plaintiffs' counsel urged the Court at oral argument to delay consideration of the practical realities of allowing a Bivens claim to go forward under these facts and circumstances until after the motion to dismiss stage. This approach, however, would result in the Court

> failing to timely consider “special factors” counseling hesitation, which include here the potential disruption and burdening of national security, intelligence and military operations arising from discovery under the Federal Rules of Civil Procedure.

You can’t have a “convicted terrorist” summon someone like Rummy to a federal courthouse to answer questions about the torture the government used to justify Padilla’s own designation as an enemy combatant so we could in turn torture him. That would be a “spectacle.”

It all makes so much sense!

RUMMY’S DUMP

Donald Rumsfeld, channeling Julian Assange, has now made the database of documents accompanying his book available.

As Spencer notes, making these documents available is largely self-serving; a way for Rummy to point to early moments of reflection that were followed by later moments of rash stupidity or lies.

> To put it uncharitably: when you’ve got a rep for being less-than-honest and unwilling to debate, you might as well let the documents speak for themselves.
>
> So take, for instance, one that Rumsfeld’s promoting on his website. It’s a September 9, 2002 summary from the Joint Staff’s top intelligence official confessing that U.S. assessments of Saddam Hussein’s weapons of mass destruction “rely heavily on analytic assumptions and judgment rather than hard evidence.” Rumsfeld told the

> chairman of the Joint Chiefs of Staff to "take a look" at the memo, because "what we don't know about WMD… is big."
>
> Aha! Rumsfeld was a voice for moderation on the Iraq WMD all along! He looks pretty good for bravely disclosing that, right? Not when you remember that *after* he received that summary, he continued to portray the evidence against Iraq as ironclad, up to and after the invasion. ("We know where [the WMD] are. They're in the area around Tikrit and Baghdad and east, west, south and north somewhat.")

Spencer points to similar examples relating to Afghanistan and interrogation.

But there are some fascinating documents in here. As Marc Ambinder noted yesterday, there's Rummy's memo to General Myers and Stephen Cambone supporting George Tenet's recommendation that John Brennan head the Terrorist Threat Integration Center; in that position Brennan oversaw targeting for Cheney's illegal wiretap program. But in news relevant to today, the memo also emphasizes Brennan's experience as CIA's Chief of Station in Cairo.

Then there's this memo from retired General Wayne Downing to Rummy recommending some changes to Special Operations. Among other things, this memo recommends that special operations report directly to the Secretary of Defense:

> To flatten the chain of command, JSOC should report directly to the SD for the immediate future. There is precedent for this new approach to the combat employment of SOF that will better position DoD for the future fight. JSOC reported directly to the CJCS prior to Goldwater-Nichols legislation and the Nunn-Cohen Amendment.

Sy Hersh explained some of the implications of

Bush reversing Goldwater-Nichols so as to give civilians direct oversight of JSOC in a 2008 article.

> [T]he 1986 Defense Reorganization Act, known as Goldwater-Nichols, [] defined the chain of command: from the President to the Secretary of Defense, through the chairman of the Joint Chiefs of Staff, and on to the various combatant commanders, who were put in charge of all aspects of military operations, including joint training and logistics. That authority, the act stated, was not to be shared with other echelons of command. But the Bush Administration, as part of its global war on terror, instituted new policies that undercut regional commanders-in-chief; for example, it gave Special Operations teams, at military commands around the world, the highest priority in terms of securing support and equipment. The degradation of the traditional chain of command in the past few years has been a point of tension between the White House and the uniformed military.
>
> "The coherence of military strategy is being eroded because of undue civilian influence and direction of nonconventional military operations," [ret. General Jack] Sheehan said. "If you have small groups planning and conducting military operations outside the knowledge and control of the combatant commander, by default you can't have a coherent military strategy. You end up with a disaster, like the reconstruction efforts in Iraq."

The memo gives hints of other issues that would later be points of contention wrt JSOC. For example, it describes the activities JSOC will need to undertake:

> The future GWOT fight will be conducted

> principally using indirect and clandestine ways and means. It will require sustained [unconventional warfare], [foreign internal defense] and operational preparation of the environment (OPE) in multiple countries. Building and leveraging partner capacity will be a core element of strategy, and the employment of surrogates will be a key method for accomplishing many GWOT missions.

As we would see, JSOC and Cheney would make broad claims for activities included under "preparation of the environment" as a means to evade congressional oversight. As that same Hersh article explained, preparing the environment was the buzzword DOD used to avoid briefing Congress on ops.

> There is a growing realization among some legislators that the Bush Administration, in recent years, has conflated what is an intelligence operation and what is a military one in order to avoid fully informing Congress about what it is doing."This is a big deal," the person familiar with the Finding said. "The C.I.A. needed the Finding to do its traditional stuff, but the Finding does not apply to JSOC. The President signed an Executive Order after September 11th giving the Pentagon license to do things that it had never been able to do before without notifying Congress. The claim was that the military was 'preparing the battle space,' and by using that term they were able to circumvent congressional oversight. Everything is justified in terms of fighting the global war on terror." He added, "The Administration has been fuzzing the lines; there used to be a shade of gray"—between operations that had to be briefed to the senior congressional leadership and

> those which did not—"but now it's a shade of mush."

Note, too, that last year, the Armed Services Committees expressed concern about (on the Senate side) DOD using special ops' ability to provide support to "surrogates" being used to justify long-term engagements in countries other than Iraq and Afghanistan and (on the House side) involving contractors. When asked whether he would share information to alleviate these concerns with intelligence committees at his confirmation hearing last year, DNI James Clapper said he wasn't obligated to, again hiding information on ops under the veil of DOD legal authorities.

Closely related is Downing's complaint that the difference between Title 10 and Title 50 authorities impede flexibility.

> Operations [redacted] outside of Iraq and Afghanistan are complicated by Title 10 vs. Title 50 authorities, and inability to flexibly detail personnel.

Title 10 activities fall under DOD war-making authority and less stringent Armed Services Committee oversight; Title 50 fall under CIA covert op authority with the required Findings to be shared with Intelligence Committees.

Now, none of this is new—we're had ongoing reporting on how both the Bush and Obama Administrations have used the legal distinction between DOD war-making and IC clandestine ops to operated with limited oversight. But it is interesting seeing Downing lay some of that framework back in 2005.

THE ILLEGAL WAR ON LATIN AMERICAN (!) TERRORISM

I linked to this Jeremy Scahill post already, but I wanted to point out a few things about Scahill's elaboration on the WaPo's covert ops story of the other day.

First, Scahill provides a list of locations where Obama's expanded special operations war has deployed:

> *The Nation* has learned from well-placed special operations sources that among the countries where elite special forces teams working for the Joint Special Operations Command have been deployed under the Obama administration are: Iran, Georgia, Ukraine, Bolivia, Paraguay, Ecuador, Peru, Yemen, Pakistan (including in Balochistan) and the Philippines. These teams have also at times deployed in Turkey, Belgium, France and Spain. JSOC has also supported US Drug Enforcement Agency operations in Colombia and Mexico. The frontline for these forces at the moment, sources say, are Yemen and Somalia. "In both those places, there are ongoing unilateral actions," said a special operations source. "JSOC does a lot in Pakistan too."

I'm not sure about you, but I, for one, have never heard of "Al Qaeda in Ecuador" or "Al Qaeda in Belgium." While some of these deployments likely **do** have ties to fighters just one step removed from al Qaeda (later in the article, Scahill describes JSOC partnering with Georgia to pursue Chechens), others might be more likely to have ties to terrorist financing (Belgium) or illicit trade (including drugs) that might fund terrorism. Or hell, maybe just

oil and gas, since they're pretty criminal and we're addicted, so it's practically the same thing.

Which brings me back to the UN report on targeted killings. When describing the target of these covert ops, the WaPo story said the ops are directed "against al Qaeda and other radical organizations." As I highlighted from the WaPo story, John Bellinger believes many of those targeted have nothing to do with 9/11.

> Many of those currently being targeted, Bellinger said, "particularly in places outside Afghanistan," had nothing to do with the 2001 attacks.

Which is a concern the UN report expresses: that the US has declared itself to be in a non-international armed conflict that is sufficiently vaguely defined as to include many people whose targeting would be illegal under international humanitarian law.

> 53. Taken cumulatively, **these factors make it problematic for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against "al Qaeda, the Taliban, and other associated forces"**107 without further explanation of how those entities constitute a "party" under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.
>
> [snip]
>
> 55. **With respect to the existence of a non-state group as a "party", al-Qaeda and other alleged "associated" groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take "inspiration" from al Qaeda**. The idea that, instead, they are part of

> continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such "associates' cannot constitute a "party" as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.
>
> 56. To ignore these minimum requirements, as well as the object and purpose of IHL, would be to undermine IHL safeguards against the use of violence against groups that are not the equivalent of an organized armed group capable of being a party to a conflict – whether because it lacks organization, the ability to engage in armed attacks, or because it does not have a connection or belligerent nexus to actual hostilities. It is also salutary to recognize that whatever rules the US seeks to invoke or apply to al Qaeda and any "affiliates" could be invoked by other States to apply to other non-state armed groups. **To expand the notion of non-international armed conflict to groups that are essentially drug cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks**. [my emphasis]

The UN reports that the US has admitted to using drones to take out Afghan drug lords; Scahill notes we've used these covert teams to target drug cartels in Mexico and Colombia. And the inclusion of so many Latin American countries on Scahill's list suggests further possible drug ties (while the presence of Georgia and Ukraine on Scahill's list suggest the possibility of organized crime targets).

In other words, precisely the concern the UN report lays out may be reflected in Scahill's

list.

All that begs the question of what specific legal authorization the Obama Administration claims to be using here. The WaPo story suggests this all goes back to the Authorization to Use Military Force, which specifically limits its application to those who executed or supported 9/11.

> Former Bush officials, still smarting from accusations that their administration overextended the president's authority to conduct lethal activities around the world at will, have asked similar questions. "While they seem to be expanding their operations both in terms of extraterritoriality and aggressiveness, they are contracting the legal authority upon which those expanding actions are based," said John B. Bellinger III, a senior legal adviser in both of Bush's administrations.
>
> The Obama administration has rejected the constitutional executive authority claimed by Bush and has based its lethal operations on **the authority Congress gave the president in 2001 to use "all necessary and appropriate force against those nations, organizations, or persons" he determines "planned, authorized, committed, or aided" the Sept. 11 attacks**.
>
> Many of those currently being targeted, Bellinger said, "particularly in places outside Afghanistan," had nothing to do with the 2001 attacks. [my emphasis]

Scahill reports that it goes back to a 2004 Rummy order (which, since Scahill describes it as being drafted in 2003, would have been developed while Bellinger was the Legal Advisor for then National Security Advisor Condi Rice).

> Sources working with US special operations forces told *The Nation* that the Obama administration's expansion of special forces activities globally has been authorized under a classified order dating back to the Bush administration. Originally signed in early 2004 by then-Secretary of Defense Donald Rumsfeld, it is known as the "AQN ExOrd," or **Al Qaeda Network Execute Order**. The AQN ExOrd was intended to cut through bureaucratic and legal processes, allowing US special forces to move into denied areas or countries beyond the official battle zones of Iraq and Afghanistan.
>
> "**The ExOrd spells out that we reserve the right to unilaterally act against al Qaeda and its affiliates anywhere in the world that they operate**," said one special forces source. The current mindset in the White House, he said, is that "the Pentagon is already empowered to do these things, so let JSOC off the leash. And that's what this White House has done." He added: "JSOC has been more empowered more under this administration than any other in recent history. No question."
>
> The AQN ExOrd was drafted in 2003, primarily by the Special Operations Command and the office of the Assistant Secretary of Defense for Special Operations/Low-Intensity Conflict and was promoted by neoconservative officials such as former Deputy Defense Secretary Paul Wolfowitz and Undersecretary of Defense for Intelligence Stephen Cambone as a justification for special forces operating covertly—and lethally—across the globe. [my emphasis]

But according to Scahill's source, the AQN ExOrd was directed at Al Qaeda and its affiliates (as the name itself would suggest). Not, presumably,

Latin American drug cartels.

And then there's the authorization first described in the NYT, which is what first intensified this focus on Obama's covert wars, and which I've unilaterally nicknamed—in an act that surely violates the international rules of acronomery—the "JUnc-WTF."

> The top American commander in the Middle East has ordered a broad expansion of clandestine military activity in an effort to disrupt militant groups or counter threats in Iran, Saudi Arabia, Somalia and **other countries in the region**, according to defense officials and military documents.
>
> The secret directive, signed in September by Gen. David H. Petraeus, authorizes the sending of American Special Operations troops to **both friendly and hostile nations in the Middle East, Central Asia and the Horn of Africa** to gather intelligence and build ties with local forces. Officials said the order also permits reconnaissance that could pave the way for possible military strikes in Iran if tensions over its nuclear ambitions escalate.
>
> While the Bush administration had approved some clandestine military activities far from designated war zones, **the new order is intended to make such efforts more systematic and long term, officials said**. Its goals are to build networks that could "penetrate, disrupt, defeat or destroy" **Al Qaeda and other militant groups**, as well as to "prepare the environment" for future attacks by American or local military forces, the document said. The order, however, does not appear to authorize offensive strikes in any specific countries.

> [snip]
>
> General Petraeus's order is meant for small teams of American troops to fill intelligence gaps about terror organizations and other threats in **the Middle East and beyond**, especially emerging groups plotting attacks against the United States. [my emphasis]

Now, it's not clear what relationship the JUnc-WTF has with the AQN ExOrd and the operations Scahill describes. Both describe clandestine teams operating in countries that are both friendly and unfriendly to us. Both describe partnering, in some cases, with local forces. The NYT described JUnc-WTF as operating primarily in countries close to the Middle East (even leaving out an obvious counterterrorism target, Philippines), though the NYT did describe JUnc-WTF as targeting developing threats in the "Middle East and beyond," and Scahill did say the operations were focused on Yemen and Somalia, as well as Pakistan. Also, the NYT admits that it withheld information about operations in certain countries, so it's possible they're not presenting all they know about geographic scope. And the NYT described JUnc-WTF to be focused on collecting intelligence, though the code phrase "prepare the environment" suggests it is far more than that. Finally, the NYT describes the associational scope of JUnc-WTF to be "to build networks that could 'penetrate, disrupt, defeat or destroy' Al Qaeda **and other militant groups**"—suggesting that the order applies to groups beyond al Qaeda, but by not quoting the document directly on that point, not clarifying precisely how JUnc-WTF defines those other militant groups.

The UN has vague concerns and Bellinger very specific ones about the way in which we're using cover of a war on terrorism (which has, after all, been renamed a war against violent extremism, with no specificity to al Qaeda or terrorism) to target people we've got no legal

basis targeting.

There are two very specific ways to think of the danger of this. Scahill makes it clear that these teams are operating in Iran; so this covert war could present an opening front on a war there. And once you consider they've been targeting Mexican drug cartels—operating on the border, then you're deploying covert teams in places like Juarez, on the border of the United States.

Nope, I can't see any way this would all go horribly wrong. Not at all.

COURT RELEASES SLAHI DECISION

Last month, we talked about Judge James Robertson's decision that Mohamedou Slahi should be released. Robertson's order has now been released. I'll have comments as I read it. But the short version is that the Government abandoned its attempt to prove (first) that Slahi had knowledge of 9/11 before it happened, and (second) that any material support he had offered al Qaeda had effectively ended by the time they picked him up.

I'll have more as I read this, but just as a reminder, this is the guy for whom Donald Rumsfeld developed a special interrogation plan including death threats.

(And in related news, Jason Leopold got a hold of the Lawrence Wilkerson declaration regarding innocent people at Gitmo.)

WILKERSON: CHENEY AND RUMMY KNEW GITMO DETAINEES WERE INNOCENT

About a hundred of you have pointed to this story, which reports that Lawrence Wilkerson signed a declaration to support the lawsuit of a former Gitmo detainee, Adel Hassan Hamad, stating that Dick Cheney and Donald Rumsfeld knew there were innocent people at Gitmo.

> Colonel Wilkerson, who was General Powell's chief of staff when he ran the State Department, was most critical of Mr Cheney and Mr Rumsfeld. He claimed that the former Vice-President and Defence Secretary knew that the majority of the initial 742 detainees sent to Guantánamo in 2002 were innocent but believed that it was "politically impossible to release them".
>
> [snip]
>
> He also claimed that one reason Mr Cheney and Mr Rumsfeld did not want the innocent detainees released was because "the detention efforts would be revealed as the incredibly confused operation that they were". This was "not acceptable to the Administration and would have been severely detrimental to the leadership at DoD [Mr Rumsfeld at the Defence Department]".
>
> Referring to Mr Cheney, Colonel Wilkerson, who served 31 years in the US Army, asserted: "He had absolutely no concern that the vast majority of Guantánamo detainees were innocent … If hundreds of innocent individuals had to suffer in order to detain a handful of hardcore terrorists, so be it."

> He alleged that for Mr Cheney and Mr Rumsfeld “innocent people languishing in Guantánamo for years was justified by the broader War on Terror and the small number of terrorists who were responsible for the September 11 attacks”.

Now, as Mary has pointed out, there was actually a study done in summer 2002 that showed that vast majority of those at Gitmo were innocent. So this is not news.

But I certainly welcome some public discussion about the maltreatment of a number of innocent people at Gitmo as we enter back into discussions on closing Gitmo.

RANDOM FRIDAY AFTERNOON LINKS

I’ve had a frazzled few days (dealing with stuff like dodgy cars) and I’m about to bury myself deep in the weeds. So I thought I’d throw up a few links to keep you all occupied so as to ensure there’s still something left in the likker cabinet for when I come out of the weeds later today.

Silicon inside the anthrax

First, if you didn’t already see JimWhite’s link to his diary on yet more evidence that the FBI didn’t solve the Amerithrax case, here’s another link. Jim discusses recent developments in the enduring questions regarding whether there was silicon in the anthrax or not, and does so in terms that non-scientists can understand.

The telecoms and the government making googly eyes again

Then there’s this article about a bill that Jay

Rockefeller and Olympia Snowe have introduced to make it easier for the government and owners of critical infrastructure to collaborate.

> If passed, the legislation would enhance collaboration between US intelligence agencies and the private sector. First, it would require the White House to designate certain technology systems as critical if their disruption threatened strategic national interests. If intelligence officials received information about a forthcoming attack targeting a specific company or critical part of the US infrastructure, a top-level private sector official with security clearance would be provided with "enough" information to defend or mitigate the attack, a congressional aide said.
>
> The threat to critical infrastructure has become a flashpoint in the broadening debate about overall cybersecurity issues. More than 85 per cent of infrastructure that is deemed to be critical is owned or operated by the private sector.

I'm mildly sympathetic to the need to make sure the private sector cooperates in cybersecurity efforts. But I would feel a lot better about the issue if the same "critical infrastructure" companies—the telecoms—hadn't collaborated with the Bush Administration to illegally spy on Americans. And heck, as cooperation with the Feds becomes a bigger and bigger cash cow for these companies, shouldn't we just take them over and get better service for a reasonable price?

GAO begs to disagree

Then there are two posts on Obama's threat to veto the intelligence authorization bill if it allows GAO to conduct investigations of the intelligence community. POGO has a good summary

pointing out that this really shouldn't be that big of a deal. And Steven Aftergood has a post with a link to and discussion of the letter the head of GAO, Gene Dodaro, sent to Intelligence Committee leadership informing him that claims made in the veto threat are inaccurate.

> OMB warned that the President's senior advisors would recommend that the President veto the bill if it included any of several provisions, including the sections concerning GAO. I write to clarify what I view as several misstatements of law and fact within OMB's letter as it relates to GAO.
>
> OMB's letter posits that the passage of the GAO provisions would result in sweeping changes to the current statutory framework and provide GAO with authority it currently lacks to conduct reviews of intelligence activities. GAO strongly disagrees. GAO has well-established statutory authority to evaluate agency programs and investigate matters related to the receipt, disbursement, and use of public money under 31 U.S.C. §§ 712 and 717 and to access agency records under 31 U.S.C. § 716. These statutes and others provide GAO with the required authority to perform audits and evaluations of IC activities. Within GAO's authority, specific safeguards exist to reflect the particularly sensitive nature of certain intelligence activities and programs.l The proposed legislative provisions in essence reaffirm GAO's existing authority in order to address the lack of cooperation GAO has received from certain elements of the IC in carrying out work at the specific request of the intelligence committees, and other committees of jurisdiction as defined by the rules of the Senate and House.
>
> GAO acknowledges and does not seek to

> displace the special relationship between the congressional intelligence committees and the IC. However, GAO does not agree with the Administration's view, originating in a 1988 opinion of the Department of Justice's Office of Legal Counsel, that the creation of the congressional intelligence oversight structure (codified at 50 U.S.C. § 413) implicitly exempted reviews of intelligence activities from the scope of GAO's existing audit authority.2 Neither the language of section 413 nor its legislative history provides support for this position. Moreover, the executive branch has expansively applied the 1988 opinion as precluding GAO reviews of matters that extend well beyond traditional intelligence activities. This has resulted in GAO frequently being unable to obtain the access or cooperation necessary to provide useful information to the Congress on matters involving the IC.

GAO is basically saying the Obama Administration is taking an expansive read of an old OLC opinion that—GAO claims—ignores the relevant law to try to prevent competent oversight of the intelligence community.

Not much to say about the War now…

Finally, there's this, from Mark Hosenball. Not surprisingly, the UK's Iraq War Inquiry wants to ask Bush Administration leaders why they brought us into an optional war in Iraq. Also not surprisingly, those Bushies have no intention of cooperating.

> British government sources tell Declassified that investigators for Britain's official Iraq War inquiry panel—which has been conducting a lengthy probe into the origins and conduct of the war—want to make a fact-finding trip to the United States. One

> sensitive item on the agenda: trying to get interviews with former Bush administration officials.
>
> But the sources, who asked for anonymity when discussing private information, said there are already indications that Bush administration "principals"—senior policymaking officials including George W. Bush and Dick Cheney—have indicated that they have no intention of talking to the British investigators.
>
> [snip]
>
> Bush and Cheney are not the only ones who are expected to turn down the Brits' invitation. The U.K. source acknowledged that other top-tier Bush administration officials—including Condoleezza Rice and Donald Rumsfeld—are unlikely to speak with the U.K. inquiry, which has no power to compel their cooperation. *The Washington Post* reported that Stephen Hadley, Bush's former national-security adviser, has been among those "voicing a strong disinclination to participate." If the higher ups won't talk, the panel hopes at least to secure interviews with lower-level U.S. officials who had a hand in planning and carrying out the invasion.

Golly! What ever might Dick and Bush and Condi and Rummy and Hadley have to hide?

THE NEXT ATTACK: HOLDER'S AMICUS

CURIAE BRIEF AGAINST UNLIMITED PRESIDENTIAL POWER

As Jake Tapper reports, the next attack the McCarthyites have planned is on Eric Holder, for once saying in an amicus curiae brief that it's possible following the Constitution will make it harder to detain potential terrorists.

> In 2004 Attorney General Eric Holder was one of four former Clinton administration officials offering an amicus brief questioning President Bush's assertion that he had the inherent authority to indefinitely detain as "enemy combatants" American citizens captured in the US.
>
> The brief, offered in the case *Donald Rumsfeld v Jose Padilla*, can be read **HERE**. Holder's co-authors include former Attorney General Janet Reno, former deputy Attorney General Philip Heymann, and the former counsel for the CIA Jeffrey Smith.
>
> A Republican official on the Senate Judiciary Committee tells ABC News that Holder did not disclose this amicus brief before his confirmation hearings.

The brief is actually refreshing in its simplicity. It recites all the means the executive branch has to combat terrorism, then says the President doesn't **also** need the power to detain Americans without any judicial oversight. I can see why and how the Republicans will make a stink of it, but that doesn't mean they are right.

But there's a part of the brief that deserves particularly close attention—because it raises the implicit question of why the Bush Administration didn't just charge Jose Padilla,

if they could back up the claims they made about him.

> When Padilla was arrested pursuant to the material witness warrant, his terrorist plans were thwarted. He was then available to be questioned to the same extent as any other citizen suspected of criminal activity. Moreover, **the facts set forth in the President's findings, and the facts presented to the District Court, are more than sufficient to support criminal charges against Padilla, including providing material support to designated terrorist organizations**, 18 U.S.C. § 2339B; providing material support to terrorists, id. § 2339A; conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a; and attempted use of a weapon of mass destruction, id. § 2332a(a)(1).36 Finally, Padilla's history of travel outside the United States, previous criminal record, and terrorism-related activities clearly justified detaining him. 18 U.S.C. § 3142(e). In short, the procedures of the criminal law provided an ample basis to detain Padilla, to subject him to interrogation, and to keep him from carrying out any violent acts against the United States or any of its citizens. **It is difficult to imagine any circumstances in which a terrorist would meet the standards for designation as an enemy combatant described by the government**, see Pet. Br. at 27, and not be subject to arrest as a material witness or a criminal.
>
> The difference between what the government did in this case, and what existing law authorizes it to do, is one of accountability and transparency. The government could have continued to detain Padilla, **but would have been required to justify the detention to a**

> **court in an adversary proceeding**, based on the traditional probable cause standard. [my emphasis]

But therein may lie the problem. Here's footnote 36, describing the allegations the Bush Administration made against Padilla:

> 36 The government claims that Padilla traveled to Afghanistan, **approached a senior officer of al Qaeda**, proposed stealing radioactive material to build a "dirty bomb" and detonate it in the United States, researched such a project at an al Qaeda safe house in Pakistan, **had "extended contacts" with al Qaeda**, received training in furtherance of terrorist activities from al Qaeda, and was sent to the United States to conduct reconnaissance or terrorist attacks on behalf of al Qaeda. Padilla, 233 F. Supp. 2d at 572-73. [my emphasis]

Given what the government said it had against Padilla, Holder and the others say, "it is difficult to imagine any circumstances" in which the government couldn't either charge Padilla criminally or continue to hold him on a material witness charge. They then rattle off the charges that would follow from the claims the government made against Padilla, the evidence they said they had.

And then noted that the only thing that would be required to hold Padilla would be an adversary hearing.

But that would very quickly bring us back to the charges, starting with the charge that Padilla had ties to Al Qaeda leaders. Leaders like Abu Zubadayah, on whose testimony these charges at least partly rely.

And for that—for not imagining that the Bush Administration had already made it nearly impossible to charge someone of these allegations because they had based it all on

torture—for that Holder will be made the next target of the McCarthyites wrath.

SCOTUS: RUMMY IS IMMUNE IN TORTURE SUIT

Today, SCOTUS declined to review an Appeals Court decision that ruled that Rummy and 10 other DOD officials are immune from suit for torture.

> The Court's denial of review of *Rasul, et al., v. Myers, et al.* (09-227) leaves intact a federal appeals court ruling that former Defense Secretary Donald Rumsfeld and ten military officers are legally immune to claims of torture and religious bias against inmates who were at Guantanamo but have since been released. The Obama Administration had urged the Court not to hear the case, saying that, whatever claims the four ex-detainees were now making, they had no legal basis for those challenges at the time they were at the U.S. military prison in Cuba – that is, between January 2002 and March 2004.
>
> The D.C. Circuit Court had ruled in favor of immunity, and in doing so avoided a repeat of its earlier decision – vacated by the Supreme Court – that Guantanamo prisoners had no constitutional rights. The Justices had ordered reconsideration of that conclusion. Instead of ruling anew on the legal challenges, the Circuit Court opted for an immunity finding. The Supreme Court's denial of review does not stand as a precedent on that point,

> or on the substance of the ex-prisoners' challenges.

As Adam Serwer points out, SCOTUS' refusal to review the immunity ruling once again deprives the American justice system of a definitive ruling that torture is wrong.

> This case, *Rasul v. Rumsfeld*, was important not just because of the alleged abuse involved. It's important because civil liberties groups are seeking, as **Ben Wizner** of the ACLU, who is one of the lawyers in the *Mohamed, et al. v. Jeppesen,* rendition case, said last week, a "binding definitive determination" from the courts that the kind of treatment suspected terror detainees were subjected to under the **Bush** administration was illegal. Without one, government sanctioned torture may make a comeback.

But I guess Rummy and the others who facilitated torture like it that way.

MORE INSANE RANTINGS FROM THE CRAZY MAN IN THE ATTIC

Someone let Dick "PapaDick" Cheney out of his undisclosed location last night—they even gave him an award for being a "keeper of the flame." In spite of the fact that the press is covering it as another serious attack from Cheney, I find it pretty laughable.

How else to treat a speech, for example, in which PapaDick boasts that Rummy got this "flame-keeper" award before him?

> I'm told that among those you've recognized before me was my friend Don Rumsfeld. I don't mind that a bit. It fits something of a pattern. In a career that includes being chief of staff, congressman, and secretary of defense, I haven't had much that Don didn't get first. But truth be told, any award once conferred on Donald Rumsfeld carries extra luster, and I am very proud to see my name added to such a distinguished list.

From that auspicious start, Cheney launches into a screed against Obama for shutting down missile defense in Czech Republic and Poland—he complains that Obama did not stand by the agreements that Cheney and Bush made.

> Most anyone who is given responsibility in matters of national security quickly comes to appreciate the commitments and structures put in place by others who came before. You deploy a military force that was planned and funded by your predecessors. You inherit relationships with partners and obligations to allies that were first undertaken years and even generations earlier. With the authority you hold for a little while, you have great freedom of action. And whatever course you follow, the essential thing is always to keep commitments, and to leave no doubts about the credibility of your country's word.So among my other concerns about the drift of events under the present administration, I consider the abandonment of missile defense in Eastern Europe to be a strategic blunder and a breach of good faith.
>
> It is certainly not a model of diplomacy when the leaders of Poland and the Czech Republic are informed of such a decision at the last minute in midnight phone calls. It took a long time and lot of

> political courage in those countries to arrange for our interceptor system in Poland and the radar system in the Czech Republic. Our Polish and Czech friends are entitled to wonder how strategic plans and promises years in the making could be dissolved, just like that — with apparently little, if any, consultation.

But he moves directly from that complaint to complaining that Obama is honoring the commitment Bush made to withdraw our troops from Iraq.

> Next door in Iraq, it is vitally important that President Obama, in his rush to withdraw troops, not undermine the progress we've made in recent years. Prime Minister Maliki met yesterday with President Obama, who began his press availability with an extended comment about Afghanistan. When he finally got around to talking bout Iraq, he told the media that he reiterated to Maliki his intention to remove all U.S. troops from Iraq. Former President Bush's bold decision to change strategy in Iraq and surge U.S. forces there set the stage for success in that country. Iraq has the potential to be a strong, democratic ally in the war on terrorism, and an example of economic and democratic reform in the heart of the Middle East. The Obama Administration has an obligation to protect this young democracy and build on the strategic success we have achieved in Iraq.

Don't worry. I wasn't really expecting any intellectual consistency from Dick Cheney.

Cheney's complaints about Obama's Afghanistan policy in this speech are getting a lot of press. What no one else wants to mention, though, is Cheney's refutation of Obama's

complaint that the Bush Administration never really had a real Afghan strategy. Cheney refutes that, you see, by noting that they conducted a strategic assessment of Afghanistan in Fall 2008, seven years after committing troops to Afghanistan.

> Recently, President Obama's advisors have decided that it's easier to blame the Bush Administration than support our troops. This weekend they leveled a charge that cannot go unanswered. The President's chief of staff claimed that the Bush Administration hadn't asked any tough questions about Afghanistan, and he complained that the Obama Administration had to start from scratch to put together a strategy.
>
> In the fall of 2008, fully aware of the need to meet new challenges being posed by the Taliban, we dug into every aspect of Afghanistan policy, assembling a team that repeatedly went into the country, reviewing options and recommendations, and briefing President-elect Obama's team.

Hahahaha!! Cheney believes that developing an Afghan strategy in an attempt to force Obama's hand can make up for the seven years during which he oversaw the complete neglect of the war against the people who actually hit us on 9/11.

I also note that Cheney neglected to mention—not even once, not even in a speech talking about "new challenges" from the Taliban—Pakistan. Perhaps that's because Cheney was personally in charge of our Pakistan policy for the last three years of the Bush Administration, during which period that country became the source of the real instability in the region.

And, in case you're wondering, Cheney also doesn't mention the number of arrests of alleged terrorists, including Najibullah Zazi. I guess that's because doing so would have made it hard

to argue—as PapaDick does—that you can't fight terrorists using a law enforcement approach. And Dick has to make that argument, of course, so as to justify his long screed in favor of torture. Note how closely this screed matches that which has shown up anonymously in the press.

> Then there's the matter of how to handle the terrorists we capture in this ongoing war. Some of them know things that, if shared, can save a good many innocent lives. When we faced that problem in the days and years after 9/11, we made some basic decisions. We understood that organized terrorism is not just a law-enforcement issue, but a strategic threat to the United States.
>
> At every turn, we understood as well that the safety of the country required collecting information known only to the worst of the terrorists. We had a lot of blind spots – and that's an awful thing, especially in wartime. With many thousands of lives potentially in the balance, we didn't think it made sense to let the terrorists answer questions in their own good time, if they answered them at all.
>
> The intelligence professionals who got the answers we needed from terrorists had limited time, limited options, and careful legal guidance. They got the baddest actors we picked up to reveal things they really didn't want to share.

There's the conflation of the information collected from KSM using torture (which KSM has said included a number of lies) with the information collected using rapport-based intelligence.

> In the case of Khalid Sheik Muhammed, by the time it was over he was not was not only talking, he was practically conducting a seminar, complete with

> chalkboards and charts. It turned out he had a professorial side, and our guys didn't mind at all if classes ran long. At some point, the mastermind of 9/11 became an expansive briefer on the operations and plans of al-Qaeda. It happened in the course of enhanced interrogations. All the evidence, and common sense as well, tells us why he started to talk.

There's the insistence that Cheney kept us safe—ignoring, of course, all the attacks on our allies.

> Eight years into the effort, one thing we know is that the enemy has spent most of this time on the defensive – and every attempt to strike inside the United States has failed. So you would think that our successors would be going to the intelligence community saying, "How did you did you do it? What were the keys to preventing another attack over that period of time?"

> Instead, they've chosen a different path entirely – giving in to the angry left, slandering people who did a hard job well, and demagoguing an issue more serious than any other they'll face in these four years. No one knows just where that path will lead, but I can promise you this: There will always be plenty of us willing to stand up for the policies and the people that have kept this country safe.

> On the political left, it will still be asserted that tough interrogations did no good, because this is an article of faith for them, and actual evidence is unwelcome and disregarded. President Obama himself has ruled these methods out, and when he last addressed the

> subject he filled the air with vague and useless platitudes. His preferred device is to suggest that we could have gotten the same information by other means. We're invited to think so. But this ignores the hard, inconvenient truth that we did try other means and techniques to elicit information from Khalid Sheikh Muhammed and other al-Qaeda operatives, only turning to enhanced techniques when we failed to produce the actionable intelligence we knew they were withholding. In fact, our intelligence professionals, in urgent circumstances with the highest of stakes, obtained specific information, prevented specific attacks, and saved American lives.

I'm most fascinated, though, by the desperation of this passage: the appeal to the "legal underpinnings and safeguards" and the claim to "moral bearings."

> In short, to call enhanced interrogation a program of torture is not only to disregard the program's legal underpinnings and safeguards. Such accusations are a libel against dedicated professionals who acted honorably and well, in our country's name and in our country's cause. What's more, to completely rule out enhanced interrogation in the future, in favor of half-measures, is unwise in the extreme. In the fight against terrorism, there is no middle ground, and half-measures keep you half exposed.
>
> For all that we've lost in this conflict, the United States has never lost its moral bearings — and least of all can that be said of our armed forces and intelligence personnel.

Is it possible the crazy man in the attic

realizes his attempts to convince others that he is anything but a torture-hungry monster just sound crazier and crazier as he babbles on?

SURPRISE! MORE SUPPRESSED TORTURE TAPES

Did Susan Crawford admit the government had tortured Mohammed al-Qahtani because she knew there were tapes that might come out?