

Weighing the rule of law (op-ed, The Oregonian, March 12, 2009)
By Ofer Raban*

Judicial proceedings of momentous potential importance are taking place these days in federal district court in San Francisco. Lawyers representing Jose Padilla, an American convicted of terrorism-related crimes, filed a lawsuit against John Yoo, the former Deputy Assistant Attorney General in the Bush Administration's Office of Legal Counsel.

The lawsuit asserts that Yoo, under pretense of legal authority, deprived Padilla of a number of statutory and constitutional rights – including the right to be free from unlawful detention conditions and from coercive interrogation techniques. The suit seeks only nominal damages – one dollar is the amount named in the lawsuit; what the lawyers are really after is a judicial declaration that Yoo's legal memoranda were, legally speaking, beyond the pale. In other words, the suit seeks to vindicate a principle lying at the heart of the Rule of Law: the idea that the law is not infinitely malleable, and that despite certain indeterminacy in complicated matters of statutory and constitutional interpretation, some interpretations are so off-the-wall as to evidence a grave professional failure. Codes of professional responsibility have long recognized this truism, and lawyers have been sanctioned and even disbarred for making frivolous legal arguments. It is now time to enforce this principle where it matters most – where frivolous interpretations are advanced not by minor lawyers representing marginal interests, but by respectable lawyers advising those who hold the levers of power.

President Lincoln, who violated the federal constitution when he suspended the writ of habeas corpus – and then expanded the suspension in defiance of a federal court decision – claimed that national emergency may sometimes justify breaking the law (which is why impeachment or criminal prosecution of administration officials are, ultimately, political decisions). Indeed, George W. Bush may have been justified in violating federal statutes and the federal constitution; but George W. Bush never faced this solemn choice – because John Yoo (and a few others like him) failed their professional and institutional duty of telling the President where the law lies.

In a piece published in the Wall Street Journal, Mr. Yoo portrayed the lawsuit as a left-wing political crusade and said it would make government decision-makers worry about being sued rather than about the good of the

nation. Mr. Yoo also said that, given the lawsuit, “It is easy to understand why CIA agents...are so concerned about their legal liability that they have taken out insurance against lawsuits.” Clearly, Mr. Yoo doesn’t understand the nature of the claim against him (which may have been his problem all along). Mr. Yoo was never asked to make decisions about the good of the nation; he was asked to determine whether the suggested decisions were legal or not. This lawsuit is not an attempt to impugn past policy decisions; it is an attempt to make sure that policy makers and their subordinates know where the law stands when they make their decisions. Presidents, like CIA agents, must have the ability to know whether their intended actions contravene federal or international law, and this lawsuit is about making sure they get proper advice. Indeed today’s CIA agents are forced to take insurance against lawsuits not because of the lawsuit against Mr. Yoo, but because Mr. Yoo’s advice was worthless.

There is a distinction, apparently lost on Mr. Yoo, between law and politics – between what the law says and what may be politically advantageous. Respect for this distinction marks the difference between a “government of laws” and other less appetizing political regimes. Yoo’s legal memoranda, whose astounding conclusions and interpretive methodologies have been subjected to near-universal professional criticism, failed to accord that respect. Now our courts have been asked to weigh in. A refusal to recognize Yoo’s culpability (be it in this tort action or, perhaps preferably, in professional responsibility proceedings) would be a slap in the face to the Rule of Law – because if John Yoo’s official conclusions about torture or presidential powers did not violate professional standards, it is hard to imagine what would.

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