



Obama Administration Faces Ethical Conflict By Representing John Yoo

By Daphne Eviatar 3/11/09 3:00 PM

Following up on my earlier post about whether the Obama Justice Department really ought to be representing John Yoo — the notorious former Office of Legal Counsel lawyer during the Bush administration — Michael Ratner, president of the Center for Constitutional Rights and a professor at Columbia Law School, pointed out to me today that the Justice Department's defense of Yoo is fraught with not only political, but ethical complications.

That's because fundamental to any argument on behalf of a government official being sued for things he did in government is the claim of "qualified immunity" — essentially, the official is immune if it wasn't clear at the time that what he was doing violated established rights.

Now, lots of people will claim that we all knew that U.S. citizens have a right not to be tortured or detained indefinitely without access to counsel and incommunicado, so Yoo should really lose that argument. Still, it's probably the best argument he has — that the president's wartime authority at least arguably overrode all those rights we thought we knew we had, but didn't know the administration had quietly revoked.

In fact, much to the dismay of some of its supporters, the Obama administration is making just that argument. In its brief moving to dismiss the case that Padilla and his mother filed against Yoo, the government argues that "Defendant Yoo is entitled to qualified immunity as a matter of law." Not only was he not personally responsible for what happened to Padilla, they claim (although Padilla's lawyers claim Yoo participated personally in formulating the plan for Padilla's detention and treatment), but the government claims that the claims all fail because "Plaintiffs have not alleged a violation of any constitutional rights."

As long as Padilla was an "enemy combatant," the government argues, it wasn't clear he had any legal rights at all. That was, of course, what the Bush administration argued, too.

But doesn't that claim contradict others made by President Obama and Eric Holder — that torture, for example, is and always was illegal? (Notably, as [I wrote recently about the al-Marri case](#), the Obama administration has not claimed that indefinite detention of U.S. residents or citizens within the United States is unconstitutional.) Do they really want to be claiming now that they're not so sure?

In Ratner's view, that's a bad thing all around.

"The more I think about it, representing Yoo puts the administration in a potential contradiction," he wrote to me in an e-mail after our phone conversation. "They should not be arguing that there was not a clearly established right to be free from detention without trial, court access or abuse under the Fifth and Eighth amendments. If they do, or have, it would be a grave disappointment and justify many of the nasty Bush administration practices."

Ratner added: "They need to get Yoo another lawyer, or better, cut him loose, as continued representation is contrary to government interests. A lawyer should represent Yoo who can take positions that they [the Obama administration] should not."

Likewise with Donald Rumsfeld, added Ratner. The Center for Constitutional Rights is representing alleged torture victims in [a case against the former secretary of defense](#), among others, now pending in the U.S. Court of Appeals for the D.C. Circuit, on remand from the U.S. Supreme Court. As in the Yoo case, the Bush administration tried to dismiss the case against Rumsfeld on the grounds of qualified immunity. Now that the Obama administration has taken over, it will be interesting to see whether that argument changes.

The Justice Department's brief in the Rumsfeld case is due later this week. Stay tuned.