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Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic

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ARTICLE

**SUING GOVERNMENT LAWYERS FOR
GIVING DUBIOUS LEGAL ADVICE IN A
NATIONAL SECURITY CRISIS: NOTES
ON HOW (NOT) TO BECOME A
BANANA REPUBLIC**

PETER H. SCHUCK*

I describe myself as a “militant moderate.”¹ Among other things, this means that I am not given to alarmist, hyperbolic, or rhetorical heat of any kind; cool understatement is more to my liking. So why do I subtitle this essay “Notes on How (Not) to Become a Banana Republic”? It will strike some listeners as inflammatory, the product of a fevered imagination. I plead guilty only to hyperbole, a time-honored rhetorical device.

Most of what I want to say before getting to the banana republic part concerns the important relationship of a governmental entity and an individual officer’s liability to deterrence—and, equally or more important but much less visible, to the risk of over-deterrence. Almost thirty years ago, in my maiden book voyage as a torts scholar, I addressed this subject in *Suing Government*, a field that I described as “public tort law.”² (How original this phrase is, I cannot say for sure, but googling it has given me some glimmer of pride.) The point of my using this phrase was to emphasize both the similarities of suits against governmental entities and officials to the private law of torts and the salient differences—other things being equal.

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1. PETER H. SCHUCK, *MEDITATIONS OF A MILITANT MODERATE: COOL VIEWS ON HOT TOPICS* 214 (2006).

2. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* xiv (1983). Much of the rest of this section is taken from the ideas in this book.

I. PRIVATE AND PUBLIC TORT LAW

Let us begin with the similarities. Both liability systems share the conventional common goals of compensating victims and deterring wrongdoing. To these I added some other goals, which may also be thought of as constraints on the pursuit of those two master objectives. First, a public tort system, like a private law system, should affirm, or at least not be inconsistent with, the dominant moral values of the community. This is not to say that those values are stable; in a dynamic, restless society like ours, they are subject to change. (Consider, for example, public attitudes toward smoking, seatbelt use, and homosexuality.) Second, a public tort system, like a private one, should be administratively efficient in at least the minimal sense that it should be cost-effective, assuming that one defines costs and benefits very broadly, as one should. (Many torts scholars entertain serious doubts about whether the private tort law system can pass this test,³ but that is another matter for another day.)

Now, let's examine some of the dissimilarities. Government, as is widely understood by taxpayers and plaintiffs lawyers alike, has the deepest pockets of all and thus can assure that judgments against it will be paid, which is not the case with private tort judgments unless the defendant is wealthy or adequately insured. This difference probably contributes to certain features of government liability statutes like the Federal Tort Claims Act: its preclusion of juries and punitive damages and its restrictions on plaintiffs' legal fees (which presumably and, in my view, improperly limits their access to the courts). The public fisc, so the argument would go, is simply such an inviting litigation target that its attractiveness must be limited—like a honey pot guarded by nettlesome bees.

Perhaps, however, the most important difference between private and public tort law—the one that I shall emphasize here—concerns the importance of the goal of encouraging vigorous decision-making and appropriate risk-taking. (“Appropriate” is a question-begging word, and in this context appropriately so.) This goal is valuable in both domains, to be sure, and I do not want to exaggerate the differences. Still, the need to promote vigorous decision-making and appropriate risk-taking—or putting it another way, to discourage undue timidity—is more central for official actors for several reasons. If a private firm decides that the liability regime makes the risk of having to compensate potential victims low enough in light of the action's potential benefits, it will undertake the action—whether the action is manufacturing a product, undertaking a medical intervention, driving a car, or buying machinery for the workplace. Such decisions will have some effects on third parties, of course—the product will be available for purchase to

3. See, e.g., STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* (1989); PETER A. BELL & JEFFREY O'CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* (1999).

other consumers, the medical treatment may improve (or impair) the lives of the patients' family members, the car may injure others, and so forth—but the effects of those actions and of the adjudication of rights and damages that may result will largely be internalized by the two parties. In that sense, the “only” public value implicated by such disputes is the social desire for corrective justice. If the private tort rules induce the potential injurer not to act—not to produce a widget or take that car trip—it is largely a matter of indifference to the rest of us. If the product is not a widget but a potentially life-saving drug—or the car trip is to the hospital or voting place—the social effects of the action will of course be that much greater and the difference between public and private stakes in the decision will be that much less.

Ordinarily, the social calculus should be quite different when the putative actor is a government official, especially the kind that political scientist Michael Lipsky aptly termed “street-level bureaucrats”:⁴ police officers on the beat, schoolteachers, social workers, drug enforcement agents, and the like. These officials must make difficult decisions with large effects on the public, little time for reflection, and inadequate information. (This is not always the case, of course; deciding whether to issue a parking ticket is neither a tough call nor one of great social moment.) If street-level officials are to act, their actions will often involve coercion (and less often violence), which increases the risk that they will violate someone's legal rights and be subject to vehement complaint, bureaucratic discipline, or litigation. Such an individual official, like her private sector counterparts, will consider the costs and benefits of her two choices: whether to act or not and, if she will act, whether to act in one way rather than another. As citizens, we should want the official who makes this assessment to consult not only her selfish interests but also to consider her official duties, her responsibilities to the public, her professional norms, and so forth.

But suppose that the government official chooses inaction. Here is the central difference, for our purposes, between her situation and that of her private counterpart. If she fails to act when she “should” act, significant public interests are sacrificed; whereas if her private counterpart chooses inaction, the risks of that choice ordinarily fall only on it alone. (Again, there are exceptions as with the life-saving drug.) Some public functions are governmental monopolies, others provide collective goods that only government can supply, and still others involve special duties of protection that discourage private substitutes. If the official doesn't act as she should in these situations, no one else can or will. When, then, should she act? In general, she should act when she either is under a duty to act (as in the case of a police officer who has reason to believe that a crime is afoot) or when

4. MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* xi (1983).

discretionary action would advance the public interest (as in the case of a police officer who must decide whether to drive the squad car down a particularly dangerous block instead of continuing down the safer main avenue).

Two other differences between private and public tort law also affect vigorous decision-making: the set of *incentives* that shape the individual's behavior and the *choices* that are available to her. The most important incentive differential is that private actors can be compensated for taking on additional, profit-increasing risk, while public officials ordinarily cannot. This difference mainly reflects the difference between private and public compensation systems, which in turn reflect a somewhat different mix of goals and constraints. Private systems, at least in principle, are flexible enough to reward employees who take risks that advance the firm's interests. Public systems, however, tend to be far more rigid and categorical, which prevents street-level officials from appropriating any of the social value that may flow from greater risk-taking on their part; indeed, such appropriation might be thought undesirable or even corrupt. For such officials, then, taking greater risks in pursuit of the public good is essentially all pain and no gain.

If public officials have fewer self-interested incentives than their private counterparts to act boldly in the public interest, they also have more options for avoiding such action or minimizing the risks that action might entail—largely because they are generally less closely supervised than their private employee counterparts. First, officials can simply refrain from acting in situations where they should act, especially if they think that neither their superiors nor those harmed by their passivity will observe their inaction. Second, they can delay their decisions—for example, by seeking their superiors' approval or more information before they act. Third, they can retreat to formalism and its cognates, legalism and ritualism; here, they comply with a rule in a way that simplifies their task and reduces their personal exposure but that often defeats the rule's underlying purpose. Finally, and most importantly, officials who face asymmetric risks of criticism and liability may have enough discretion to choose relatively riskless actions over relatively risky ones, even if this choice is socially perverse. Consider a social worker who faces the difficult choice of removing a child from a troubled home or leaving him with his parents in hopes of preserving the family. Assume that she is more likely to be criticized (or sued) if she leaves the child with his parents, who then abuse him, than she would be if she placed the child in foster care. In close cases and at the margin, her self-interested motive might outweigh (ambiguous) professional norms and be

decisive in the removal. Such asymmetric risk structures are very common in life, especially in the public service.⁵

These differences in incentives, choices, and monitoring create greater principal-agent problems than in the private sector, thus making it easier for the low-level official to finesse her duty and protect her self-interest by not acting vigorously. In addition, this agency problem is magnified because the substantive criterion for deciding what to do—the content of her duty, if you will—is much more opaque than that of her private counterpart, whose lodestar is firm profit maximization. (I am not suggesting that the profit criterion is always clear enough to dictate specific actions, only that it is much clearer than that of “order maintenance,” “public safety,” “sound education,” and other public law goals.) This ambiguity provides greater scope for the official to compromise the vigorous decision-making/appropriate risk-taking goals through self-protective choices.

If I have gone on at length in this analysis, it is because I believe it is vital to establish public law’s special and compelling reasons to be concerned about the costs to society that officials’ incentives for self-protection can inflict. We must also think long and hard before we urge courts or legislatures to do anything that will tend to increase those incentives and costs.

II. THE DIFFERENCE THAT 9/11 HAS MADE

This concern about official self-protection is greatly heightened in a post-9/11 world. In this world, the need for bold, aggressive, official action to avert serious threats is greater than ever. It is, nevertheless, also a world in which officials have more reason than ever to fear that they will be severely criticized, arraigned before the court of public opinion, and perhaps even sued for damages if they make a decision that was arguably wrong or that may seem wrong with the benefit of the hindsight afforded by a calmer and less dangerous environment. Officials can also anticipate that if they are indeed sued over such a decision, they may well face ruinous personal and financial costs—even if the government agrees to defend them and they ultimately prevail.

Why are such suits more likely in today’s heated political and legal climate than they were in the past? First, the stakes are higher. Because we face a constant threat to public safety, we must significantly rely—for better *and* for worse—on public officials to protect us. This reliance is simply a fact of life; it does not depend on one’s views about how to combat terror, the scope of human rights, or the limits of governmental power.

5. SCHUCK, *supra* note 2, at 57 (citing Don Bellante & Albert N. Link, *Are Public Sector Workers More Risk Averse Than Private Sector Workers?*, 34 INDUS. & LAB. REL. REV. 408 (1981)).

Second, national security demands that many official decisions be veiled for some period of time. Transparency is almost always a virtue in a democracy, but occasionally it must yield to secrecy—although one hopes that this yielding is only narrow and temporary. Once unveiled, secrecy seems, and sometimes is, sinister, inviting legal challenge of the underlying action. Again, hindsight is not always a reliable guide to resolving such challenges.

Third, the legal standards that are supposed to govern official conduct in this area—for example, “torture,” “material assistance,” or “threat”—are often maddeningly murky. Judicial interpretations of the relevant phrases often deepen rather than dispel this murkiness. This legal uncertainty also means that both sides can usually muster respectable legal arguments for their positions.

Fourth, courts are more likely to be uncomfortable with how officials conduct the war on terrorism, which often involves practices—preventive detention, interrogation, isolation, rendition, secret evidence, special tribunals, limits on counsel, Guantanamo, and so forth—that go right up to the line of legality, as conventionally understood, and arguably may cross that line. The fact that Congress often supports the presidency in these particular policy settings could affect the courts in different ways. Judges may be more inclined to defer to the other branches’ greater political responsibilities, but it may also increase judges’ sense of isolation, perhaps intensifying their felt duty to rein in the other two branches in the name of the Constitution, especially given the open-ended time frame of the war on terror. This latter dynamic may have influenced the Supreme Court’s decision in *Boumediene* and other post-9/11 rulings on these national security issues.⁶

Finally, controversial national security policies raise difficult and deeply contested empirical issues (e.g., costs, benefits, and degree of effectiveness) and normative tradeoffs (e.g., security, liberty, and diplomacy), but the salience and weight of these empirical and normative judgments vary over time. This is especially true today, more than a decade after 9/11, when the public’s fear of violent attack has receded somewhat. With the ostensible abatement of the emergency, both the public and the courts tend to give greater weight to the temporarily-subordinated, but usually dominant, rule-of-law values as conventionally understood, which a liberty-loving public reveres and of which the courts conceive themselves to be the primary institutional guardians.

Taken together, then, I suspect that these post-9/11 developments magnify officials’ already significant anxieties about the risks of being punished in one way or another for decisions that they made or influenced earlier when they were participants in the war against terrorism. Are these anxie-

6. *Boumediene v. Bush*, 553 U.S. 723 (2008). The others are *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

ties well-founded, or are they merely pretenses enabling officials to avoid responsibility for their misconduct? I believe that, first, these litigation anxieties are, indeed, often well-founded; and second, even—or especially—if officials exaggerate the risk of such sanctions, it can do great harm to the polity.

III. THE CASE OF *PADILLA V. YOO*

The tortuous path of the “torture memos” is a long and winding road that shows no signs of reaching its destination.⁷ In 2002, lawyers in the Justice Department’s Office of Legal Counsel (“OLC”) prepared these legal analyses at the request of the Central Intelligence Agency as the Bush administration developed new detention and interrogation policies regarding suspected Taliban and Al Qaeda terrorists captured abroad.⁸ The memos concluded that the prolonged detention, isolation, and a wide range of harsh interrogation techniques (including waterboarding, most notoriously) that the CIA wanted to use on a small number of “enemy combatants” were legally permissible.⁹ The memos were also forwarded to the Attorney General, other senior Justice Department officials, and senior White House staff who, along with the CIA, presumably relied on them in framing their policies.¹⁰

The principal drafter of the early memos was John Yoo. A graduate of Harvard College and Yale Law School; former Senate staffer; former U.S. Supreme Court clerk; prolific scholar on issues of separation of powers, international law, and the law of war and national security; and professor at Boalt Hall School of Law at the University of California, Berkeley, Yoo is a leading exponent of broad presidential powers in wartime subject to limited or no judicial review. (Disclosure: Yoo was my student at Yale in the early 1990s, and I consider him a friend.) Jay Bybee, his boss, the head of the OLC at the time, and now a federal court of appeals judge, reviewed and signed the memos. The memos aroused enormous controversy from the moment the first one was leaked in June 2004; the Obama administration published them in 2009, and harsh criticism continues unabated to this day from many quarters. Some attack the memos’ legal analysis; others denounce the Bush administration’s policy decisions to engage in the authorized practices; and still others criticize the bureaucratic politics and secrecy surrounding them.

On June 12, 2009, Judge Jeffrey White of the federal district court in San Francisco issued an opinion refusing to dismiss a lawsuit against Yoo brought by Jose Padilla, a U.S. citizen who was convicted in 2007 of aiding

7. Much of the analysis that follows in this section is taken from Peter H. Schuck, *Immunity, Not Impunity*, AM. LAW., Nov. 2009, at 51.

8. Michael B. Mukasey, Remarks to J. Reuben Clark Law Soc’y (Feb. 18, 2011).

9. *Id.*

10. *Id.*

terrorists and sentenced to more than 17 years.¹¹ Padilla (and his mother, who also sued) had sought nominal damages and a declaration that Yoo violated Padilla's constitutional rights by rendering opinions and formulating policies that allegedly set in motion Padilla's illegal interrogation and detention.¹² Yoo has appealed Judge White's decision to the U.S. Court of Appeals for the Ninth Circuit, which as of November 6, 2011 was still holding the case in abeyance while considering the applicability to Yoo's case of the Supreme Court's decision in *Ashcroft v. al-Kidd*¹³ on the scope of immunity from *Bivens* lawsuits. (*Al-Kidd* involves an allegedly pretextual use of the material witness statute against a detainee, which in any event could be readily distinguished from Yoo's situation.)¹⁴ For reasons that I shall now explain, I believe that the Ninth Circuit should and will reject the claims against Yoo at the threshold.

This lawsuit and Judge White's decision upholding it are ill-conceived for at least three distinct reasons: legal principles, public policy, and professional ethics. *I take this view even though I am willing to concede arguendo the main criticisms leveled at Yoo's memos*: that they got the law wrong at key points, were sometimes sloppily and superficially reasoned, and were intended to justify a desired outcome—in the sense that, as when lawyers counsel clients in the typical case, the clients ask how close they can get to the legal line without transgressing it. (If I am right, of course, it follows that officials like Yoo should not be prosecuted criminally where the standard of proof and the necessity of showing the requisite *mens rea* would be much higher and the sanctions more severe.)

A. *Legal Principles*

Even assuming that these criticisms of the memos are correct, the long-standing law of official immunity requires that Yoo be protected from civil liability—unless he is denied the immunity on the ground that the court finds that the governing law on the particular issue was so clearly established that in giving the contrary advice, he should or must have known that it was erroneous and would violate the plaintiff's legal rights.¹⁵ This “clearly established law” standard, which the Court has worked out over decades, may sometimes be difficult to apply—in hard cases, clarity is in the eye of the beholder—but it does strike roughly the correct balance between the competing public and private interests. For Padilla to overcome Yoo's immunity claim, then, he must do much more than demonstrate that Yoo's legal conclusion (not just his reasoning) was wrong and violated his legal rights—although even this will be difficult to do. He must also show

11. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1012 (N.D. Cal. 2009).

12. *Id.* at 1013–19.

13. *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 131 S. Ct. 415 (2010).

14. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

15. *E.g.*, *Pearson v. Callahan*, 555 U.S. 223 (2009).

that (1) Yoo could not reasonably have believed that his legal advice was correct because the law was so clearly to the contrary, and (2) this erroneous advice was the proximate cause of Padilla's alleged torture.¹⁶

Padilla cannot meet this standard. His legal obstacles begin with the insufficiency of his complaint. In considering Yoo's motion to dismiss, of course, Judge White had to assume the truth of Padilla's factual allegations. The Supreme Court, however, held two years ago in *Bell Atlantic v. Twombly*¹⁷ that assumed facts do not suffice without more to advance a plaintiff's claims to trial. To avoid dismissal, a plaintiff must show that the link between his alleged facts and his legal theory is more than conceivable; it must be "plausible on its face." Then, only three weeks before Judge White's decision in *Padilla v. Yoo*, the Supreme Court reaffirmed *Twombly* in *Ashcroft v. Iqbal*,¹⁸ which dismissed a complaint alleging, as Padilla does against Yoo, unconstitutional detention and interrogation after 9/11. (Justice Souter and three others dissented.) As in its other official immunity decisions, the Court reiterated the need to head off burdensome discovery and trial unless the plaintiff can make a plausible threshold showing of liability. Judge White, however, did not even bother to distinguish *Iqbal*.

Even with the benefit of discovery, however, Padilla would be unable to make the requisite showing. Consider the evidentiary obstacles he would face—quite apart from having to overcome Yoo's strong immunity defense (discussed again below). He would have to prove that Yoo, rather than Bybee (not a defendant and now a federal judge), was responsible for the allegedly wrong advice in the memos; that he did not reasonably rely on information provided to him by the CIA about the techniques; that the layers of Yoo's superiors (all fine lawyers) who reviewed and transmitted the advice upward did not endorse it and take the responsibility on themselves (i.e., did not become a "supervening cause" of what ensued); and that Yoo's advice was the actual and proximate cause of the policy decisions that Padilla challenges. To prove actual and proximate cause, Padilla would also have to show that Yoo's advice dominated the many other factors that must have influenced President George W. Bush and his military, intelligence, and political advisers in the decision to use the challenged techniques.

In order to establish these things, moreover, Padilla would presumably have to take depositions of President Bush, the Attorney General, and their top staff members and subpoena their internal deliberative documents, which would surely be privileged. Judge White brushed aside these and other legal obstacles, reasoning that all of them were matters to be developed through discovery, even though the Court in *Twombly* and *Iqbal* had rejected precisely this reasoning, stating:

16. *Al-Kidd*, 580 F.3d at 970.

17. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

18. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.¹⁹

Assuming that Padilla could somehow hurdle these threshold legal obstacles, he would face three other formidable ones. First, he must show that the tight restrictions that the Court has long imposed on the right to bring *Bivens* actions²⁰—damage actions against individual federal officials for constitutional violations—should be relaxed in this case. In the four decades of *Bivens* actions, however, the Court has allowed such claims to proceed in only two situations, none since *Carlson v. Green* in 1980.²¹ Neither of the allowed claims was remotely like the claims in *Yoo*.²² It is also noteworthy that although Congress has legislated twice on the treatment of detainees since 9/11 and the disclosures about detainee mistreatment at Abu Ghraib and elsewhere, it has never created a tort remedy of this kind.²³ Moreover, the standard that a *Bivens* plaintiff must satisfy—that there are no “special factors counseling [sic] hesitation”²⁴ in allowing a damage remedy against an individual official rather than suing under the Federal Tort Claims Act (FTCA)²⁵—cannot be met in a case like *Yoo*, in which serious legal and factual difficulties abound. Once again, Judge White waved this caselaw aside, dismissing in one sentence the closest precedent—a recent D.C. Circuit decision denying a *Bivens* remedy to plaintiffs with claims similar to Padilla’s—simply because those plaintiffs were

19. *Iqbal*, 129 S. Ct. at 1953 (quoting *Bell Atl. Corp.*, 550 U.S. at 559).

20. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

21. *Carlson v. Green*, 446 U.S. 14 (1980). See generally, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (discussing the Supreme Court’s refusal to extend *Bivens* since *Carlson*).

22. For a critique of the Court’s interpretation of *Bivens* in this context, see, e.g., Stephen Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010). Vladeck’s argument is that if a *Bivens* action is the only likely source of relief, the courts can use other doctrines to reject such claims if the circumstances warrant, and thus the *Bivens* limitations on justiciability should not be used to cut off the claims prematurely at the threshold. In another article for this symposium volume, Vladeck and his co-author argue that even if no *Bivens* claim is available, Padilla can sue *Yoo* and other officials under state tort law. Stephen Vladeck, *Bivens Remedies and the Myth of the “Headly Days,”* 8 U. ST. THOMAS L.J. 514 (2011).

23. In the Intelligence Authorization Act of 2008, Congress did seek to limit interrogation techniques available to the CIA to only those contained in the U.S. Army Field Manual, which does not allow waterboarding. H.R. 2082, 110th Cong. § 327 (2008). President Bush vetoed the bill because of this provision, and his veto was sustained in Congress. *Bill Overview*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2082> (last visited Sept. 29, 2011).

24. *Bivens*, 403 U.S. at 396.

25. Padilla could have sued under the FTCA but presumably would lose because of any of four exceptions: discretionary functions, intentional torts, arising out of combatant activities during time of war, or arising in a foreign country. 28 U.S.C. § 2680(a), (h), (j), (k) (2011). In each instance, the outcome would depend on how certain statutory terms were interpreted.

detained abroad while Padilla was detained here, which is, or should be, an irrelevant distinction in the case against Yoo.

Second, Padilla must show that Yoo's memos were wrong as a matter of law. Given the ambiguity of international instruments, domestic statutes, and judicial precedents on this point at that time (and even now), this will be a challenging, though not impossible, task. Although some legal scholars disparage Yoo's analysis and conclusion,²⁶ others—some liberal,²⁷ some more conservative²⁸—accept Yoo's conclusion while disputing some of his legal analysis.²⁹ Notably, Congress has refused on several occasions to define and prohibit waterboarding as torture, and at least one circuit court has defined torture under the Convention Against Torture in a way that likely would exclude waterboarding from the definition.³⁰ Again, the point is not that Yoo's conclusion on this question was ultimately correct—I express no opinion here on that question—but only that it was genuinely arguable at the time and remains arguable today.

The third and most important obstacle is official immunity, discussed briefly above. The Court has insisted both on protecting officials' good faith decisions even when erroneous (if they were not erroneous, of course, they would not need the immunity) and on ensuring in immunity-worthy cases that this shield operates at the threshold before the official is subjected to the burdens of discovery, the financial costs and trauma of litigation, the risks of potential liability, and the temptation to reduce those risks by testifying in ways that compromise legitimate governmental secrets ("graymail").³¹ The Court's reason for granting such protection is certainly

26. See, e.g., Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 647–48 (2005); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 222 (2006); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 504–06 (2007).

27. See, e.g., Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SEC. L. & POL. 285, 287–91 (2005) (explaining that the United States' derogation from the Convention Against Torture (CAT)'s ban on cruel, inhuman, and degrading treatment turned the distinction between torture and such treatment into a live legal issue with regards to treatment not on US soil); Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate About Torture*, 1 J. NAT'L SEC. L. & POL. 231, 242 (2005) (conceding but criticizing Senate's derogation from CAT's definition of torture, and arguing that the debate should go beyond the boundary line between torture and non-torture).

28. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* 141–76 (2007); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1812–13 (2009).

29. At least one scholar argues that individual liability, civil or criminal, is not necessary to hold officials responsible for their wrongful legal advice. Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law after Bush*, in *WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION* 183, 205–06 (Austin Sarat & Nasser Hussain eds., 2010).

30. *Pierre v. Attorney General*, 528 F.3d 180, 189 (3d Cir. 2008) (en banc) (explaining that CAT requires "a showing of specific intent before the court can make a finding that a petitioner will be tortured.").

31. See discussion of graymail issue in *Arar v. Ashcroft*, 585 F.3d 559, 578–79 (2d Cir. 2009).

not any judicial solicitude for the individual official. Rather, the Court's concern is for the *public's* interest in fearless, vigorous decision-making by officials who must exercise often delicate judgment under highly constrained conditions. Thus, to overcome the immunity claim, Padilla must prove not just that Yoo violated his legal rights but that the violated right was "clearly established" as a matter of law, implying either that Yoo wrote his memos in bad faith or that he was so obtuse that he failed to reach a legal conclusion that was obvious to all.

Even if some of Yoo's legal analysis turns out to be wrong, how can Padilla possibly show that Yoo did not believe in the truth of his own analysis and indeed knew that it was manifestly wrong? Critics say many nasty things about Yoo and his views, but few assert that he did not believe in the principles he avowed or that he eschewed the rule of law. He simply interpreted the law differently than they do—and in their view, wrongly.³² On this point, consider the context in which Yoo worked as described by former Chief Judge and Attorney General Michael Mukasey:

The difficulty and novelty of the legal questions these lawyers confronted is scarcely mentioned; indeed, the vast majority of the criticism is unaccompanied by any serious legal analysis. In addition, it is rarely acknowledged that those public servants were often working in an atmosphere of almost unimaginable pressure, without the academic luxury of endless time for debate. Equally ignored is the fact that, by all accounts I have seen or heard, including but not limited to Jack Goldsmith's book, those lawyers reached their conclusions in good faith based upon their best judgments of what the law required.³³

Consider also the findings of an analysis by New York Times reporters Scott Shane and David Johnston published in June 2009.³⁴ They wrote that many Justice Department lawyers reviewing the legal arguments for the harsh interrogation techniques in 2005, including Deputy Attorney General James Comey, who strongly opposed using them as a matter of policy, concluded that the techniques were lawful. (Comey, of course, is widely praised for his integrity and professionalism—for example, in the infamous unseemly effort by White House officials to pressure the then-hospitalized Attorney General, John Ashcroft, to reauthorize President Bush's domestic surveillance program.) The Times article also detailed how later OLC directors Jack Goldsmith and Daniel Levin, while withdrawing Yoo's memo,

32. See, e.g., Alan B. Morrison, *Alas, No Disciplinary Action; Torture Memo Authors Are Immune Since It's Hard to Prove Bad Faith or Incompetence*, 31 NAT'L L.J. 38 (2009). Morrison urges that a new remedy for lawyer incompetence be established, but he does not claim that it would condemn Yoo in this case.

33. Michael B. Mukasey, Remarks at the Boston College Law School Commencement (May 23, 2008).

34. Scott Shane & David Johnston, *U.S. Lawyers Agreed on the Legality of Brutal Tactic*, N.Y. TIMES, June 7, 2009, at A1.

accepted the legality of those techniques (including, in Levin's case, waterboarding) even as they opposed their use on policy grounds and found some of Yoo's earlier analysis to be sloppy.³⁵

These techniques, it seems, yielded a great deal of valuable information that surely saved the lives of many Americans and others. Attorney General Mukasey continues:

We learned a great deal through the CIA program. In fact, you can focus on only three of the detainees—Abu Zubaydah, Khalid Sheikh Mohammed, and Abdel Rahim al Nashiri—and see a huge trove of valuable information. . . . Not only did [Khalid Sheikh Mohammed] disclose general information on how Al-Q[aeda] moved money and people, but also specific information that helped disrupt other plots, including one involving airplanes, this one directed against the library tower in Los Angeles that was to be carried out by a south Asian group Other information received from [Khalid Sheik Mohammed] resulted in the capture of people involved in a plan to develop a biological weapons capability in the United States, and on and on.³⁶

Whether the clear life-saving value of these techniques is or should be relevant to their legality—whether Kantian or consequentialist assessments should control our legal definition of torture—is a hard and important question that deserves robust public debate. For present purposes, the key point is that this question clearly was open when the memos were written.

On January 23, 2012, the Fourth Circuit considered Padilla's *Bivens* claim against top Defense Department officials based on the same theories on which he had sued Yoo.³⁷ (In this Fourth Circuit case, Padilla has dropped Yoo and other legal professionals as defendants, along with medical personnel and interrogators). Because the court refused to allow a *Bivens* claim, it did not need to reach the issue of qualified immunity. For these reasons, I expect the Ninth Circuit to agree.

B. Public Policy

There is a good reason why the Supreme Court insists on broad immunity for all but clearly established and knowing violations of law—and this reason is not an exception to the rule of law but is an essential element of it. Society depends on mid-level officials like Yoo to give their superiors (and us) their best judgment on difficult issues without having to worry about being dragged into court or disbarred if they turn out to be wrong, or (in the case of criminal prosecution) when a new administration arrives in Washington. The public interest is compromised when such officials pull their

35. Some more liberal legal scholars have also taken roughly this position. See, e.g., Scheppele, *supra* note 28, at 287–91; Levinson, *supra* note 28, at 242.

36. Mukasey, *supra* note 8.

37. *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012).

analytical punches in anticipation of having to defend possible *Bivens* actions. Immunity in these circumstances benefits us; if it also benefits officials like Yoo, that is incidental. Given the punch-pulling alternative, it is simply the lesser of two evils.

The legal immunity to which I believe Yoo is entitled in this case, of course, cannot immunize him from other more informal sanctions and costs. The Justice Department, having perceived a potential conflict of interest in representing him, ceased doing so. It agreed instead to pay a private lawyer for Yoo at an hourly rate far below what the best of them charge, especially in the hothouse legal environment of Washington, D.C. Fortunately for Yoo, a conservative legal eminence, Miguel Estrada, offered to represent Yoo pro bono. Had Estrada not been willing to do so, Yoo's defense costs could be financially ruinous—even if Yoo wins his case. Yoo is lucky to have Estrada in his corner, of course, but how many officials can count on pro bono representation by a top lawyer who is prepared to take up the heavy burden simply in order to vindicate a principle? Putting officials at risk of personal bankruptcy—whether or not they later prevail in court—is not only manifestly unfair to them; but, more importantly, it will tend to discourage top-flight lawyers from going into public service.

C. *Professional Ethics*

There has been much talk among Yoo's critics of disbaring him and other officials who gave legal advice that some other lawyers and lay people find abhorrent.³⁸ Some of these critics claim that his client was the nation, not the President—as if this would make a difference, given that the President speaks for the nation. In reality, this is an effort to find scapegoats for Bush administration policies that many Americans fervently opposed—and that contributed to his party being driven from office in the 2008 elections. (The fact that the Obama administration has reinstated most of these policies, though not waterboarding,³⁹ is only one of the many ironies of this episode.) Lawyers should not be severely punished for writing arguably sloppy or faulty memos, much less for being on the wrong side of history—which in this case, of course, has not yet been finally written. Obama's Department of Justice leadership was right to reject the idea of seeking professional sanctions against Yoo. It is one thing to disagree strenuously with a lawyer's view of the law; it is quite another to say that he has tra-

38. E.g., Stephen Gillers, *The Torture Memos*, NATION, Apr. 28, 2008; Jack Balkin, *Did Yoo and Bybee Violate Canons of Professional Ethics?*, BALKIN BLOGSPOT (Apr. 12, 2008), <http://balkin.blogspot.com/2008/04/did-yoo-and-bybee-violate-canons-of.html>; Scott Horton, *A Response to Dean Edley*, BALKIN BLOGSPOT (Apr. 12, 2008), <http://balkin.blogspot.com/2008/04/response-to-dean-edley.html>; Glen Greenwald, *John Yoo's War Crimes*, SALON (Apr. 2, 2008), http://www.salon.com/news/opinion/glenn_greenwald/2008/04/02yoo.

39. Scott Shane & Mark Landler, *Obama, in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A1.

duced the rule of law and must be banished from its precincts. A professional ethic worthy of the name knows the difference.

Protecting officials from being sued personally over good faith legal and policy disagreements does not place them above the law. Rather, it preserves the fine line between law and politics as well as between legal sanctions and legitimate disagreement about law and policy. This line is essential for the integrity and vitality of each. If government lawyers' advice turns out to be wrong or illegal, they will suffer the obloquy, fairly or unfairly, of having rendered it as well as the reputational, professional, and other sanctions that may follow it. In Yoo's case, he has been constantly harassed and his classes picketed, since he returned to Boalt Law School to teach more than five years ago and many faculty and students at the university have publicly demanded his ouster. They have a perfect right to do so, of course, but such harassment can only increase officials' disincentives to engage in the kinds of vigorous decision-making and appropriate risk-taking that are needed to protect vital public interests. One response to this disturbing reality is to say that this demonization simply comes with the territory; to borrow from Harry Truman, if government lawyers can't take the heat, they should stay out of the kitchen. This response, however, is too easy; it will simply encourage our government lawyers to serve up pabulum instead of following more controversial recipes. A better answer is for those who criticize the lawyer's decision to continue to vigorously argue their positions but to make their arguments in public deliberative fora with a decent respect for the difficulty of such legal questions—in short, to turn on the light but turn down the heat.

IV. THE FUTURE

Government officials, like almost everyone else, are risk-averse—maybe even more so.⁴⁰ Other things being equal, and given the asymmetric incentives that those who must make controversial decisions or recommendations face, even a small risk of being sued or prosecuted (and if a lawyer, disbarred) over those decisions or recommendations would tend to induce rational officials to hunker down, cover their rears, hedge their bets, and pull their punches. Encouraging timorous self-protection on the part of officials to whom we entrust with the most delicate balancing of our vital interests and values is the last thing that a sound legal system should do.

As it happens, we have been there before. Professor and former OLC Director Jack Goldsmith traces what he calls “cycles of timidity and aggression” in official and public attitudes toward the intelligence community and its work. Political leaders, he says:

Pressure the community to engage in controversial action at the edges of the law and then fail to protect it from recriminations

40. SCHUCK, *supra* note 2, at 68–71.

when things go awry. This leads the community to retrench and become risk averse, which invites complaints by politicians that the community is fecklessly timid. Intelligence excesses of the 1960s led to the Church committee reproaches and reforms of the 1970s, which led to complaints that the community had become too risk-averse, which led to the aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led (both before and after 9/11) to complaints about excessive timidity.⁴¹

As Mukasey notes, “that pendulum is now swinging back once again.”⁴² This is to be expected in a society like ours, committed to both security and liberty. We must look to the law to regulate and adjust the tension between them in light of current realities, social needs, and imperishable values. There is much room for reasonable, professional, and patriotic disagreement about where the balance should be struck and which legal forms that balance should take. For example, if we conclude that detainees like Padilla deserve a monetary damage remedy for wrongful treatment in detention, it may be better to create such a remedy against the United States under the FTCA or some special statute, so long as the government retains a properly-designed defense for good faith discretionary policy judgments that turn out to be erroneous.⁴³ In cases where individual officials like Yoo acted within the scope of their authority, broadly defined,⁴⁴ a remedy directly against the United States would strike a better balance between the goals of compensation and optimal deterrence than a *Bivens* remedy against individual officials like Yoo would. If we are primarily concerned with setting the record straight and assessing official conduct rather than providing a monetary remedy, then the appointment of a governmental investigative body or a private blue-ribbon fact-finding commission may be appropriate.⁴⁵ The precise form that the responses to particular instances of alleged official misconduct should take, of course, is an important question that deserves more careful assessment than I can give it here.

The law of governmental and official liability is the fulcrum of that necessary, delicate balance. One hallmark of a banana republic is that officials realistically fear that they will face criminal prosecution and exile if and when the opposing party gains office. This is one reason, of course,

41. GOLDSMITH, *supra* note 28, at 163.

42. Mukasey, *supra* note 33.

43. SCHUCK, *supra* note 2, at 113–14.

44. The law of official and governmental immunity defines “scope of authority” in terms of whether the official was authorized to make that kind of decision, not whether the decision was legally correct. *See, e.g.,* Stump v. Sparkman, 435 U.S. 349 (1978).

45. There are many precedents for this, including the review of the World War II Japanese internment, discussed in Vladeck, *supra* note 29.

why autocratic leaders so desperately hang on to power. Fear of personal ruin, however, can do great damage even in a genuine democracy like ours. At the margin, where good and evil inevitably do their work, even a small risk of serious personal sanctions against officials is enough to deform our democracy, unleashing a new cycle—not just of timidity and aggression but also of political vengeance—that we cannot readily control. Except in cases of demonstrable criminality, let us reserve our reprisals, principled as well as unprincipled, for elections.