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

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BRIEF FOR DISTINGUISHED PROFESSORS OF CONSTITUTIONAL AND FEDERAL COURTS LAW AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 7

I. THE DISTRICT COURT CORRECTLY CONSTRUED AND APPLIED THE "SPECIAL FACTORS" STANDARD IN HOLDING THAT PADILLA STATED A VIABLE *BIVENS* CLAIM. 7

A. THE DISTRICT COURT CONSIDERED THE "SPECIAL FACTORS" OF CONGRESSIONAL AUTHORIZATION, WAR POWERS, NATIONAL SECURITY, AND FOREIGN POLICY AND CORRECTLY CONCLUDED THAT THESE FACTORS DID NOT PRECLUDE A CLAIM. 8

B. THE DISTRICT COURT FOLLOWED ESTABLISHED PRECEDENT IN CONSIDERING THE ABSENCE OF AN ALTERNATIVE REMEDY AS PART OF THE "SPECIAL FACTORS" ANALYSIS. 9

II. CONGRESS HAS EVINCED ITS INTENTION NOT TO PRECLUDE A *BIVENS* ACTION BROUGHT BY A U.S. CITIZEN SEIZED ON U.S. SOIL AND DESIGNATED AS AN "ENEMY COMBATANT." 12

A. IN RATIFYING THE CONVENTION AGAINST TORTURE, CONGRESS SPECIFICALLY ELECTED NOT TO ENTER A RESERVATION TO THE OBLIGATION TO CREATE A REMEDY FOR TORTURE WITHIN U.S. TERRITORY. 13

III. "SPECIAL FACTORS" DO NOT CREATE A *PER SE* RULE REQUIRING JUDICIAL DEFERENCE IN CASES THAT SOMEHOW INVOLVE NATIONAL SECURITY. 18

A. THE "SPECIAL FACTORS" STANDARD DOES NOT PRECLUDE A REMEDY IN CASES INVOLVING WAR POWERS OR NATIONAL SECURITY, WITHOUT MORE. 20

B. THE HOLDING IN *ARAR V. ASHCROFT* SHOULD NOT GUIDE THIS COURT IN DECIDING WHETHER A U.S. CITIZEN DEPRIVED OF FUNDAMENTAL CONSTITUTIONAL RIGHTS IS ENTITLED TO A *BIVENS* REMEDY. 29

CONCLUSION 28

LIST OF AMICI 34

TABLE OF AUTHORITIES

Arar v. Ashcroft, 585 F.3d 559 (2009)…….5, 25-27

Bell v. Hood, 327 U.S. 678 (1946)…….……...…2

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)……...*passim*

Boumediene v. Bush, 128 S. Ct. 2229 (2008)…….17,22

Boyd v. United States, 116 U.S. 616 (1886)……..7

Carlson v. Green, 446 U.S. 14 (1980)……...10, 16

Chappell v. Wallace, 462 U.S. 296, 302 (1983)……12, 26

Davis v. Passman, 442 U.S. 228 (1979)……..2, 10

Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006)……..22

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)……..……6, 22

Hope v. Pelzer, 536 U.S. 730, 738 (2002)……..…….24

Keenan v. Hall, 83 F.3d 1083, 1090-91 (9th Cir. 1990)…..……...…..24

Martinez v. City of Oxnard, 337 F.3d 1091, 1092 (9th Cir. 2003)……...…24

McCarthy v. Madigan, 503 U.S. 140 (1992)……..…….16

Munsell v. Dep't of Agric., 509 F.3d 572 (D.C. Cir. 2007)……....16

Rasul v. Bush, 542 U.S. 446 (2004)……...…….22

United States v. Stanley, 483 U.S. 669, 680 (1987)……...…...12, 21, 23, 26

Wilkie v. Robbins, 551 U.S. 537 (2007)……7-8, 11, 24-25

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)…….22

Statutes

18 U.S.C. § 2340……..……...14

10 U.S.C. §801 note…….....17

28 U.S.C. §2241……...…17

28 U.S.C. §2679……..16

Treaties

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 UN GAOR Supp. No. 51, UN Doc A/39/51 (1984), *U.S. Ratification* (1994)..……..13

Congressional and Other Government Reports

Initial Report of the United States of America to the Committee Against Torture, UN Doc. CAT/C/28/Add.5, at ¶ 269 (February 9, 2000)……...15

Reservations, Declarations, and Understandings to the Convention Against Torture, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990)……13-14

Senate Report No. 103-107……14-15

STATEMENT OF INTEREST

Amici are distinguished professors and practitioners with a professional expertise in constitutional law and federal jurisdiction.[1] Their interest in this case is in further elucidating the law concerning the "special factors" standard. *Amici* urge affirmance of the district court's well-reasoned opinion that "special factors" do not preclude the court from recognizing a *Bivens* cause of action in the case of a U.S. citizen tortured on U.S. soil by U.S. officials. *Amici curiae* have no personal, financial, or other professional interest, and take no position respecting any other issue raised in the case below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case – involving allegations that U.S. officials arbitrarily detained and tortured a U.S. citizen on U.S. soil – falls squarely within the purview of the *Bivens* doctrine, the fundamental purpose of which is to protect the constitutional rights of individuals against abuse by government officials. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971Resting upon the longstanding judicial tenet that "where federally protected rights had been invaded,

[1] Names and affiliations of *amici curiae* are listed in the Appendix. Affiliations are given for the purpose of identification only. All parties consented to the filing of this brief.

it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," *Bivens*, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). At its core, *Bivens* is a vehicle to provide a remedy for a government official's violation of individual constitutional rights, so that those rights do not "become merely precatory." *Davis v. Passman*, 442 U.S. 228 (1979).

Yoo and the United States as *amicus curiae* argue that the district court misconstrued and misapplied the "special factors" test required in any *Bivens* case. When the Supreme Court first recognized a remedy directly under the Constitution, it did so where "no special factors counsel[ed] hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. "Special factors" is essentially a prudential doctrine that, under appropriate circumstances, counsels judicial deference to the legislative branch with respect to fashioning constitutional damage remedies. Yoo and the United States argue that the district court erred by distinguishing precedents that considered the existence of an alternative remedial scheme; by implying a *Bivens* action without explicit Congressional authorization; and by not finding special factors to preclude a *Bivens* cause of action in a case purportedly implicating war powers and matters of national security. *See* Brief for Appellant, at 28, 33-36; Brief for United States as *Amicus Curiae*, at 10-12.

Amici urge affirmance of the district court's manifestly correct analysis and ruling. *See* 633 F. Supp.2d 1005 (N.D. Cal. 2009)("Opinion"). The granting of a *Bivens* remedy to a U.S. citizen subject to torture and abuse in U.S. custody was entirely consistent with prior precedent with respect to special factors. Yoo and the Executive would have the courts abdicate their essential role in protecting against the infringement of constitutional rights based only on the talismanic invocation of national security. But national security or war powers cannot be used as a shield to protect the sanctioning of the torture of a U.S. citizen on U.S. soil, and it is the essential role of the judicial branch to prevent the 'war on terror" from becoming the blank check for official torture that Yoo and the United States seek.

Yoo and the United States also suggest that the district court's consideration of the availability of alternative remedial schemes was erroneous. Quite the contrary. *First*, in all of the "special factors" cases the Supreme Court has decided, the Court has considered as part of the analysis whether an alternate remedy existed to address the constitutional injury that the complainant had allegedly suffered, or whether Congress, in creating such an alternate remedy, had implicitly or explicitly foreclosed a damages remedy.

Second, the "special factors" analysis has never required courts to wait for specific Congressional authorization before creating a damages remedy. "Special

factors" is not an empty vessel into which the United States can pour anything which it deems "sensitive" or "specialized." As a general matter, Congress recognized *Bivens* actions when it defined limits on absolute immunity for government officials in the Westfall Act. Moreover, in the context of torture, Congressional intent points strongly to the creation of a *Bivens* remedy. Congress ratified the Convention Against Torture in 1994 with the understanding that the United States would be obligated under international law to provide a damages remedy for acts of torture committed on U.S. territory. Congress understood and intended that obligation to be met by *Bivens*. To find otherwise would require this Court to view Congress as having engaged in self-contradictory action -- approving a treaty requiring civil remedies but then failing to provide a remedy while implicitly rejecting one already existing and available. Finally, in specifically legislating rules for the treatment and legal rights of "alien enemy combatants," Congress understood that a *Bivens* remedy was being preserved for citizens.

Third, the district court correctly noted that "special factors counseling hesitation" "relate not to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). Yoo and the United States, in essence, urge the Court to adopt a *per se* rule, akin to what the Court adopted in the cases dealing with the

internal disciplinary structure of the military – namely, that any and all matters touching on national security necessarily preclude a judicially-created damages remedy and that all power in the area should vest in an all powerful, unreviewable executive. Such a proposition runs directly counter to the Supreme Court's post-9/11 national security cases setting limits on executive powers in the context of the "war on terrorism." Furthermore, this Court is not being asked to rule on the general question of whether a *Bivens* remedy is appropriate in *any* case in *any* place brought by *any* plaintiff touching on *any* aspect of national security. It need only decide the quite limited question of whether such a remedy should be available for the torture of a U.S. citizen in U.S. custody on U.S. soil. The Second Circuit's *en banc* ruling in *Arar v. Ashcroft*, 585 F.3d 559 (2009), provides no guidance to this Court, basing its holding on the *ipse dixit* that a *Bivens* action is barred whenever "such an action would have a natural tendency to affect diplomacy, foreign policy, and the national security of the nation," *id.* at 574. *Arar* is not only wrongly decided, it is inapplicable given that Padilla, unlike Arar, is a U.S. citizen and his torture occurred in the United States, not in a foreign country

The "special factors" analysis was born out of judicial scruple that the bedrock structural principle of separation of powers reserves "law-making" to the legislative branch. It is that same concern with separation of powers that should guide this Court in addressing Padilla's claim. The unilateral authority of each

branch has well-established limits. The Judiciary may not rule on issues of law in the absence of a concrete case or controversy. Absent valid delegation, the Executive may not declare a rule of law. And, Congress may not participate in the enforcement of the laws it has enacted. Judicial deference has never been absolute and the district court correctly held that "all three branches of government have a role when individual liberties are at stake." Opinion, at 1026 (paraphrasing *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004)(finding that "the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government"). The separation of powers principle underlying judicial deference to the legislative branch in *Bivens* cases does not counsel hesitation in a case involving unilateral law-making on the part of the Executive in creating the standards for both the designation of U.S. citizens as enemy combatants and their treatment while in custody. The "special factors" doctrine is not, and was never meant to be, a doctrine for the courts to turn a blind eye to Executive misconduct. The Executive is not free to torture U.S. citizens on U.S. soil and deprive them of their constitutional rights by invoking the black box of national security.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONSTRUED AND APPLIED THE "SPECIAL FACTORS" STANDARD IN HOLDING THAT PADILLA STATED A VIABLE *BIVENS* CLAIM.

The federal courts' competence to provide damage remedies for violations of individual constitutional rights arises from their common law powers in conjunction with general federal question jurisdiction provided by 28 U.S.C. § 1331, *Bivens*, 403 U.S. at 396, and therefore flows from the same sources that give rise to the "*presumed availability* of federal equitable relief against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring) (emphasis added).[2] Thus, the dismissal of a *Bivens* action is appropriate only in certain, limited circumstances and involves the court in a two-step analysis. First, it must be determined whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)(citing *Bush*, 462 U.S. at 378); and

[2] Justice Harlan further noted that judicial review of constitutional damages actions was especially appropriate given the Court's role as ultimate protector of the Bill of Rights. *Bivens*, 403 U.S. at 407 (Harlan, J., concurring); *see also Boyd v. United States*, 116 U.S. 616, 635 (1886 ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

second, if not, "'the federal courts 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.* at 550 (quoting *Bush*, 462 U.S. at 378).

Yoo and the United States argue that the district court erred under "step-two" of *Bivens* by putatively holding that to find "special factors" precluding a remedy, "there *must* exist 'an alternative scheme' that proves 'an avenue for redress for the claimant.'" Brief for Appellant, at 28 (emphasis added).[3] That is not what the district court found. The district court correctly found that there was no alternative scheme, but it did not make the existence of such a scheme a precondition for finding special factors.

A. THE DISTRICT COURT CONSIDERED THE "SPECIAL FACTORS" OF CONGRESSIONAL AUTHORIZATION, WAR POWERS, NATIONAL SECURITY, AND FOREIGN POLICY AND CORRECTLY CONCLUDED THAT THESE FACTORS DID NOT PRECLUDE A CLAIM.

When the district court concluded that "special factors" do not counsel hesitation "where [as here] there is no authority evidencing a remedial scheme for

[3] The United States makes a similar argument. Brief of the United States as *Amicus Curiae*, at 10 ("In permitting the *Bivens* claims in this case, the district court erroneously focused on whether there would be an alternative remedy or remedial scheme that precluded the *Bivens* claims here.")

the designation or treatment of an American citizen residing in America as an enemy combatant," Opinion, at 1025, that was far from the end of its analysis. The district court in no way implied that the lack of a comprehensive remedial scheme is "the *only* circumstance in which a *Bivens* remedy must be denied," as Yoo suggests. Brief for Appellant, at 29 (emphasis added). The district court went on to consider numerous "special factors" raised by Yoo – examining in turn arguments that such factors counseled hesitation i) because Padilla's detention was authorized by Congress in the Authorization for the Use of Military Force, ii) because courts should defer to the Executive in wartime, iii) because creating a *Bivens* remedy would require courts to look into state secrets, and lastly iv) because Padilla's allegations involve foreign policy. Opinion, at 1026-1030. The district court simply and correctly reasoned that these purported factors did not preclude a *Bivens* remedy in the case of torture of a United States citizen.

B. THE DISTRICT COURT FOLLOWED ESTABLISHED PRECEDENT IN CONSIDERING THE ABSENCE OF AN ALTERNATIVE REMEDY AS PART OF THE "SPECIAL FACTORS" ANALYSIS.

Even if a *Bivens* remedy is "not an automatic entitlement," *Wilkie*, 551 U.S. at 550, the lack of an adequate alternate remedy must be considered as part of the analysis. As the district court correctly noted, every Supreme Court precedent significantly discussing "special factors" has considered whether alternative

remedial schemes exist, often as *part of* the special factors analysis. And, as the district court also correctly reasoned, the core of the "special factors" standard relates not to the "merits of the particular remedy sought" but to the "question of who should decide whether such a remedy should be provided." *Bush*, 462 U.S. at 380. When Congress creates a remedy but does not make manifest an intention to supplant a *Bivens* remedy, the required analysis includes the consideration of alternative remedial schemes. *See id.* at 378 ("When Congress provides an alternative remedy, it may…indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts 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").

Consideration of the Supreme Court's "special factors" precedents shows that the two prongs of the Bivens analysis are not as clearly distinct as Yoo and the United States assert. Indeed, the consideration of an alternative remedial scheme was initially articulated as part of a "special factors" analysis in *Bivens* itself ; *see also Davis v. Passman*, 442 U.S. at 247-48. In *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), a case against federal prison officials, the Court first bifurcated the considerations and articulated a two-step test that required a clear statement from

Congress that an alternative remedial scheme was intended to preclude a *Bivens* remedy. In *Bush v. Lucas*, the Court redefined the "special factors" standard as the balancing test recently reaffirmed in *Wilkie*. In *Bush*, the Court maintained a distinction between considering the alternative remedies and the special factors" analysis, but the entirety of its reasoning shows that the "special factor" on which it based its decision not to recognize a remedy in the absence of explicit authorization from Congress was the existence of "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." 462 U.S. at 380-391. In *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988), the Court folded the alternative remedial scheme prong back into the "special factors" test, dropping the requirement of a clear statement from Congress and defining "special factors" to "include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." Although *Wilkie* did not involve a comprehensive scheme already created by Congress, the Court considered the remedies available to the plaintiff in reaching its conclusion that "any damages remedy for actions of Government employees who push too hard to the Government's benefit may come better if at all through legislation." *Wilkie*, 551 U.S. at 562.[4]

[4] *See* also 551 U.S. at 554 ("…the competing arguments boil down to one on a side: from [plaintiff], the inadequacy of discrete, incident-by-incident remedies .

The military cases relied upon by Yoo are not to the contrary. In both cases, the gravamen of the Court's "special factors" decision was the exercise by Congress of its plenary authority over the military in establishing "a comprehensive internal system of justice to regulate military life" that did not include the right of damages actions against superior officers. *Chappell v. Wallace*, 462 U.S. 296, 302, 304 (1983); *see also United States v. Stanley*, 483 U.S. 669, 680, 683-84 (1987).[5]

II. CONGRESS HAS EVINCED ITS INTENTION NOT TO PRECLUDE A *BIVENS* ACTION BROUGHT BY A U.S. CITIZEN SEIZED ON U.S. SOIL AND DESIGNATED AS AN "ENEMY COMBATANT."

In support of Yoo, the United States further argues that the courts should abstain from creating a *Bivens* action in Padilla's circumstances because such an action in this context requires explicit Congressional authorization. Brief of the United States as *Amicus Curiae*, at 4.

Amici respectfully submit that Congress has manifestly indicated its intention that a *Bivens* action be available for claims in torture. The U.S. government has represented to the Committee Against Torture that a *Bivens* remedy is available for

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."); and 551 U.S. at 562 ("Robbins had ready at hand a wide variety of administrative and judicial remedies to redress his injuries…").

[5] In *Chappell*, enlisted men brought a race discrimination suit against their superior officers. *Stanley* extended *Chappell*'s holding to any act "incident to service" so as to bring the *Bivens* doctrine in line with the *Feres* doctrine announced in the Federal Tort Claims Act line of cases.

torture occurring within the territory of the United States. Congress ratified the Convention Against Torture (CAT) with the understanding that the United States was obligating itself under international law to provide a remedy for victims of torture. If the allegations of mistreatment that Padilla has made meet the applicable definition of torture in the CAT, he is entitled to a remedy and Congress has clearly evinced its intention that *Bivens* should be available to provide it.

A. IN RATIFYING THE CONVENTION AGAINST TORTURE, CONGRESS SPECIFICALLY ELECTED NOT TO ENTER A RESERVATION TO THE OBLIGATION TO CREATE A REMEDY FOR TORTURE WITHIN U.S. TERRITORY.

Yoo's argument that special factors preclude the court from fashioning a *Bivens* action for torture of a U.S. citizen on U.S. soil by U.S. officials flies in the face of express treaty obligations requiring the U.S. to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." Convention Against Torture, Art. 14, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 198, UN Doc. A/39/51 (1984); 1465 UNTS 85. In ratifying the CAT in 1994, the U.S. deposited *Reservations, Understandings, and Declarations to the Torture Convention* with the United Nations, in which it stated its understanding that the obligation entailed by Article 14 required the U.S. to "provide a private right of action for damages *only for acts of torture committed in territory under [its] jurisdiction*" (italics added), Cong.

Rec. S17486-01 (daily ed., Oct. 27, 1990). This understanding, limiting the Article 14 obligation to torture committed in territories under its jurisdiction, left the obligation to provide a right to compensation *untouched* as to causes of action arising out of torture on U.S. soil. Congress passed only limited implementing legislation, most dealing with extraterritorial obligations, when the CAT was ratified, since Congress largely regarded existing federal law adequate to meet the treaty obligations with respect to U.S. territory. *See* S. Rep. No. 103-107, at 59, *as reprinted in* 1994 U.S.C.C.A.N. 302, 366 ("…acts of torture committed within the United States…[would] be covered by existing applicable federal and state statutes"); *see also*18 U.S.C. §2340 ("federal torture statute")(prohibiting torture occurring outside of the United States). The legislative history of the federal torture statute leaves no doubt that Congress entered a reservation *only* to the extraterritorial obligations created by Article 14.

> Section 2340B[6] makes it clear that the new federal provision on torture is intended to supplement existing state law and not to supplant it. Consistent with the Senate's understanding pertaining to article 14 of the Convention, the legislation does not create any private

[6] 28 U.S.C. §2340(B) makes explicit Congress's intention that §2340 not create private rights of action for torture occurring outside of the United States. ("Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.")

> right of action for acts of torture committed outside the territory of the United States.

S. Rep. No. 103-107, at 59, 1994 U.S.C.C.A.N. at 366. In its First Report to the Committee on Torture, the United States Department of State described what federal law would meet the Article 14 obligations:

> At the federal level, the principal avenues are administrative tort claims and civil litigation. Existing United States law establishes private rights of action for damages in several forms. Such suits could take the form of a common law tort action for assault, battery or wrongful death, a civil action for violations of federally protected civil rights, *or a suit based on federal constitutional torts*. Under the Equal Access to Justice Act, 28 U.S.C. § 2412, a federal court may award costs and reasonable attorney's fees and expenses to a plaintiff who prevails in a suit based on a for (sic) violation of his or her civil rights.

Initial Report of the United States of America to the Committee Against Torture, UN Doc. CAT/C/28/Add.5, at ¶ 269 (February 9, 2000) (emphasis added). The *Bivens* remedy sought here is the only one of those enumerated in the State Department Report to the Committee Against Torture available to Padilla.

B. CONGRESS HAS CONSISTENTLY LEGISLATED WITH THE PRESUMPTION *BIVENS* WOULD BE AVAILABLE TO U.S. CITIZENS IN PADILLA'S CIRCUMSTANCES.

Since 1971, Congress has legislated based upon the recognition of the Supreme Court's *Bivens* jurisprudence. Congress first ratified the *Bivens* doctrine in 1974 when, as the Supreme Court noted, it amended the Federal Tort Claims Act (FTCA) to provide for claims based on law enforcement torts and elected to

preserve the individual *Bivens* remedy. *Carlson*, 446 U.S. at 20. In 1988, in response to the invitation by the Supreme Court to legislate on the subject of immunity for government officials, Congress responded with the Westfall Act, creating a comprehensive scheme to define the contours of the absolute immunity doctrine. The Westfall Act intentionally and specifically preserved a *Bivens* right of action for constitutional torts.[7] Congress acts when necessary to adjust the Supreme Court's *Bivens* jurisprudence, as when it overruled *McCarthy v. Madigan*, 503 U.S. 140 (1992), by statute, so no general presumption against a *Bivens* action should be inferred. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 590-91 (D.C.

[7] The Westfall Act makes a case against the United States the "exclusive remedy" in a civil action in tort against a federal official, except that the exclusiveness of this remedy "does not extend or apply to a civil action against an employee of the Government-- (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. §2679(b)(2)(A) and (B). Not only does the plain language of the statute indicate Congress's intent to preserve *Bivens* but the legislative history makes that intent explicit. The House Report on the Westfall Act explains that "the exclusive remedy [created by the Westfall Act] expressly does not extend to so-called constitutional torts." H.R. Rep. No. 100-700 at 5, as *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949 (citing *Bivens*, 403 U.S. 388). The House Report emphasized the distinction "between common law torts and constitutional or Bivens torts." *Id.* "A constitutional tort action…is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in Bivens…the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. *Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights*"(emphasis added). *Id.* at 5950.

Cir. 2007) (noting in dictum that the Eighth Circuit's presumption against *Bivens* is at odds with the *Wilkie* weighing test).

Congress has also specifically preserved *Bivens* in contemplating the possible detention of U.S. citizens as "enemy combatants." In 2005, in providing for uniform standards for interrogation of persons held by the Department of Defense, Congress specifically stated that "[n]othing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody…of the United States." National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §1402, 119 Stat. 3136 (codified at 10 U.S.C. §801 note (2006)). Further, in attempting to strip federal courts of jurisdiction to hear habeas or other actions by individuals held as "enemy combatants," an attempt declared unconstitutional by the Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Congress limited the stripping of jurisdiction to *aliens* in U.S. custody. Military Commissions Act of 2006, Pub. L. No. 109-366, §7(a), 120 Stat. 2600, 2636 (codified at 28 U.S.C. §2241(e)(1) (2006)(stripping federal courts of jurisdiction "to hear or consider an application for a writ of habeas corpus filed by or on behalf of an *alien* detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.")(emphasis added). Congress knows how to define

categories and it specifically limited the (later invalidated) restriction of jurisdiction to aliens. Padilla is a citizen.

III. "SPECIAL FACTORS" DO NOT CREATE A *PER SE* RULE REQUIRING JUDICIAL DEFERENCE IN CASES THAT SOMEHOW INVOLVE NATIONAL SECURITY.

Yoo and the United States ask this Court to stay its hand in fashioning a remedy for a U.S. citizen designated as an "enemy combatant" because such a suit would allegedly threaten the "decision-making" in the areas of war powers and national security. Brief for Appellant, at 21 ("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.")[8] At the core of Yoo's argument is his inability to distinguish discretionary decision-making from unlawful conduct. Discretionary decision-making is broad, but it is not unlimited and, quite simply, it does not encompass the sanctioning of torture. Yoo fails to explain why sanctioning the torture of a citizen implicates national security or foreign policy. In any event, separation of powers does not require a *per se* rule

[8] *See also* Brief for Appellant at 29-30 ("…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.")

that permits torture because a government official argues that national security or war powers are involved.

The United States echoes this argument in arguing that a *Bivens* action in this context requires Congressional authorization, while additionally, and disingenuously, suggesting that Padilla's suit challenges the President's authority to detain him.[9] This Padilla does not do. He challenges the lawfulness of his own designation as enemy combatant and the deprivations of his constitutional rights consequent upon that designation. Both Yoo and the United States wrongly argue that the "special factors" standard requires judicial deference merely because a case somehow "implicates" areas that have political or policy implications. Tellingly, neither Yoo nor the United States point to *specific* errors in the district court's analysis of the special factors of national security, war powers, and foreign relations or why allowing a remedy in these circumstances would have a tangible impact on national security, war powers or foreign relations. None of these important areas of policymaking allows for a warrant for torture. That is what the judicial branch must tell the Executive in this case.

[9] The United States reads *Wilkie* as premised on the doctrine of constitutional avoidance. However, assuming it is adequately pleaded, a *Bivens* action requires a court, at the motion to dismiss stage, to assume that a constitutional right has been infringed.

A. THE "SPECIAL FACTORS" STANDARD DOES NOT PRECLUDE A REMEDY IN CASES INVOLVING WAR POWERS OR NATIONAL SECURITY, WITHOUT MORE.

Yoo borrows language from the First Amendment context in suggesting that Padilla's action might "chill" future Justice Department lawyers, Brief for Appellant, at 33, and the United States worries about the "large shadow" the case would cast over "matters of military discretion," Brief of United States as *Amicus Curiae*, at 16;[10] but neither suggests specific reasons why the district court was wrong in concluding that any peripheral war powers or national security concerns raised by the case could be dealt through standard judicial case management.[11] The invocation of national security is a mere assertion, not an argument. Yoo cites no Supreme Court case holding that the mere bearing of a case on national security or war-making concerns amounts to a "special factor" precluding a *Bivens* remedy.

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[10] Though Yoo nominally includes the "national security" and "foreign relations" powers of "the political branches" among his grounds for appeal, he does not press those arguments, perhaps because the declassification of the documents mentioned in Padilla's complaint renders them practically moot. The United States argues that national security and war powers preclude a *Bivens* remedy at greater length, Brief of United States as *Amicus Curiae*, at 11, 14; but the argument remains conclusory. The United States notes only that "a court would have to inquire into what the conditions of Padilla's military confinement were and as to what interrogation techniques were used against him." Just so. If the Executive has violated Padilla's constitutional rights by torturing him, it is the role of the courts to uphold individual liberties and provide redress.

[11] Yet the United States does not address the district court's conclusion that detention of an alleged "enemy combatant" for purposes other than preventing return to the battlefield does not go to the "core strategic warmaking power." Brief for United States as *Amicus Curiae*, at 25.

Nor could he, because none exists. *United States v. Stanley* is his sole authority and it pertains only to the internal disciplinary system of the military. It does not stand for the general rule, as Yoo argues, that when the Constitution "*explicitly* devotes an area of law-making to a coordinate branch, the Judiciary has no license to create a *Bivens* remedy." Brief for Appellant, at 35. In fact, *Stanley* disavows that very construction of its holding.[12] *Stanley*'s reasoning rested on both a specific (and unique) grant of power in the Constitution[13] and Congress's exercise of that power to create a comprehensive remedial scheme. As the district court correctly noted, here there is no "remedial scheme for designation or treatment of an American citizen residing in America" as an enemy combatant. Opinion, at 1025.

Padilla concedes the President has the power to designate U.S. citizens as "enemy combatants." He simply asserts he should have a remedy to challenge that classification. Four times since 9/11, the Supreme Court has rejected the argument that courts should stand back and let the Executive Branch create a secret and judicially-unreviewable program of executive detention and torture inconsistent

[12] The phrase "exempt from *Bivens*" is taken from the Majority's characterization of the dissent's characterization of the Majority's position. *Stanley*, 483 U.S. at 682. "*This is not to say*, as Justice Brennan's dissent characterizes it…that all matters within congressional power are exempt from *Bivens*." *Id.* .

[13] Constitutional provisions related to the power to make rules governing the military are found in Article I, §8, cls. 11-15.

with both domestic and international law. Because "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," "[i]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Hamdi v. Rumsfeld*, 542 U.S. at 535 (plurality opinion). To the contrary, "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Boumediene v. Bush*, 128 S.Ct. at 2277; *see also Rasul v. Bush*, 542 U.S. 446 (2004) (finding that "there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated"); *Hamdan v. Rumsfeld,* 126 S.Ct. 2749, 2775 n.23 (2006) (finding that separation of powers bars Executive from unilaterally abrogating minimum requirements of Uniform Code of Military Justice in trying foreign alleged enemy combatants).

Since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), it has been clear that the Constitution endows the judiciary with the power and obligation to review and enjoin unconstitutional executive action involving national security or foreign affairs. There is thus no reason to conclude that the judiciary does not have the power to award the less intrusive remedy of damages in this context.

Where, as here, there is no alternative means of remedying fundamental constitutional violations, and there is no evidence of Congressional intent to foreclose judicial redress for those rights, any foreign affairs or national security concerns—and neither Yoo nor the United States have articulated such concerns in other than conclusory fashion-- must be weighed against *Bivens'* originating principle that constitutional rights not become "merely precatory." *Davis*, 442 U.S. at 242.

Furthermore, to the extent that these arguments regarding national security are specifically aimed at protecting executive functions, they do not speak to the separation of powers concerns underlying the "special factors" standard – namely, deference to the law-making powers of the legislature. The United States cites a long line of cases, admittedly "outside the context of implied *Bivens* actions," implicating a variety of political and military decisions, such as granting military assistance to Israel, firing missiles during NATO training exercises, mining and bombing North Vietnamese harbors and territories, bombing Cambodia, recommending a coup of a foreign leader, and determining which foreign assets are friendly and which are not. Brief for United States as *Amicus Curiae*, at 11-13. But like Yoo, the United States's argument fundamentally relies on *Stanley*,

distinguished *supra*.[14] In the area of national security, neither the Constitution's text nor Supreme Court precedent support a *per se* rule presumptively foreclosing judicial review of executive decisions. And notwithstanding that Congress has a variety of enumerated powers relating to foreign affairs generally – see, e.g., Art. III, §8, cls. 3, 10, 11 --there is no enumerated right to strip U.S. citizens of their constitutional rights on the unilateral say-so of the Executive.

Finally, Yoo and the United States seek to recast Padilla's suit as a policy disagreement. Policy disputes, by their nature, involve differences of opinion over two lawful or arguably lawful courses of action. If the acts alleged here had been carried out against a citizen not designated as an "enemy combatant," their illegality would not be in question. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 738 (2002)(punitive chaining unconstitutional); *Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1990), *partially amended and reh'g denied*, 135 F.3d 1318 (1998)(noise and constant illumination unconstitutional); *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003), *cert. denied*, 542 U.S. 953 (2004)(coercive interrogation unconstitutional). Yoo and the United States press *Wilkie* as an apposite case on the theory that this case, like *Wilkie*, involves government officials going "too far." But this case is fundamentally different. *Wilkie* involved

[14] The other cases are distinguished ably in Padilla's brief.

a plaintiff land-owner harassed by government pressure to grant an easement that the government, through its own negligence, had failed to record when it was granted by the previous owner. The legitimacy of the government's ends in that case—to obtain the previously unrecorded easement right—as well as most of the means were not seriously in question. *Wilkie*, 551 U.S. at 557. Not so here, where both the ends and the means would be manifestly illegal but for Padilla's designation as an "enemy combatant."

B. THE HOLDING IN *ARAR V. ASHCROFT* SHOULD NOT GUIDE THIS COURT IN DECIDING WHETHER A U.S. CITIZEN DEPRIVED OF FUNDAMENTAL CONSTITUTIONAL RIGHTS IS ENTITLED TO A *BIVENS* REMEDY.

In adjudicating the separation of powers issues raised by this case, *Amici* urge this Court not to accept Yoo's invitation to look to *Arar v. Ashcroft* for guidance. In *Arar*, the Court of Appeals incorrectly described the "special factors" standard as "remarkably low" – "at the opposite end of the continuum from the unflagging duty to exercise jurisdiction," *Arar*, 585 F.3d at 574, and as requiring that no "countervailing factors" be taken into account, *id.* at 573-574. This overstates the braking function of the "special factors" doctrine to the point of error, as non-justiciability would logically be at the opposite end of the continuum from unflagging duty, and it altogether ignores the balancing test announced in *Bush* and *Wilkie* . In construing the "special factors" standard, the Second Circuit

particularly relied on two Supreme Court cases, *Chappell* and *Stanley*, dealing with an area of law (the governance of the military) specifically delegated to Congress by the Constitution; and wrongly concluded, without discussion, that "hesitation" is counseled "whenever thoughtful discretion would pause to consider." *Arar*, 585 F.3d at 574. Yoo states that the *Arar* court was "quoting *Stanley*," in describing the "special factors" threshold as "remarkably low," thereby suggesting that this statement of the law comes directly from the Supreme Court, Brief for Appellant, at 29, but this is simply wrong. *Stanley* nowhere states that the "special factors" standard is "remarkably low." Indeed, if anything, *Stanley* stands for the opposite proposition – that "special factors" will not be found unless the Constitution specifically grants authority in a particular field of governance to Congress and Congress acts decisively to exercise that authority. 462 U.S. at 304. In light of the common-law balancing required of courts by *Wilkie v. Robbins* and *Bush v. Lucas*, the Second Circuit's refusal to take "account…of countervailing factors " constitutes an error of law.[15]

The *Arar* Court's application of this erroneous statement of law is equally flawed. Its discussion of putative "special factors" is reflexively deferential to the

[15] Judge Pooler tried to save the Majority by characterizing its construal of the "special factors" standard as dicta, but the Majority specifically rejected that characterization. *Arar*, 585 F.3d at 574 ("They are integral to the holding in this *in banc* case, because we do not take account of countervailing factors and because we apply the standard we announce.")

Executive branch and largely ignores the tools courts have at their displosal to manage complex and sensitive issues on a daily basis. The holding in *Arar* rests on the dubious logic that since Congress (in the Second Circuit's view) did not *specifically* authorize a *Bivens* action in Arar's *specific* circumstances, courts should not deploy these tools on his behalf. 585 F.3d at 575-76. The judicial branch never has and cannot now abdicate its function based upon hypothetical sensitivity and it has ample tools to protect against real as opposed to reflexive claims of national security.

Acknowledging that such speculation or suspicion "may or may not amount to a special factor," the *Arar* Court also found that it was too difficult to draw the line between "unconstitutional and constitutional conduct and the ultimate course which officials should have pursued." *Arar*, 585 F.3d at 580. The dissent correctly notes that the majority could only reach this conclusion by severing the domestic facts in Arar's complaint from the international ones and then dismissing them as insufficiency pleaded. Even if the Second Circuit was correct in saying that the situation in rendition cases was "so different" from an ordinary *Bivens* case, the line-drawing problem presented in a rendition case is not present here, where it is clear that the interrogation techniques used against Padilla would have been illegal if used against detainees in any context.

CONCLUSION

For the reasons described above, the decision of the district court should be affirmed and the case remanded for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a).

I hereby certify that this brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,566 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Word 2007 in Times New Roman in 14-point.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, I attempted to electronically filed the foregoing "Brief of Distinguished Professors of Constitutional and Federal Courts Law as *Amici Curiae*" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Because the CM/ECF system was inaccessible, I served the brief upon opposing counsel via email. Email copies were sent to Miguel Estrada, Esq., Scott Martin, Esq., Robert Loeb, Esq. and Counsel of Record for Judicial Watch. I hereby certify that the foregoing brief was filed on January 23, 2010 using the CM/ECF system. The brief as filed contains no substantive changes to the brief served on counsel. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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