No. 09-16478

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE PADILLA AND ESTELA LEBRON,

Plaintiffs-Appellees,

v.

JOHN YOO,

Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District Of California

BRIEF FOR APPELLANT

Miguel A. Estrada
Counsel of Record
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 530-4238

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Constitutional Provisions **Page(s)**

Statutes

TABLE OF AUTHORITIES
(continued)

Statutes (continued) **Page(s)**

Other Authorities

INTRODUCTION

On September 11, 2001, members of the al Qaeda terrorist organization hijacked commercial airliners and crashed them into the Pentagon and World Trade Center, destroying the latter and killing nearly 3000 civilians. In the aftermath of this unprecedented attack, the President of the United States and his advisers grappled with how to faithfully apply Supreme Court precedents developed in the context of conventional warfare to a changed world in which America's enemies no longer wore uniforms or targeted only the military. Defendant-Appellant John Yoo, then a Deputy Assistant Attorney General in the Department of Justice, provided legal advice to the President about some of the rules governing the detention and treatment of such unlawful enemy combatants.

Based on evidence that Plaintiff-Appellee Jose Padilla had entered the United States to conduct terrorist operations for al Qaeda, the President determined that Padilla satisfied the criteria for enemy-combatant status. Invoking both his own constitutional powers and the authority granted by Congress to "use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States," Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), the President ordered Padilla's detention. Three-and-a-half years later, Padilla was transferred from military to civilian custody and convicted of conspiracy to commit terrorist acts abroad. In this civil suit, Padilla and his mother

seek to hold Yoo personally liable for the President's determination that Padilla is an enemy combatant, as well as the treatment he allegedly received from other federal officials while in military custody.[1]

JURISDICTIONAL STATEMENT

The district court properly exercised jurisdiction pursuant to 28 U.S.C. § 1331 because Padilla's claims arise (if at all) under the Suspension Clause, Treason Clause, and First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*

On June 12, 2009, the district court denied Yoo's motion to dismiss based on qualified immunity and the absence of any implied cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Excerpts of Record ("E.R.") 43. The district court amended its opinion on June 18, 2009. E.R. 1.

Yoo filed a timely notice of appeal on July 9, 2009. E.R. 85. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, which permits an immediate appeal of the district court's denial of qualified immunity, including the

---

[1] Because Padilla and his mother rely on the same factual allegations to support their claims, this brief will refer only to Padilla except when specifically addressing his mother's claims.

sufficiency of the pleadings, *see, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-46 (2009).

Because "the recognition of the entire cause of action" is "'directly implicated by the defense of qualified immunity,'" this Court also "ha[s] jurisdiction over th[e] issue" whether to imply a *Bivens* remedy. *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) (quoting *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006)). Although this Court had reached a different conclusion before *Wilkie*, *see Kwai Fun Wong v. United States*, 373 F.3d 952, 961 (9th Cir. 2004); *Pelletier v. Fed. Home Loan Bank*, 968 F.2d 865, 871 (9th Cir. 1992), those decisions have been superseded by the Supreme Court, *see Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the district court overstepped its authority by creating an implied constitutional damages remedy against Yoo for legal advice he allegedly gave to the President on matters of national security and foreign policy.

(2) Whether Yoo is entitled to qualified immunity because he was not personally responsible for Padilla's detention or conditions of confinement and because any alleged constitutional or statutory violations stemming from that confinement were not clearly established at the time of Yoo's actions.

STATEMENT OF THE CASE

Padilla filed this action against Yoo in the Northern District of California. Dkt. Entry ("D.E.") 1. The amended complaint alleges that Yoo drafted a series of legal memoranda while serving as an attorney in the Justice Department's Office of Legal Counsel ("OLC") that "set in motion" purported constitutional violations, including the President's decision to detain Padilla as an enemy combatant. E.R. 227 ¶ 3. Yoo moved to dismiss on the grounds that no implied cause of action exists for these claims and that, in any event, he is entitled to qualified immunity. D.E. 24. The district court denied the motion to dismiss, E.R. 1, 43, and this appeal timely followed, E.R. 85.

STATEMENT OF FACTS

In the Authorization for Use of Military Force ("AUMF") enacted on September 18, 2001, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). On June 9, 2002, relying on the AUMF and his constitutional power as Commander-in-Chief, the President directed the Secretary of Defense to detain Padilla in military custody as an enemy

combatant. E.R. 506. The President determined that Padilla is "closely associated with al Qaeda," had engaged in "hostile and war-like acts" against the United States, possesses critical "intelligence about personnel and activities of al Qaeda," and "represents a continuing, present and grave danger to the national security of the United States." *Id.* The President concluded that Padilla's detention was "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." *Id.*

A. Padilla's Detention And Conviction

The President ordered Padilla's detention after evaluating intelligence that Padilla, an American citizen, was "closely associated" with al Qaeda in the Middle East and Southwest Asia. E.R. 509 ¶ 5; *see also* E.R. 510 ¶ 10 (describing "significant and extended contacts with senior [a]l Qaeda members and operatives"). While in Afghanistan, Padilla approached Abu Zubaydah, a senior lieutenant of Osama bin Laden, "with [a] proposal to conduct terrorist operations within the United States." E.R. 509 ¶ 6. At Abu Zubaydah's direction, Padilla traveled to Pakistan to receive explosives training from al Qaeda operatives. *Id.* ¶¶ 6-7. Padilla's discussions with Abu Zubaydah included a plan to "build and detonate a 'radiological dispersal device' (also known as a 'dirty bomb') within the United States," *id.* ¶ 8, as well as "other operations including the detonation of explosives in hotel rooms and gas stations," E.R. 510 ¶ 9. Padilla was instructed to

return to the United States "to conduct reconnaissance and/or other attacks on behalf of [a]l Qaeda." *Id.* ¶¶ 9-10.

Padilla returned to the United States on May 8, 2002 and was immediately detained as a material witness in a grand jury investigation into the September 11 attacks. *Padilla ex rel. Newman v. Bush* ("*Padilla I*"), 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002). The President designated Padilla as an enemy combatant on June 9, 2002, E.R. 506, and he was thereafter transferred to the Naval Consolidated Brig in Charleston, South Carolina, E.R. 512 ¶ 16.

Two days later, Padilla's attorney filed a habeas petition on his behalf in the Southern District of New York. The district court concluded that the President possessed both constitutional authority and statutory authority under the AUMF to detain "as an enemy combatant an American citizen captured on American soil" for the "duration of armed conflict with al Qaeda." *Padilla I*, 233 F. Supp. 2d at 588, 610. The district court certified that issue for interlocutory appeal as raising "substantial ground for difference of opinion." *Padilla ex rel. Newman v. Rumsfeld* ("*Padilla III*"), 256 F. Supp. 2d 218, 223 (S.D.N.Y. 2003). It deferred the issue whether, under a deferential standard of review, the evidence adduced by the government was sufficient to justify Padilla's detention. *Padilla I*, 233 F. Supp. 2d at 605-08; *see also Padilla ex rel. Newman v. Rumsfeld* ("*Padilla II*"), 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

In a split decision, the Second Circuit reversed in relevant part. Relying on the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes detention of citizens "except pursuant to an Act of Congress," the Second Circuit concluded that the AUMF was insufficiently clear to allow the President "to detain as an enemy combatant an American citizen seized on American soil." *Padilla v. Rumsfeld* ("*Padilla IV*"), 352 F.3d 695, 698 (2d Cir. 2003). The dissenting judge, by contrast, believed that the President has "inherent authority" as Commander-in-Chief to detain American citizens as enemy combatants and that, in any event, the AUMF constituted statutory authority for such detention. *Id.* at 726, 730-32 (Wesley, J., dissenting in relevant part).

The Supreme Court reversed on jurisdictional grounds, concluding that Padilla's habeas petition should have been brought in the District of South Carolina, where his immediate custodian was located. *Rumsfeld v. Padilla* ("*Padilla V*"), 542 U.S. 426, 451 (2004). On the same day, the Court concluded that the AUMF is "explicit congressional authorization" for the detention of citizen enemy combatants and that it "satisfie[s] § 4001's requirement that a detention be 'pursuant to an Act of Congress.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality); *id.* at 587 (Thomas, J., dissenting) (agreeing with the plurality).

Padilla re-filed his habeas petition in the District of South Carolina, raising many of the same constitutional arguments that he asserts in this litigation. In

particular, Padilla claimed that he was "unlawfully held" with "no opportunity" to "contest the factual grounds for his imprisonment"; that he "ha[d] the right to access to counsel"; and that his "ongoing interrogation" violated the Fifth, Sixth, and Eighth Amendments. D.E. 1 ¶¶ 1, 3, 15, 27-29, 32, No. 2:04-cv-2221 (D.S.C.).

The district court granted summary judgment in Padilla's favor, concluding that the Non-Detention Act barred Padilla's detention "under the unique circumstances presented here," *see Padilla v. Hanft* ("*Padilla VI*"), 389 F. Supp. 2d 678, 679 (D.S.C. 2005), but the Fourth Circuit reversed, *see Padilla v. Hanft* ("*Padilla VII*"), 423 F.3d 386 (4th Cir. 2005). The Fourth Circuit explained that, based on the government's factual allegations, Padilla "unquestionably qualifies as an 'enemy combatant' as that term was defined" by the *Hamdi* plurality, *id.* at 391, and that "the AUMF applies even more clearly and unmistakably to Padilla than to Hamdi," *id.* at 396. The Fourth Circuit concluded that, under *Hamdi*, the President could "detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, *and* who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil." *Id.* at 397 (emphasis in original).

While Padilla's petition for certiorari was pending before the Supreme Court, the government transferred Padilla to civilian custody. *See Hanft v. Padilla* ("*Padilla IX*"), 546 U.S. 1084 (2006); *Padilla v. Hanft* ("*Padilla VIII*"), 432 F.3d 582 (4th Cir. 2005).[2] In civilian custody, Padilla was charged with conspiracy to murder, kidnap, and maim persons in a foreign country, 18 U.S.C. § 956; providing material support to terrorists, *id.* § 2339A; and conspiracy to provide material support to terrorists, *id.* § 371. The indictment alleged that Padilla "operated and participated in a North American support cell that sent money, physical assets, and mujahideen recruits to overseas conflicts for the purpose of fighting violent jihad" and that Padilla himself had "traveled overseas for that purpose." D.E. 141 ¶¶ 5, 11, No. 04-cr-60001 (S.D. Fla.). On August 16, 2007, a jury convicted Padilla on all three counts against him, D.E. 1193, No. 04-cr-60001 (S.D. Fla.), and he was sentenced to over 17 years in prison, D.E. 1332, No. 04-cr-60001 (S.D. Fla.). Padilla's appeal is pending in the Eleventh Circuit. *See* No. 08-10560-GG (11th Cir.).

---

[2] The Supreme Court subsequently denied Padilla's petition for certiorari. *See Padilla v. Hanft* ("*Padilla X*"), 547 U.S. 1062 (2006). Writing for three Justices, Justice Kennedy declined to decide whether the habeas petition had been mooted and instead emphasized the "strong prudential considerations disfavoring the exercise of the Court's certiorari power." *Id.* at 1063 (Kennedy, J., concurring). Justice Ginsburg dissented, arguing that Padilla's habeas petition was not moot. *Id.* at 1064-65 (Ginsburg, J., dissenting).

B. Yoo's Government Service

Yoo served in OLC from 2001 to 2003. E.R. 229 ¶ 14. OLC has "traditionally had responsibility for providing legal advice to the President (subject to approval of the Attorney General)." *Morrison v. Olson*, 487 U.S. 654, 700 (1988) (Scalia, J., dissenting). In the immediate aftermath of the September 11 attacks, OLC lawyers were asked to evaluate the President's authority to use military force to defend the country and prevent another attack. *See generally* E.R. 230-31 ¶ 19(a)-(j). This assignment raised numerous legal questions for which existing law provided scant guidance, ranging from the permissibility of using military force domestically against terrorists to the limits that the Constitution and international law place on the interrogation of detainees captured on the battlefield in Afghanistan. *Id.*

According to the amended complaint, Yoo "wrote and promulgated a series of memoranda" during this time. E.R. 230-31 ¶ 19.[3] The majority of those memoranda addressed legal constraints on the detention and interrogation of persons who, unlike Padilla, were captured and detained outside the United States:

- Two January 2002 memoranda concluding that the Geneva Conventions do not apply to members of al Qaeda or the Taliban. E.R. 230 ¶ 19(c)-(d).

[3] Several of these memoranda were signed by Yoo's superior and do not identify Yoo as an author. *See* E.R. 217, 325, 355, 401.

These memoranda were expressly limited to detainees captured in Afghanistan and did not address any constitutional issues. *See* E.R. 247, 280, 289, 320. They also "expresse[d] no view as to whether the President should decide, as a matter of policy" to "adhere to the standards of conduct in those treaties." E.R. 247, 289.

- A February 2002 memorandum "concerning legal constraints that may potentially apply to interrogation of persons captured in Afghanistan." E.R. 326, *cited in* E.R. 231 ¶ 19(e).
- An August 2002 memorandum concluding that, for an interrogation method to constitute impermissible "torture" under 18 U.S.C. § 2340A, which applies only to conduct outside the United States, it must "inflict pain that is difficult to endure," and the interrogator must have the specific intent to cause such pain. E.R. 356, *cited in* E.R. 231 ¶ 19(h). The memorandum was limited to "the conduct of interrogations outside the United States." *Id.*
- Another August 2002 memorandum, which approved the use of certain interrogation techniques on an enemy combatant, including waterboarding. E.R. 231 ¶ 19(i). That memorandum was limited to Abu Zubaydah, an alien enemy combatant held outside the United States.

- A March 2003 memorandum "examin[ing] the legal standards governing military interrogations of alien unlawful combatants held outside the United States." E.R. 406, *cited in* E.R. 231 ¶ 19(j).[4]

The amended complaint alleges that Yoo authored four memoranda applicable to enemy combatants held in the United States:

- An October 2001 memorandum concluding that the Posse Comitatus Act, 18 U.S.C. § 1385, and the Fourth Amendment would not apply to the President's use of military force against terrorists within the United States, E.R. 230 ¶ 19(a); *see also* E.R. 167 (memorandum).
- A December 2001 memorandum discussing possible criminal charges against an American citizen who is a member of a terrorist organization or the Taliban. E.R. 230 ¶ 19(b).
- A May 2002 memorandum—alleged to exist only "[u]pon information and belief"—discussing access to counsel and mail by detainees held at naval brigs in Norfolk, Virginia, and Charleston, South Carolina. E.R. 231 ¶ 19(f).

---

[4] Padilla also cites a memorandum written by the General Counsel of the Department of Defense (and allegedly "reviewed and approved" by Yoo) authorizing certain interrogation techniques, such as the use of stress positions. E.R. 231 ¶ 20. This memorandum was limited to "the interrogation of detainees at Guantanamo Bay." E.R. 488.

- A June 2002 memorandum explaining that the Non-Detention Act does not bar the detention of United States citizens designated as enemy combatants—a position later upheld in *Hamdi*. E.R. 231 ¶ 19(g); *see also* E.R. 204 (memorandum).

Finally, the amended complaint cites a June 2002 memorandum allegedly authored by Yoo (but signed by Yoo's superior) on "'whether [Padilla] could qualify, legally, as an enemy combatant.'" E.R. 235-36 ¶¶ 38, 42 (quoting John Yoo, *War By Other Means* (2006)). That memorandum began by recounting the "facts provided to" OLC, including that Padilla "recently entered the United States as part of a plan to conduct acts of sabotage that could result in a massive loss of life," that "while abroad he had meetings with a senior al Qaeda operative with whom he discussed a plan to detonate a radiological explosive device in the United States," and that "[h]e had received training, at the direction of a senior al Qaeda official, in the use of explosives." E.R. 219. Accepting those facts as true for purposes of the memorandum, OLC analyzed the constitutionality of detaining Padilla as an enemy combatant, recognizing that his status as an American citizen made the question a difficult one. E.R. 220. Invoking the Supreme Court's decision in *Ex Parte Quirin*, 317 U.S. 1 (1942), and foreshadowing the *Hamdi* decision two years later, the memorandum concluded that "Padilla properly qualifies as a belligerent (or combatant) who may be seized by the military and

held at least until the end of the conflict." E.R. 222. The memorandum did not address what interrogation methods could be used against Padilla or any other issues relating to the conditions of his confinement, nor did it discuss whether Padilla could file a habeas petition or otherwise seek judicial review of his detention.

C. Padilla's Lawsuits

While awaiting his criminal trial, Padilla filed a lawsuit in the District of South Carolina against several current and former government officials, alleging that his apprehension and detention violated numerous constitutional rights. *See* D.E. 91, No. 2:07-cv-410 (D.S.C.). The lawsuit named as defendants a former Secretary of Defense, Attorney General, and commander of the naval brig where Padilla was detained, among others. *Id.* Padilla sought declaratory and injunctive relief, one dollar in damages, and attorneys' fees. That case remains pending.

After his conviction, Padilla filed this lawsuit against Yoo raising similar constitutional claims as the South Carolina case. D.E. 1. Drawing heavily on Yoo's book, *War By Other Means*, the amended complaint alleges that, through his work at OLC, Yoo violated Padilla's rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments, Article III, the Suspension Clause, and the Treason Clause, as well as his rights under RFRA. E.R. 244-45 ¶ 82. Padilla seeks one

dollar in damages, as well as attorneys' fees. E.R. 245-46 ¶ 84. (Padilla voluntarily dismissed claims for declaratory relief. *See* D.E. 51-52.)

Yoo moved to dismiss. D.E. 24. He emphasized that Padilla's claims would require the district court to create a new constitutional right of action against a government lawyer for legal advice given to the President about the detention of enemy combatants. *Id.* at 10-24. Doing so "would not only constitute an unprecedented intrusion into the President's authority in the areas of war-making, national security and foreign policy, it could jeopardize the ability of the President and other Executive Branch officials to obtain candid legal advice on constitutional matters of utmost national importance and sensitivity." *Id.* at 1-2.

Yoo also argued that he was entitled to qualified immunity. He emphasized that he had not personally participated in any of the alleged violations: He did not make the decision to detain Padilla as an enemy combatant, nor was he responsible for Padilla's treatment while detained. D.E. 24, at 27-34. In any event, none of the rights at issue had been clearly established when Yoo worked in OLC. *Id.* at 34-50.

D. The District Court's Decision

The district court denied Yoo's motion to dismiss. E.R. 1. It first held that Padilla could proceed with a *Bivens* action under the Supreme Court's two-part test, which asks whether there is "'any alternative, existing process'" for

remedying the alleged constitutional deprivation and whether there are "'special factors counseling hesitation'" in creating a new damages remedy. *See* E.R. 13 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 576 (2007), and *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). The court concluded that habeas corpus was not an alternative remedy for Padilla's claims because "Padilla's habeas petition . . . would have been filed against the military commander in charge of the brig" rather than against Yoo. E.R. 15. The court then determined that no "special factors" exist because "there is no authority evidencing a remedial scheme for designation or treatment of an American citizen residing in America as an enemy combatant," E.R. 21, and because the numerous national-security and foreign-relations concerns raised by Yoo did not "ba[r] judicial review," E.R. 23.

The district court also rejected Yoo's qualified-immunity argument. It concluded that Yoo was personally responsible for the alleged violations because the OLC memoranda had "set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights." E.R. 34. The rights at issue were clearly established with respect to enemy combatants, the district court believed, because "the basic facts alleged in the complaint clearly violate the rights afforded to citizens held in the prison context." E.R. 37.

SUMMARY OF ARGUMENT

The district court's judgment should be reversed.

First, the district court erred in implying a damages remedy against a government lawyer who allegedly provided legal advice to the President regarding the designation, detention, and treatment of enemy combatants. Habeas corpus is the proper vehicle for citizens detained as enemy combatants to challenge their detention, and the availability of habeas relief precludes courts from creating a new judicial remedy. An implied damages remedy is particularly inappropriate here, where the legal advice at issue concerned issues of national security and foreign policy of the utmost sensitivity and importance. Subjecting that advice to judicial second-guessing would create tremendous practical difficulties and would imperil the President's ability to obtain candid legal counsel when circumstances require it most.

Second, Yoo is entitled to qualified immunity. He was not personally responsible for any of the alleged constitutional or statutory violations. To the contrary, the amended complaint claims repeatedly that Yoo provided *ex post* legal justification for policy decisions that had already been made by other officials. Moreover, Padilla does not allege the violation of any clearly established rights. The law governing enemy combatants was and remains murky. To the extent enemy combatants possess any of the rights Padilla invokes—and, in most cases, it

is clear they do not—those rights were not clearly established when Yoo worked in OLC.

STANDARD OF REVIEW

This Court reviews "constitutional issues *de novo*," including the district court's decision to create an implied constitutional cause of action. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998). The district court's denial of qualified immunity and its interpretation of RFRA also present legal questions that this Court examines *de novo*. *Fry v. Melaragno*, 939 F.2d 832, 835 (9th Cir. 1991); *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

ARGUMENT

I. The District Court Erred By Creating An Unprecedented *Bivens* Remedy For Legal Advice A Government Lawyer Provided To The President On Pressing Issues Of National Security.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized an implied constitutional cause of action for alleged violations of the Fourth Amendment prohibition on unreasonable searches and seizures. The Supreme Court has subsequently recognized, however, that "implied causes of action are disfavored," and it therefore "has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). "In the 38 years since *Bivens*, the Supreme Court has extended it twice only," *Arar v. Ashcroft*,

No. 06-4216-cv, 2009 WL 3522887, at *8 (2d Cir. Nov. 2, 2009) (*en banc*), permitting *Bivens* suits only for employment discrimination in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979), and Eighth Amendment violations by prison officials, *Carlson v. Green*, 446 U.S. 14 (1980).

The Supreme Court has not created a new *Bivens* remedy since *Carlson*—nearly three decades ago. Instead, it "has focused increased scrutiny on whether Congress intended the courts to devise a new *Bivens* remedy, and in every decision since *Carlson*, across a variety of factual and legal contexts, the answer has been 'no.'" *W. Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116, 1119 (9th Cir. 2009); *see also Wilkie v. Robbins*, 551 U.S. 537 (2007); *Malesko*, 534 U.S. at 61; *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 699 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

The district court's dramatic expansion of *Bivens* to a lawsuit against a government lawyer for allegedly erroneous legal advice provided to the President in a national-security matter goes far beyond anything sanctioned by the Supreme Court even in the heyday of implied causes of action, and certainly beyond the Court's more skeptical recent decisions. The Supreme Court has never upheld a *Bivens* suit against government policymakers, let alone against the lawyers who advise those policymakers. In fact, for almost all of the rights Padilla invokes, the

Supreme Court has not established a *Bivens* remedy against *anyone*—even the ground-level officials who have traditionally been the defendants in *Bivens* suits.[5]

Contrary to the district court's conclusion, Padilla's claims fail the Supreme Court's two-part inquiry for evaluating whether an implied *Bivens* remedy is appropriate. At step one, a court cannot imply a *Bivens* remedy where "any alternative, existing process for protecting the [constitutional right] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. If no alternative process exists, at step two a court "'must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush*, 462 U.S. at 378).

Padilla's attempt to invoke a *Bivens* remedy falters at both steps. *First*, Congress has established "an alternative, existing process" for contesting policies related to the detention of enemy combatants: habeas corpus. That ancient writ

---

[5] For example, many of Padilla's claims are premised on the First Amendment, E.R. 244-45 ¶ 82, but the Supreme Court has previously "declined to extend *Bivens* to a claim sounding in the First Amendment," *Iqbal*, 129 S. Ct. at 1948 (citing *Bush*, 462 U.S. at 367). In dismissing purported *Bivens* claims on qualified-immunity grounds, the Supreme Court emphasized that its "reluctan[ce] to extend *Bivens* liability 'to any new context or new category of defendants' . . . might well have disposed of [the plaintiff's] First Amendment claim of religious discrimination." *Id.* (quoting *Malesko*, 534 U.S. at 68).

was established in the Constitution and by statute as the appropriate remedy to challenge allegedly unlawful detention. *Second*, this case overflows with "special factors" that preclude a judicially created remedy. Threatening Executive Branch lawyers with personal liability for reaching allegedly incorrect legal conclusions regarding the constitutionality of a President's wartime actions would infringe on the core war-making authority that the Constitution reserves to the political branches and would prove unworkable in practice. The district court's decision to imply such a novel and dangerous *Bivens* remedy should be reversed.

A. Congress Established Habeas Corpus As An Alternative Process For Challenging Unlawful Confinement.

Padilla's claims rest on his assertion that he was wrongfully detained as an enemy combatant. *See, e.g.*, E.R. 236 ¶¶ 43-44, 243 ¶¶ 76-77. Congress has provided "an alternative, existing process" (*Wilkie*, 551 U.S. at 550) for Padilla to challenge his designation as an enemy combatant: habeas corpus. Under long-established principles, the availability of habeas-corpus relief forecloses suit under even the *express* statutory remedy granted by 42 U.S.C. § 1983 for state prisoners seeking relief that would demonstrate the invalidity of their confinement. *A fortiori*, the availability of habeas corpus forecloses the creation of an *implied* cause of action that, if successful, would necessarily demonstrate that Padilla was improperly detained.

1. "[A] prisoner in state custody cannot use a [Section 1983] action to challenge 'the fact or duration of his confinement.'" *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). That is because "the language of the habeas statute is more specific" than Section 1983, and "the writ's history makes clear that it traditionally 'has been accepted as the specific instrument to obtain release from [unlawful] confinement.'" *Id.* at 79 (quoting *Preiser*, 411 U.S. at 486) (alteration in original). Neither may a prisoner invoke Section 1983 to invalidate his confinement "*indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Id.* at 81 (emphasis in original). For example, a Section 1983 claim that depends for its success on demonstrating that the plaintiff's confinement was unlawful is barred unless that confinement is first invalidated in a habeas proceeding. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

The *Preiser-Heck* doctrine also bars *Bivens* actions that would necessarily demonstrate the invalidity of a federal detention. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996); *see also, e.g., Lora-Pena v. FBI*, 529 F.3d 503, 505 n.2 (3d Cir. 2008) (*per curiam*); *Robinson v. Jones*, 142 F.3d 905, 906-07 (6th Cir. 1998) (*per curiam*); *Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir. 1996); *Abella v. Rubino*, 63 F.3d 1063, 1064-66 (11th Cir. 1995) (*per curiam*). This is unremarkable: Because the Supreme Court has interpreted the habeas statute to

preclude the express cause of action in Section 1983, surely it also bars a judicially created *Bivens* suit. *See Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (*Bivens* "is the federal analog to suits brought against state officials" under Section 1983). The habeas statute is therefore a classic illustration of *Bivens* step one: a congressional determination, through the specificity of habeas relief, that a judicially created remedy is foreclosed.

2. The *Preiser-Heck* doctrine applies equally to detained enemy combatants as it does to convicted federal prisoners. The courts of appeals have consistently applied *Preiser-Heck* to bar any challenge to federal confinement, regardless of whether the challenge would undermine a *criminal* conviction. *See Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1137 (9th Cir. 2005) (civil commitment); *see also, e.g., Cohen v. Clemens*, 321 F. App'x 739, 741-42 (10th Cir. 2009) (immigration detainment). Indeed, two of the Supreme Court's leading cases (including *Preiser* itself) concerned the loss of good-time credits by prisoners, which does not implicate the validity of a conviction. *See Edwards v. Balisok*, 520 U.S. 641, 644-48 (1997); *Preiser*, 411 U.S. at 487. Instead, the *Preiser-Heck* doctrine applies whenever the "more specific" habeas remedy could be used to challenge the confinement, *Wilkinson*, 544 U.S. at 79, and thus prevents any use of damages suits to "circumvent the more stringent requirements for habeas corpus," *Huftile*, 410 F.3d at 1139.

In this case, the *Preiser-Heck* doctrine bars most or all of Padilla's claims. Unquestionably, Padilla's claims of "unconstitutional military detention," "denial of the right to be free from unreasonable seizures," and denial of the "right not to be detained . . . without due process of law" (E.R. 245 ¶ 82(h)-(j)) could be adjudicated in a habeas proceeding. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2242-43 (2008) (habeas corpus is used "most frequently to ensure that the party's imprisonment or detention is not illegal"). These claims lie at the very core of habeas corpus. In addition, Padilla's challenges to the conditions of his confinement, such as unlawful interrogations, rest on the proposition that he was improperly detained as an enemy combatant. *See, e.g.*, E.R. 227 ¶ 4. Under *Heck*, any theories of liability that would necessarily invalidate his detention as an enemy combatant are barred.

The district court concluded, however, that habeas corpus does not bar Padilla's *Bivens* claims because "Padilla's habeas petition, regardless of its scope, would have been filed against the military commander in charge of the brig, not against the former Deputy Attorney General [*sic*] who allegedly scripted legal cover for the military rank and file." E.R. 15. That is clearly wrong. The district court's reasoning would require overruling decades of Supreme Court precedent barring *Bivens* claims against federal officials even if an alternative remedy did not lie against those particular defendants. *See, e.g.*, *Wilkie*, 551 U.S. at 552-54

(emphasizing the availability of suit against an agency under the Administrative Procedure Act in declining to create a *Bivens* remedy against individual federal officials); *Schweiker*, 487 U.S. at 424-25 (citing the availability of administrative remedies in declining to create a *Bivens* remedy against state and federal officials); *Bush*, 462 U.S. at 386-88 (citing civil-service remedies against NASA in declining to create a *Bivens* remedy against a NASA official). Indeed, because the proper respondent in a habeas suit is almost invariably a custodian (such as a warden), *Padilla V*, 542 U.S. at 434-36, the district court's reasoning would require overruling innumerable cases applying *Preiser-Heck* to suits against non-custodians, *see, e.g.*, *Edwards*, 520 U.S. at 643-44, 648-49 (prison-discipline hearing officer); *Heck*, 512 U.S. at 479 (prosecutors and police officer); *Huftile*, 410 F.3d at 1137-38 (prison psychologist).

3. It is no answer for Padilla to claim (incorrectly) that he can no longer bring a habeas petition. This Court has held that, "in certain limited cases, *Heck* does not bar a § 1983 claim if habeas relief is unavailable." *Huftile*, 410 F.3d at 1141 (citing *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002)).[6] The "limited" circumstances present in *Nonnette* are absent here. "*Nonnette*'s relief from *Heck*

[6] Although *Nonnette* is binding on this panel, Yoo believes it was incorrectly decided. *See, e.g.*, *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *see also Wilson v. Johnson*, 535 F.3d 262, 267 & nn.6-7 (4th Cir. 2008) ("[T]he circuits are split on this issue.").

'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters.'" *Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2006) (quoting *Nonnette*, 316 F.3d at 878 n.7). *Nonnette* does not apply where, as here, the plaintiff seeks to challenge the underlying detention. *Id.*

Moreover, *Nonnette*'s exception is justified, if at all, based on the express statutory command of Section 1983. *Cf. Heck*, 512 U.S. at 501 (Souter, J., concurring). No comparable justification exists for *implying* a *Bivens* remedy. To the contrary, this Court need not even decide whether the *Preiser-Heck* doctrine applies to *any particular plaintiff* to conclude that habeas constitutes an alternative congressional remedy for testing executive detention that makes it unnecessary to create a new judicial remedy. Instead, as the *en banc* D.C. Circuit recognized in an opinion joined by then-Judge Ginsburg, the "preclusive effect" of an alternative remedy "extends even to those claimants within the system for whom [it] provides 'no remedy whatsoever.'" *Spagnola v. Mathis*, 859 F.2d 223, 228-29 (D.C. Cir. 1988) (*en banc*) (quoting *Schweiker*, 487 U.S. at 423); *see also Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008).

In any event, even if released detainees were permitted to bring *Bivens* suits challenging their detention, that would not salvage Padilla's claims because he remains "in custody" within the meaning of the habeas statute. Padilla has alleged that he "continues to suffer deprivation of liberty . . . and other collateral effects

from the unlawful 'enemy combatant' designation, including the threat that he will once again be militarily detained." E.R. 243 ¶ 76. According to Padilla, on his transfer to civilian custody the government informed his counsel that "the 'enemy combatant' designation had not been rescinded and that the government could therefore militarily detain Mr. Padilla at any time based on his alleged past acts." *Id.* ¶ 77.

Given these allegations, Padilla satisfies the "in custody" requirement for two independent reasons. *First*, because of his criminal convictions, Padilla is quite literally in the custody of the federal government; his designation as an enemy combatant simply means that he might remain in prison even after his sentence. Padilla may challenge that future imprisonment now. *See Peyton v. Rowe*, 391 U.S. 54, 67 (1968) ("[A] prisoner serving consecutive sentences is 'in custody' under any one of them.").

Second, even if Padilla were not literally in the custody of the federal government, the government's unbounded discretion to detain him satisfies the "in custody" requirement. In *Hensley v. Municipal Court*, 411 U.S. 345 (1973), the Supreme Court held that a prisoner released on his own recognizance satisfied the "in custody" requirement. The prisoner's "freedom of movement," the Court explained, "rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice." *Id.* at 351; *see also Justices*

of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-01 (1984) (pretrial detainee); *Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (parolee). This Court has similarly held that "an individual who, though not in physical custody, [is] subject to a final order of deportation" satisfies the "in custody" requirement. *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001) (citing *Williams v. INS*, 795 F.2d 738, 744-45 (9th Cir. 1986)).

Like a prisoner released on his own recognizance or an immigrant subject to immediate deportation, Padilla's designation as an enemy combatant subjects him to imprisonment at the discretion of the federal government. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality). Because Padilla therefore satisfies the "in custody" requirement for a habeas petition, his *Bivens* claims challenging the basis for his detention are barred by the habeas statute.

B. "Special Factors" Disfavor The Creation Of A New Damages Remedy Against Government Lawyers For Legal Advice Given To The President On National Security.

The district court also erred in its "special factors" analysis under step two of *Bivens*. It held that, in order to find such factors, there must exist "an alternate scheme" that provides "an avenue for redress for the claimant." E.R. 18. The district court declined to "find that special factors counsel hesitation where there is no authority evidencing a remedial scheme for designation or treatment of an American citizen residing in America as an enemy combatant." E.R. 21.

This reasoning contravenes *Stanley*'s holding that "it is *irrelevant* to a 'special factors' analysis whether the laws currently on the books afford [the plaintiff] an 'adequate' federal remedy for his injuries." 483 U.S. at 683 (emphasis added). "The 'special facto[r]' that 'counsel[s] hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion . . . by the judiciary is inappropriate." *Id.* (alterations in original).

Although courts have held that the existence of a comprehensive remedial scheme constitutes a "special facto[r]," that is by no means the *only* circumstance in which a *Bivens* remedy must be denied. To the contrary, the "threshold" for the "special factors" analysis—"that a factor 'counsels hesitation'—is remarkably low" and satisfied "whenever thoughtful discretion would pause even to consider." *Arar*, 2009 WL 3522887, at *10 (quoting *Stanley*, 483 U.S. at 683-84). In this case, "special factors" far more than "counse[l] hesitation"—they preclude a *Bivens* remedy.

First, a remedy against government lawyers who advise policymakers about the constitutionality of proposed policies would effect an unworkable and dangerous expansion of *Bivens* liability. The judgment about whether to create such liability should rest with the political branches. *Second*, imposing liability on lawyers who counsel the President about the legality of his national-security

policies would disrupt an area of policymaking that the Constitution commits to the political branches. The judiciary has quite properly been reluctant to encroach on this authority.

1. Creating A *Bivens* Action For Legal Advice That A Court Later Determines Is Incorrect Would Effect A Vast And Unworkable Expansion of *Bivens* Liability.

Padilla seeks to hold a government lawyer liable for failing to provide a "fair and impartial evaluation of the law" and "fair legal analysis to guide the Executive's decision-making." E.R. 232-33 ¶¶ 22-23. The amended complaint alleges that other government officials, relying on the legal advice in OLC's memoranda, engaged in activities that caused Padilla's injuries. E.R. 236-43 ¶¶ 45-75. Padilla does not allege (nor could he) that Yoo had any authority beyond issuing legal opinions evaluating policies that other government officials implemented.

"*Bivens* has never been approved as a . . . vehicle for challenging government policies." *Arar*, 2009 WL 3522887, at *16. Instead, "[a] suit seeking a damages remedy against senior officials who implement [challenged] polic[ies] is in critical respects a suit against the government as to which the government has not waived sovereign immunity." *Id.* at *11. The *en banc* Second Circuit has emphasized that such a suit is impermissible because it "unavoidably influences government policy, probes government secrets, invades government interests,

enmeshes government lawyers, and thereby elicits government funds for settlement." *Id.*

The purported *Bivens* claims at issue here are even more clearly impermissible than those rejected in *Arar*. Yoo merely gave legal advice to *others* (including the President) about proposed policies. There is no support for expanding *Bivens* liability beyond immediate government actors, and beyond even high-level policymakers, to those who *counsel* the policymakers on the legality of proposed policies.

Unlike the few *Bivens* actions that the Supreme Court has permitted, where "the line between constitutional and unconstitutional conduct" was "easy to identify," *Arar*, 2009 WL 3522887, at *16, claims that a government lawyer provided "unfair" legal advice present no standard to guide judicial decision-making. The Supreme Court has warned against precisely this sort of open-ended claim that a government official went "too far" in doing his job. In *Wilkie*, the Court declined to extend *Bivens* liability to claims that government officials "overreached" by illegally pressuring a landowner to grant an easement. According to the Court, extending *Bivens* to that context "would invite claims in every sphere of legitimate governmental action affecting property interests," and "across this enormous swath of potential litigation would hover the difficulty of devising a 'too much' standard that could guide an employee's conduct and a

judicial factfinder's conclusion." 551 U.S. at 561. "The point," the Court said, "is not to deny that Government employees sometimes overreach," but rather "the reasonable fear that a general *Bivens* cure would be worse than the disease." *Id.*

As in *Wilkie*, Padilla seeks to impose liability on a government official for going "too far"—for issuing legal opinions that, in Padilla's view, were too aggressive in interpreting the law. The underlying legal questions addressed in Yoo's memoranda are difficult enough; answering *meta*-questions about whether Yoo's analysis was so unreasonable that it demonstrates an intent to violate Padilla's rights is virtually impossible.

Before the district court, Padilla downplayed these workability problems by citing a handful of decisions, none involving a *Bivens* suit, in which courts have permitted plaintiffs to go forward with claims against government lawyers for providing intentionally incorrect legal advice. In those cases, such as this Court's decision in *Donovan v. Reinbold*, the evidence of intentional misconduct was straightforward—for example, instructing a police officer to ignore an administrative order, *see* 433 F.2d 738, 744-45 (9th Cir. 1970). Even ignoring that these scattered decisions do not address whether to *create* a cause of action, they say nothing about the workability of suits against government lawyers in general, especially where (as here) the sole or primary evidence of wrongdoing is that the defendant reached allegedly erroneous conclusions on unsettled questions of law.

Allowing such claims against government lawyers involved in high-level military and national-security issues will open the floodgates to politically motivated lawsuits. If Padilla may pursue this *Bivens* suit against a subordinate OLC attorney, then surely the same reasoning would permit suits against the more senior officials who evaluated or implemented his detention, including the head of OLC, the Attorney General, the Secretary of Defense, the White House Counsel, and the President himself. For that matter, the district court's reasoning would appear to permit a *Bivens* action against the Justice Department lawyers who defended Padilla's detention in court. Padilla seems content to use the federal courts as a forum for airing policy disagreements by pursuing $1 damages suits against every official he can hale into court. Congress, however, has not authorized such an impermissible "onslaught of *Bivens* actions." *Wilkie*, 551 U.S. at 562.

2. Holding Professor Yoo Personally Liable Would Chill Executive Branch Attorneys From Offering Candid Legal Advice To The President On Issues Of National Security And Foreign Policy.

This case also threatens to disrupt the political branches' constitutional role in war-making and foreign policy. "The Supreme Court has expressly counseled that matters touching upon foreign policy and national security fall within 'an area of executive action in which courts have long been *hesitant* to intrude' absent congressional authorization." *Arar*, 2009 WL 3522887, at *12 (quoting *Lincoln v.*

Vigil, 508 U.S. 182, 192 (1993)) (emphasis in original); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988) (same). That hesitation is especially warranted here: If Executive Branch lawyers are threatened with personal liability should their legal analysis turn out to be incorrect, they will be reluctant to provide candid guidance on politically controversial issues. For that reason, too, the Constitution's textual commitment of war and foreign policy to the political branches counsels against the creation of a *Bivens* remedy.[7]

The "special factors" analysis rests on the bedrock constitutional principle of the separation of powers. *See Malesko*, 534 U.S. at 69; *Stanley*, 483 U.S. at 669. That is because the question whether to create a new *Bivens* action turns not on

---

[7] A related inquiry is "the degree of disruption" the *Bivens* remedy will cause to the affairs of a coordinate branch. *Stanley*, 483 U.S. at 682. As in *Stanley*, any *Bivens* remedy premised on the allegedly wrongful classification of Padilla as an enemy combatant will countenance "judicial inquiry into, and hence intrusion upon, military matters." *Id.* Padilla's claims rest upon his assertion that the "intelligence reports" containing statements by "confidential sources detained and interrogated outside of the United States" were inadequate to justify his detention. E.R. 236 ¶ 42. Proceeding with this lawsuit will unquestionably require discovery of those confidential reports, which "risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs." *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007). Protecting the intelligence under seal is no solution: Not only does that "still entail considerable risk," *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005), "[t]he preference for open rather than clandestine court proceedings" is itself a "special factor that counsels hesitation in extending *Bivens*," *Arar*, 2009 WL 3522887, at *14.

"the merits of the particular remedy" but rather "who should decide whether such a remedy should be provided." *Bush*, 462 U.S. at 380.

When the Constitution *explicitly* devotes an area of lawmaking to a coordinate branch, the judiciary has no license to create a *Bivens* remedy. In *Stanley*, for instance, the Supreme Court held that it could not imply a *Bivens* remedy for activities "incident" to military service because "we are confronted with an explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces,' U.S. Const. art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages," 483 U.S. at 681-82 (emphasis and alteration in original). The areas of lawmaking to which the Constitution directly speaks are thus "exempt from *Bivens*." *Id.* at 682 & n.6; *see also Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

"[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Article I grants Congress the powers "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make Rules for the Government and Regulation of the land and naval Forces," and "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel

Invasions." U.S. Const. art. I., § 8, cls. 11-15. Article II makes the President "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States," and grants him the "Power, by and with the Advice and Consent of the Senate, to make Treaties." *Id.* art. II, § 2, cls. 1-2. Accordingly, the Supreme Court has acknowledged the wide deference owed to the political branches in war-making, even where express statutory or constitutional remedies are at issue. *See Boumediene*, 128 S. Ct. at 2277 ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."); *see also, e.g.*, *Lichter v. United States*, 334 U.S. 742, 782 (1948).

As the *Hamdi* plurality recognized, "the capture, detention, and trial of unlawful combatants" is, "by 'universal agreement and practice,'" an "'important inciden[t] of war.'" 542 U.S. at 518; *see also Padilla VII*, 423 F.3d at 392 ("[T]he President is authorized by the AUMF to detain Padilla as a fundamental incident to the conduct of war."). The Constitution's textual commitment of war-making authority to the political branches therefore counsels judicial hesitation in augmenting the remedies provided by Congress to those whom the President determines are enemies. *See Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) ("[t]he danger of obstructing U.S. national security policy is [a special] factor" counseling hesitation in creating a new *Bivens* remedy); *see also Sanchez-*

Espinoza v. Reagan, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (Scalia, J., joined by Ginsburg, J.).

The district court dismissed the separation-of-powers ramifications of its decision by quoting *Hamdi*'s statement that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." E.R. 2 (quoting 542 U.S. at 536). But the Supreme Court made that statement in the context of habeas corpus—a remedy guaranteed by the Constitution and statute—not in creating an entirely new damages remedy. "Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them." *Arar*, 2009 WL 3522887, at *11. In any event, the district court's reasoning proves too much: A proposed *Bivens* remedy *always* concerns "individual liberties," since it is an individual damages remedy for the violation of a constitutional right. The Supreme Court's repeated holdings that courts must take into account the separation of powers when deciding whether to extend *Bivens* foreclose the district court's approach in this case.

II. Professor Yoo Is Entitled To Qualified Immunity.

The district court erred in denying Yoo's motion to dismiss on the basis of qualified immunity. It labeled as "clearly established," during Yoo's government service from 2001 through 2003, rights that have been the subject of the last decade's most fluid and unpredictable area of constitutional law. As then-Judge Mukasey noted with respect to Padilla's first habeas petition, "it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't." *Padilla I*, 233 F. Supp. 2d at 607. The district court compounded its error by holding Yoo personally responsible for the policy decisions and actions of other government officials, notwithstanding the Supreme Court's recent reiteration that "each Government official . . . is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949.

The doctrine of qualified immunity protects public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). As a result, a government official's assertion of qualified immunity can be overcome only if the plaintiff meets the burden of showing: (1) "the officer's conduct violated a constitutional right," and (2) "the

right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Padilla has not carried his burden on either prong.[8]

A. Professor Yoo Was Not Personally Responsible For Any Alleged Violation Of Padilla's Rights.

In *Iqbal*, the Supreme Court rejected *Bivens* claims brought by an individual detained in the aftermath of the September 11 attacks who had sued a former Attorney General and Director of the Federal Bureau of Investigation ("FBI") for the harsh conditions of confinement he faced. The Supreme Court emphasized that, "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution." 129 S. Ct. at 1948 (emphasis added). This inquiry "must be individualized and focus on the duties and responsibilities of each individual defendant." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Padilla's claims fail this inquiry because he has not adequately alleged that Yoo was personally responsible for any of the purported constitutional violations.

---

[8] The Supreme Court held in *Pearson v. Callahan* that courts should "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S. Ct. 808, 818 (2009).

The amended complaint hints that Yoo was involved in "formulating unlawful policies" regarding enemy combatants, E.R. 227 ¶ 3, and alleges that Yoo was a "key member" of the "War Council," a group of executive officials that "met regularly 'to develop policy in the war on terrorism,'" E.R. 229 ¶ 15 (quoting John Yoo, *War By Other Means* 30 (2006)). It is unclear whether Padilla believes that Yoo himself—rather than the President or other senior executive officials—made any particular policy decision that Padilla claims was unlawful, but in any event the amended complaint contains no "specific, nonconclusory factual allegations" to that effect. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). To the contrary, Yoo's alleged participation in a "War Council" is perfectly consistent with lawful behavior, and such "factually neutral" allegations are insufficient to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007).[9]

The district court permitted Padilla's claims to proceed based on allegations that memoranda authored by Yoo "set in motion" Padilla's detention and

---

[9] Even if the district court's decision on *qualified* immunity could be affirmed based on Yoo's alleged policymaking, the suit would then be subject to dismissal based on *absolute* immunity: Allegations that Yoo played a critical policymaking role in the President's decisions on sensitive national-security issues would state the paradigmatic case for presidential-advisor absolute immunity. *See Harlow*, 457 U.S. at 812 ("For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.").

conditions of confinement. E.R. 227 ¶ 3, *quoted in* E.R. 34. But Padilla's own theory is that Yoo provided legal justifications for policy decisions that had "already been reached" (E.R. 233-34 ¶ 30) by other government officials over whom Yoo had no control: Padilla alleges that Yoo prepared a series of legal memoranda designed "to justify illegal policy choices that he knew had already been made." E.R. 232-33 ¶ 23. Padilla claims, for instance, that Yoo attempted to "justify the Executive's already concluded policy decision to employ unlawfully harsh interrogation tactics." E.R. 233 ¶ 27; *see also id.* ¶ 29 (alleging that Yoo "justif[ied] the Executive's already concluded policy decision"). These allegations rebut any suggestion that Yoo himself "set in motion" the policy decisions that Padilla challenges.

1. Yoo Was Not Personally Responsible For The Decision To Detain Padilla As An Enemy Combatant.

The district court erroneously concluded that OLC's memoranda make Yoo personally responsible for Padilla's designation as an enemy combatant. That decision was made by the President (not Yoo) under the authority granted to him (not Yoo) by the AUMF and the Constitution. *See* E.R. 506. According to Padilla's own exhibits, Yoo's alleged involvement was attenuated and subject to the discretion and oversight of many independent actors. It involved neither the gathering of intelligence to support the enemy-combatant designation nor the ultimate decision whether to detain Padilla in view of that intelligence.

Padilla alleges that Yoo "personally 'reviewed the material on Padilla to determine whether he could qualify, legally, as an enemy combatant, and issued an opinion to that effect.'" E.R. 235 ¶ 39 (quoting *War By Other Means*). That memorandum concluded only that Padilla is "properly considered an enemy combatant" based on "the facts provided to us." E.R. 217. This legal opinion was *upheld* by the Fourth Circuit. *Padilla VII*, 423 F.3d at 391.

Even ignoring that ultimate authority rested at all times with the President, Padilla has not provided any "specific, nonconclusory factual allegations," *Crawford-El*, 523 U.S. at 598, that Yoo's legal opinion "set in motion" (E.R. 227 ¶ 3) the President's designation of Padilla as an enemy combatant. Yoo's legal analyses were only one component of "a thorough—indeed, painstaking—mechanism to ensure multiple layers of scrutiny before even proposing any action to the President." E.R. 503. Those multiple layers included: (1) development and compilation of intelligence about the suspected enemy combatant; (2) evaluation by the Department of Defense, Central Intelligence Agency, and Department of Justice about whether to prosecute criminally or detain militarily; (3) tentative advice from OLC based on oral briefings; (4) written assessment and recommendation by the Director of Central Intelligence; (5) written assessment and recommendation by the Secretary of Defense; (6) memorandum from the Criminal Division of the Department of Justice assessing all available information

from the FBI and other sources; (7) written legal opinion from OLC evaluating whether, based on the intelligence provided to it, the suspect satisfies the legal standard for enemy-combatant status; (8) written assessment and recommendation from the Attorney General to the Secretary of Defense; (9) written recommendation from the Secretary of Defense to the President;[10] (10) written recommendation by the White House Counsel's Office; and (11) ultimate decision by the President to designate the enemy combatant and take him into military custody. E.R. 503-04. Thus, far from "set[ting]" Padilla's designation as an enemy combatant "in motion," E.R. 227 ¶ 3, Yoo was at most one of the "multiple layers of scrutiny" (E.R. 503) that occurred before the President's decision.

2. Yoo Was Not Personally Responsible For The Alleged Conditions Of Padilla's Confinement.

The amended complaint also falls short of alleging that Yoo was personally responsible for the conditions of Padilla's confinement. Only one of the memoranda that Padilla cites addressed the treatment of enemy combatants detained in the United States, *see* E.R. 231 ¶ 19(f), and it purportedly concerned

---

[10] The Secretary of Defense's recommendation was accompanied by a package of materials containing the Central Intelligence Agency's assessment and recommendation, the Secretary of Defense's initial assessment, the Department of Defense's intelligence information, the Attorney General's legal assessment and recommendation, the Criminal Division's memorandum, and the OLC opinion. E.R. 504.

only one aspect of Padilla's detention: Padilla claims that it "authorized" the "restrictions imposed on [his] access to counsel," E.R. 240 ¶ 60. It is unclear precisely what this purported memorandum concluded about Padilla's access to counsel; his allegations are made only "[u]pon information and belief," E.R. 231 ¶ 19(f), 240 ¶ 60. But even if the memorandum had concluded that enemy combatants could be denied access to counsel without violating any constitutional rights—the correct legal conclusion under the circumstances, *see infra* Part II.B.1—Yoo would not be personally responsible for the Department of Defense's decision to prohibit Padilla from consulting with counsel. The decision whether to permit access to counsel was made by the Deputy Secretary of Defense after consultation with the Central Intelligence Agency, FBI, and the White House. E.R. 504-05.

Each of the remaining memoranda about conditions of confinement and interrogation addressed the rights of persons detained *outside* the United States. *See, e.g.*, E.R. 247-487. These memoranda do not address the alleged rights of an enemy combatant like Padilla—a citizen held within the United States.

The amended complaint speculates that "[it] was foreseeable that the illegal interrogation policies would be applied" to Padilla because he was detained by the "same military authority that controlled Guantanamo." E.R. 238-39 ¶ 53. This allegation is irreconcilable with the fact that the memoranda, by their terms, apply

only to detainees captured abroad—a limitation that would have been unnecessary if Yoo intended to give legal advice covering *all* enemy combatants. Indeed, the reasoning of the memoranda rests in critical part on the fact that the detainees at issue were held abroad. *See* E.R. 330-31 (reasoning that "the Fifth Amendment does not confer rights upon aliens outside the sovereign territory of the United States"); E.R. 406 ("conclud[ing] that the Fifth and Eighth Amendments . . . do not extend to alien enemy combatants held abroad"). Even if Department of Defense officials *in fact* ignored these limitations—and there is no reason to believe they did—it is not remotely "plausible" (*Twombly*, 550 U.S. at 555) that Yoo intended his legal opinions to be applied beyond their express limitations to the treatment of an American citizen captured and detained on American soil.

Ruling out "vicarious liability" in a *Bivens* action, the Supreme Court emphasized in *Iqbal* that "each Government official . . . is only liable for his or her own misconduct." 129 S. Ct. at 1949. And if a supervisor like the Attorney General is not liable for his subordinates' independent actions, as *Iqbal* holds, it is even less appropriate to hold a subordinate like Yoo liable for the independent actions of other officials with final policymaking authority.

B. Padilla's Alleged Rights Were Not Clearly Established.

The district court introduced its opinion by misstating the proper inquiry for a qualified immunity claim. "This lawsuit," it declared, "poses the question

addressed by our founding fathers about how to strike the proper balance" between fighting a war and protecting civil liberties. E.R. 1-2. The issue here is not what the "proper balance" *should* be, but whether that delicate legal balance was "clearly established" when Yoo was serving in government.

During Yoo's government service from 2001 to 2003, the rights of a citizen enemy combatant were anything but "clearly established." To the contrary, there was "no well traveled road delineating the respective constitutional powers and limitations in this regard." *Padilla IV*, 352 F.3d at 727 (Wesley, J., dissenting in relevant part). The controlling authority during Yoo's time at OLC was the unanimous decision in *Ex Parte Quirin*, 317 U.S. 1 (1942), which had strongly suggested that even citizen enemy combatants captured on American soil possessed few, if any, of the rights accorded to non-combatants. Yoo left the government one year *before* a fractured Supreme Court attempted to answer—in 90 pages and nearly 30,000 words—whether any specific rights might still be open to American citizens designated as enemy combatants. Yet even the Supreme Court could not produce a majority opinion on this issue: *Hamdi* splintered the Justices and produced four divergent opinions that leave much of the law unclear.

Indeed, when Padilla first made many of the arguments he now repeats, the Southern District of New York acknowledged that "there is substantial ground for difference of opinion" on (among other things) whether the President had authority

to designate Padilla as an enemy combatant and detain him indefinitely, and whether Padilla had a right to present facts challenging his designation as an enemy combatant. *Padilla III*, 256 F. Supp. 2d at 223. Padilla's habeas petitions were heard by four district and circuit courts, which variously decided that his detention was lawful, then unlawful, then unlawful, and then lawful. *Compare Padilla I*, 233 F. Supp. 2d at 564 (lawful), *with Padilla IV*, 352 F.3d at 695 (unlawful), *with Padilla VI*, 389 F. Supp. 2d at 678 (unlawful), *with Padilla VII*, 423 F.3d at 386 (lawful). It was unclear even which court could consider Padilla's petition, until the Supreme Court ruled—over a four-Justice dissent—that Padilla had filed in the wrong court. *Padilla V*, 542 U.S. at 426. The law governing Padilla's claims has been, at best, unsettled; to the extent Padilla has alleged any constitutional violations, the rights he asserts were anything but "clearly established" when Yoo worked in OLC between 2001 and 2003.

1. Denial Of Access To Counsel.

Padilla claims he was deprived of the "right of access to legal counsel protected by the First, Fifth, and Sixth Amendments to the U.S. Constitution," E.R. 244 ¶ 82(a), because he was denied access to counsel during the first half of his military detention, E.R. 240 ¶ 56. When he raised a similar argument in his first habeas petition, however, the Southern District of New York rejected it. *Padilla I*, 233 F. Supp. 2d at 600.

As *Padilla I* recognized, violation of the implied Fifth Amendment right to counsel "'occurs only at trial.'" 233 F. Supp. 2d at 601 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). "That is of no help to Padilla," the court concluded, because he "does not face the prospect of a trial." *Id.* This rejection of Padilla's Fifth Amendment claim makes clear, at a minimum, that the right was not clearly established.

Similarly, the Sixth Amendment grants the right of counsel to the "accused" in a "criminal proceeding." "[T]he Sixth Amendment does not speak to Padilla's situation," *Padilla I* concluded, because "there is no 'criminal proceeding' in which Padilla is detained." 233 F. Supp. 2d at 600. At the very least, Padilla's alleged Sixth Amendment right was not clearly established.

Finally, "[t]he First Amendment's applicability in the area of lawyer-client relations is not well-defined." *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005). While this Court has "recogniz[ed] that—at least as a general matter—the 'right to hire and consult an attorney'" is protected by the First Amendment, *id.* (quoting *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000)), there is no reason to believe that the First Amendment guarantees enemy combatants unfettered access to counsel. To the contrary, one of the primary purposes of military detention is to "restrict the detainee's communication with confederates," *Padilla VII*, 423 F.3d at 395, including by using counsel as an

unwitting—or witting, *see United States v. Sattar*, 395 F. Supp. 2d 79 (S.D.N.Y. 2005)—intermediary to send messages to others. The government likewise has a pressing interest in obtaining information through interrogation that might help avert future terrorist attacks. "Though common sense suffices" to show that "counsel would often destroy the intelligence gathering function," *Hamdi*, 542 U.S. at 598 (Thomas, J., dissenting), the government provided a sworn declaration in connection with Padilla's first habeas petition that "[p]ermitting Padilla any access to counsel may substantially harm our national security interests" by undermining the interrogation process, *Padilla II*, 243 F. Supp. 2d at 50. For either of these reasons, the denial of access to counsel did not violate Padilla's First Amendment rights. Even if Padilla were correct that depriving an enemy combatant of access to counsel violates the First Amendment, however, such a right was not clearly established between 2001 and 2003.

2. Denial Of Access To Court.

Padilla claims that he was deprived of his "right of access to court" under various constitutional provisions. E.R. 244 ¶ 82(b). None of the memoranda at issue addressed whether Padilla or any other enemy combatant would have access to court. But even if they had, it was not clearly established during Yoo's government service that an enemy combatant has a right of access to the civilian court system.

A year *after* Yoo left OLC, the *Hamdi* plurality concluded based on an *ad hoc* balancing inquiry that an enemy combatant must have a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533 (invoking *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Constitutional tests that "involv[e] the balancing of competing interests" are "so fact dependent that the 'law' can rarely be considered 'clearly established.'" *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986); *see also DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (same). Justice Thomas's dissent in *Hamdi* illustrates precisely how indeterminate the *Eldridge* balancing test is in this context: "[I]f applied correctly," he believed that test "would probably lead to the result I have reached," namely that "due process requires nothing more than a good-faith executive determination" that "need not and should not be subjected to judicial second-guessing." 542 U.S. at 590, 592, 594 (Thomas, J., dissenting). And even the *Hamdi* plurality acknowledged that its standard might be satisfied "by an appropriately authorized and properly constituted military tribunal." *Id.* at 538. Thus, it was unclear even after Yoo left OLC whether and to what extent enemy combatants have a right of access to court.

Moreover, Padilla has not specified any claim that he was unable to bring as a result of the alleged violation—a requirement even in the context of civilian prisoners. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996); *see also*, *e.g.*,

Christopher v. Harbury, 536 U.S. 403, 415 (2002) (noting that the plaintiff in a denial-of-access-to-courts claim must plead "official acts frustrating the [underlying] litigation"). The only past claim mentioned in the amended complaint is a habeas petition, *see* E.R. 240 ¶ 59, which was filed *two days* after Padilla was taken into military custody. After receiving access to counsel, Padilla lost his challenge to the President's detention authority, *see Padilla VII*, and ultimately was convicted of supporting terrorism, *see supra* at 9.[11]

3. Unconstitutional Conditions Of Confinement And Unconstitutional Interrogations.

Padilla claims that he was subjected to "illegal conditions of confinement and treatment" and "coercive and involuntary illegal interrogations" in violation of the Fifth and Eighth Amendments. E.R. 244 ¶ 82(c)-(d). The Eighth Amendment prohibition on cruel and unusual punishment is inapplicable, or at the very least its

---

[11] To the extent Padilla suggests he was denied the opportunity to contest the factual basis for his designation as an enemy combatant, *cf.* E.R. 236 ¶ 43, he is incorrect. Padilla did not obtain a factual hearing on the basis for his detention for two reasons: (1) he filed his initial habeas petition in the wrong jurisdiction, *see Padilla V*, and (2) once he filed in the proper jurisdiction, he made a strategic decision to litigate the legal issue whether the President had authority to detain him, and only afterwards to address the factual basis for his detention, *see* D.E. 30, No. 2:04-cv-2221 (D.S.C.); *see also infra* at 59-60. In any event, it was not clearly established from 2001 to 2003 that a court could entertain a factual challenge to an enemy-combatant designation. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004); *Hamdi*, 542 U.S. at 585 (Thomas, J., dissenting) ("[W]e lack the information and expertise to question whether Hamdi is actually an enemy combatant.").

application was not clearly established from 2001 to 2003, because Padilla's treatment in military detention was not a "punishmen[t]" (U.S. Const. amend. VIII) stemming from a criminal conviction. *See Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."). The district court believed, however, that "although Padilla's claim must be analyzed under the Due Process provision of the [Fifth] Amendment and not pursuant to the Eighth Amendment, the [Eighth] Amendment sets the bar below which the treatment of detainees should not fall." E.R. 36; *see also* E.R. 78.

The district court relied heavily on *Oregon Advocacy Center v. Mink*, which held that the Eighth Amendment provides a "'minimum standard of care'" for pretrial detainees because "the due process rights of pretrial detainees are 'at least as great as the Eighth Amendment protections available to a convicted prisoner.'" 322 F.3d 1101, 1120 (9th Cir. 2003) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)); *see also Hydrick v. Hunter*, 500 F.3d 978, 989 (9th Cir. 2007) (holding that "the rights afforded [convicted] prisoners set a floor for those that must be afforded" to civilly committed sexual predators). The district court's reasoning is flatly inconsistent with *Hamdi*, where a plurality of the Supreme Court concluded that citizens detained militarily are *not* entitled to the minimum rights

possessed by citizens in non-military detention. Instead, the rights of citizen enemy combatants "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi*, 542 U.S. at 533. If nothing else, *Hamdi* demonstrates that it is not clearly established even today—let alone between 2001 and 2003—that the Eighth Amendment rules applicable to ordinary prisoners "se[t] the bar below which the treatment of [enemy combatants] should not fall," E.R. 36.

Even in the ordinary prison context, substantive due process rights under the Fifth Amendment are violated only by executive action that "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1988). "Conduct intended to injure in some way *unjustifiable by any government interest* is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849 (emphasis added). That is not the case here: If Padilla was interrogated, it was because he "possesses intelligence, including intelligence about the personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States." E.R. 506. Whether or not Padilla's treatment would have amounted to a constitutional violation in the criminal context, it is not clearly established even today—let alone from 2001

through 2003—that harsh interrogation techniques are unconstitutional when they are applied to enemy combatants for the purpose of averting a terrorist attack.

4. Denial Of Freedom Of Religion.

Padilla claims he was deprived of his right to free exercise of religion under the First Amendment and RFRA. E.R. 244-45 ¶ 82(e). Even in the context of ordinary criminal imprisonment, the standard for a "substantial burden" on the exercise of religion is context-sensitive, and courts are rightly deferential to the government. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-49 (1987). For example, the Supreme Court rejected free-exercise claims when prison regulations prevented Muslim prisoners from attending a weekly service "commanded by the Koran." *Id.* at 345. The Court "reaffirm[ed] [its] refusal, even where claims are made under the First Amendment, to 'substitute [its] own judgment on . . . difficult and sensitive matters of institutional administration,' for the determinations of those charged with the formidable task of running a prison." *Id.* at 353 (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)). It is even less appropriate in the context of enemy combatants for a court to substitute its judgment for that of the Executive. At a minimum, whatever rights an enemy combatant may have under the First Amendment or RFRA were not (and are not) clearly established.

With respect to Padilla's RFRA claim in particular, dismissal is also warranted because that statute does not authorize damages suits against a

government official in his individual capacity. RFRA provides that "[a] person whose religious exercise has been burdened . . . may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief against a government*." 42 U.S.C. § 2000bb-1(c) (emphasis added). The phrase "appropriate relief against a government" would be an odd way for Congress to indicate that individual employees must pay money judgments from their personal assets.

The district court held otherwise because RFRA defines "government" in part as an "official (or other person acting under color of law)." E.R. 41 (quoting 42 U.S.C. § 2000bb-2(1)). This construes the definition so broadly that it impermissibly reads the term "government" out of the statute. *See Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 171-72 (2001) (rejecting the argument that, in defining "navigable waters" as "waters of the United States," Congress intended to "rea[d] the term 'navigable waters' out of the statute"). Instead, the phrase "official (or other person acting under color of law)" simply indicates that such government officers—like agencies—can be sued in their official capacities. That interpretation makes perfect sense in the context of a statute authorizing "appropriate relief against a government," 42 U.S.C. § 2000bb-1(c), because an official-capacity suit is in effect against the government itself, *see*

Hafer v. Melo, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

5. Denial Of The Right To Information And Association.

Padilla claims he was deprived of his "right to information" and "right to association" under the First Amendment, E.R. 245 ¶ 82(f)-(g), and his mother claims she was deprived of the "rights to association and communication" under the First and Fifth Amendments, *id.* ¶ 83. Yet before the district court, they could not cite even a single precedent granting *any* sort of prisoner a constitutional right to receive visitors. And even if ordinary prisoners had such a right, it would be manifestly inappropriate for enemy combatants detained while military operations continue. One of the primary purposes for military detention is to "prevent the captured individual from serving the enemy." *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Thus, as the Fourth Circuit recognized, the authority to detain *incommunicado* is inherent in the President's authority to detain an enemy combatant. *Padilla VII*, 423 F.3d at 395 (approving the use of military detention to "restrict the detainee's communication with confederates"). Yet even if the Fourth Circuit was mistaken on this issue in 2005, it was hardly clear from 2001 through 2003 that detained enemy combatants had the constitutional rights Padilla invokes.

6. Unconstitutional Military Detention, Denial Of The Right To Be Free From Unreasonable Seizures, And Denial Of Due Process.

Finally, Padilla claims that Yoo violated his "right to be free from military detention" under various constitutional provisions, E.R. 245 ¶ 82(h); his Fourth Amendment "right to be free from unreasonable seizures," *id.* ¶ 82(i); and his Fifth Amendment "right not to be detained or subjected to the collateral effects of designation as an 'enemy combatant' without due process of law," *id.* ¶ 82(j). Contrary to Padilla's claims, the Supreme Court has confirmed that even citizens may be militarily detained as enemy combatants.

At the time Yoo served in government, "the most apposite precedent" (*Hamdi*, 542 U.S. at 523) had unanimously upheld the military trial and *execution* of enemy combatants captured on American soil, even though one of the defendants claimed to be an American citizen. The Supreme Court emphasized that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Quirin*, 317 U.S. at 37. Thus, even if the Supreme Court had not later spoken to the precise issue Padilla now raises, *Quirin* would foreclose any argument that it was "clearly established" in 2001 that citizens could not be detained as enemy combatants.

The Supreme Court did, however, address the issue. Relying heavily on *Quirin*, the *Hamdi* plurality concluded that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." 542 U.S. at 519. Justice Thomas provided a fifth vote for this position, "agree[ing] with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants." *Id.* at 589 (Thomas, J., dissenting). Thus, as the Fourth Circuit recognized in rejecting Padilla's habeas petition, the President possesses authority to designate citizens like Padilla as enemy combatants and detain them in military custody "as a fundamental incident to the conduct of war." *Padilla VII*, 423 F.3d at 391-92. These decisions confirm that the President's decision to detain Padilla as an enemy combatant was perfectly consistent with, not contrary to, "clearly established" law.[12]

Padilla asserts that he "is not an 'enemy combatant.'" E.R. 236 ¶ 43. At the time of Yoo's actions, however, the Supreme Court had held that "the Government may detain individuals whom the Government *believes to be* dangerous." *United*

---

[12] These decisions also distinguish this case from *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), which denied qualified immunity for misuse of the material witness statute. Whereas the government's use of the material witness statute in that case had been *disapproved* as "illegitimate" in a high-profile federal court opinion months before al-Kidd's arrest, *see id.* at 972, the President's conclusion that he had authority to detain citizen enemy combatants was expressly *approved* by the Supreme Court—both before and after Padilla's capture.

States v. Salerno, 481 U.S. 739, 748 (1987) (emphasis added). Justice Thomas invoked this rule in *Hamdi*, concluding that the President may "unilaterally decide to detain an individual if the Executive deems this necessary for the public safety *even if he is mistaken*." 542 U.S. at 590 (Thomas, J., dissenting) (emphasis in original). Thus, even if Padilla were correct, it was not clearly established that this would render unconstitutional the President's decision to detain him.

In any event, this Court need not accept Padilla's legal conclusion. *See Iqbal*, 129 S. Ct. at 1949-50. The amended complaint does not challenge *any* of the specific facts that led the President to determine that Padilla is an enemy combatant, *see* E.R. 506. Based on these facts, the Fourth Circuit concluded that "Padilla *unquestionably* qualifies as an 'enemy combatant' as that term was defined for purposes of the controlling opinion in *Hamdi*." *Padilla VII*, 423 F.3d at 392 (emphasis added).

Indeed, Padilla's own legal maneuvers in his second habeas petition belie any assertion that his non-combatant status was "clearly established." Padilla challenged the President's legal authority to detain him, but strategically elected to postpone any challenge to the factual basis for that detention—even after the district court advised his attorneys that "if your client really is not an enemy combatant . . . and you challenge it straight up, then he may be out much sooner." Jan. 29, 2009 Hr'g Tr. 65, No. 2:07-cv-410 (D.S.C.) (discussing the habeas

proceedings); *see also* D.E. 30, No. 2:04-cv-2221 (D.S.C.) (reflecting that Padilla endorsed the strategic judgment notwithstanding this advice). Thus, as the District of South Carolina recognized in considering Padilla's *Bivens* action against other federal officials: "If it were so clearly established" that Padilla was not an enemy combatant, then "it should have been raised in 2002. . . . [A]t least you didn't see [this point as] so clearly established back when you were trying to get him out of jail in 2002." Jan. 29, 2009 Hr'g Tr. 69, No. 2:07-cv-410 (D.S.C.). Padilla's strategic decision may well have been justified—after all, a federal jury applying a higher standard of proof found him guilty of terrorism, *see supra* at 9—but it suggests that even Padilla did not believe he was innocent.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

/s/ Miguel A. Estrada

November 9, 2009

Miguel A. Estrada
Counsel of Record
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 530-4238

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,998 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

STATEMENT OF RELATED CASES

Appellant John Yoo is aware of no related cases pending before this Court.

/s/ Miguel A. Estrada
Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated: November 9, 2009

ADDENDUM OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8 of the United States Constitution provides in relevant part:

> The Congress shall have Power * * *
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 9, Clause 2 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article II, Section 2, Clauses 1 and 2 of the United States Constitution provide:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article III, Section 2, Clause 3 of the United States Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Article III, Section 3, Clause 1 of the United States Constitution provides:

> The Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 3 of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1, provides:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Section 5(1) of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-2(1), provides in relevant part:

> As used in this chapter—
>
> (1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . .

The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), provides:

> Joint Resolution
>
> To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.
>
> Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
>
> Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and
>
> Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2009, an electronic copy of the foregoing Brief for Appellant was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following registered CM/ECF participants:

Natalie L. Bridgeman, Esq.
Jonathan Freiman, Esq.
Tahlia Townsend, Esq.
Counsel for Appellees Jose Padilla and Estela Lebron

/s/ Miguel A. Estrada
Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036