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

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

In this litigation, a convicted terrorist detained as an enemy combatant by order of the President seeks to enlist the aid of the federal courts in airing his policy disagreements with the previous administration's efforts to avoid a second devastating attack on American civilians. Although Padilla is simultaneously pursuing the same claims against 61 other defendants, including the senior officials who actually promulgated the challenged policies and the ground-level officials who enforced them, he brings this suit solely against Professor Yoo, a government lawyer who did neither.

To permit the suit to proceed, the district court implied an unprecedented *Bivens* remedy to challenge legal advice provided to the President on pressing national-security issues, indulged an untenably gauzy theory of causation to hold Professor Yoo liable for policy decisions made and implemented by others, and imagined in the confused caselaw governing enemy combatants a degree of clarity that does not exist even today. Neither Padilla nor his *amici* make any serious effort to confront the grave consequences of creating this new cause of action or stripping government lawyers of qualified immunity in this situation.

The district court's expansion of *Bivens* liability will stifle the candor required of the President's lawyers on complicated and sensitive matters of national security. It will disrupt an area of policymaking that the Constitution

wisely commits to the political branches. And it will deter qualified lawyers from entering public service for fear of facing lawsuits from those affected by the President's policies. In its chilling effect on the men and women serving the current President and every future Commander-in-Chief, Padilla's success would come at a cost far greater than the token dollar for which he has sued.

Padilla claims that these concerns will never materialize because he alleges that Professor Yoo *intentionally* provided incorrect legal advice to the President. But the sole basis for this conclusory assertion is the fact that Padilla so strongly disagrees with Professor Yoo's conclusions. Since any plaintiff could similarly allege that challenged legal advice was intentionally wrong, this purported limitation would do nothing to avert the systemic damage that Padilla's suit would cause to the current and future administrations, as *amicus* United States explains.

The district court's qualified-immunity decision is similarly ill-conceived. Stripped of his overwrought rhetoric regarding the atrocities orchestrated by the Nazi High Command and the (hypothetical) summary execution of American citizens, Padilla's claims rest on his belief that the constitutional rights afforded to those designated as enemy combatants should be coextensive with—or perhaps greater than—those of convicted prisoners. Far from being clearly established, this proposition has been rejected repeatedly by the Supreme Court. And even on the few issues where Padilla's views are consistent with current law, such as the right announced in *Hamdi* to challenge enemy-combatant designation, the rights Padilla claims were announced in splintered decisions only *after* Professor Yoo left government service. Imposing liability for the latter issues would punish Professor Yoo for failing to anticipate the outcome of these divided decisions; imposing liability for the former would replace the considered judgment of the Executive and Judicial Branches on national-security issues with the policy preferences of a convicted terrorist.

The district court's decision warrants reversal.

ARGUMENT

I. The District Court Improperly Crafted An Implied Damages Remedy To Challenge Legal Advice Provided To The Executive Branch On Sensitive Matters Of National Security.

The district court's decision to imply a *Bivens* remedy for Padilla's claims is flawed in two critical respects. *First*, Congress has already established habeas corpus as "an alternative, existing process" for citizens detained as enemy combatants to challenge their detention. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). *Second*, the nature of Padilla's claims—challenges to executive policy and legal advice on issues of national security—"counsel[s] hesitation" in permitting these issues to be litigated through a judge-made cause of action. *Bush v. Lucas*, 462 U.S. 367, 378 (1983).

A. The Availability Of Habeas Relief Bars Creation Of A Judicial Remedy To Challenge Unlawful Detention As An Enemy Combatant.

American citizens detained as enemy combatants have a fully effective statutory and constitutional remedy to challenge that classification: habeas corpus. Padilla has presented no persuasive reason for courts to amplify that remedy with an implied damages action against individual officers.

1. Padilla claims that habeas corpus is not an effective remedy because "habeas can only *stop* ongoing illegality" but "does nothing to *remedy* illegality that has already occurred." Padilla Br. 16 (emphases in original). This argument is foreclosed by Supreme Court precedent. In *Bush v. Lucas*, the Court assumed that existing remedies "did not fully compensate [the plaintiff] for the harm he suffered." 462 U.S. at 372. The Court emphasized, however, that the *Bivens* "question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff." *Id.* at 388. Instead, the Court invoked the availability of administrative review and equitable remedies in declining to imply a *Bivens* remedy. *Id.* at 386-88.

Similarly, in *Schweiker v. Chilicky*, the Court declined to create a *Bivens* remedy for denial of Social Security benefits even though the relevant statutes made "no provision for remedies in money damages against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits." 487

U.S. 412, 424 (1988). Noting that *Bush* had "refused to create a *Bivens* action even though it . . . acknowledged that 'existing remedies do not provide complete relief for the plaintiff," the Court held that the "case before us cannot reasonably be distinguished from *Bush.*" *Id.* at 423, 425 (quoting 462 U.S. at 388). Although the "creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed," Congress had "provide[d] meaningful safeguards or remedies for the rights of persons situated as [the plaintiffs] were." *Id.* at 425.

The Supreme Court has therefore made clear that existing remedies preclude a *Bivens* action, even if they would not provide "complete relief" for every plaintiff, *Bush*, 462 U.S. at 388, and indeed even if they would leave some injuries "unredressed," *Schweiker*, 487 U.S. at 425; *see also Janicki Logging Co. v. Mateer*, 42 F.3d 561, 564 (9th Cir. 1994) ("the fact that the courts could create a more complete remedy for the asserted wrong does not mean that they should").¹

¹ Padilla's *amici* are similarly wrong to dismiss the alternative remedies identified by the United States because they do not "provide a 'direct action' against the alleged government wrongdoers." Legal Ethics Scholars *Amici* Br. 26 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)). Both the Supreme Court and this Court have rejected *Bivens* suits based on the availability of relief under the Administrative Procedure Act, even though it "does not provide for monetary damages" or "allow claims against individuals." *W. Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116, 1122-25 (9th Cir. 2009); *see also Wilkie*, 551 U.S. at 552-54.

2. As Professor Yoo explained in his opening brief, the availability of habeas relief precludes even the *express* statutory remedy under 42 U.S.C. § 1983 and thus, *a fortiori*, bars the creation of an *implied* remedy under *Bivens*. *See* Yoo Br. 22-25 (discussing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994)). Padilla attempts to cabin the *Preiser-Heck* doctrine to criminal convictions and sentences, *see* Padilla Br. 17-18, but this Court rejected such a limitation in *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1137, 1139-40 (9th Cir. 2005).

According to Padilla (at 18-19), *Huftile* has been "limited" by the Supreme Court's decision in *Wallace v. Kato*, 549 U.S. 384 (2007). *Wallace*, however, had no occasion to address whether the *Preiser-Heck* doctrine applies to civil detention or military confinement. Instead, the Court held in *Wallace* that an arrestee could bring a Section 1983 claim challenging his arrest even if the claim could potentially impugn "*an anticipated future conviction*." *Id.* at 391-95 (emphasis in original). In clarifying that *Preiser-Heck* does not apply to future detentions, the Court did not limit the *types* of past or present detentions to which it applies.

Padilla simply lifts quotations from *Wallace* out of context to suggest that the Supreme Court was considering whether the *Preiser-Heck* doctrine applies to non-criminal detentions, but there is no reason to believe the Court resolved an issue that was neither briefed nor raised—and, in the process, overruled numerous decisions by the courts of appeals, including *Huftile*. *See also*, *e.g.*, *Cohen v*. *Clemens*, 321 F. App'x 739, 741-42 (10th Cir. 2009) ("[T]he rule in *Heck* is not limited to claims challenging the validity of criminal convictions."); *Morris v. City of Detroit*, 211 F. App'x 409 (6th Cir. 2006) (juvenile non-criminal incarceration). To the contrary, this Court has recently invoked both *Wallace* and *Huftile* in a civil commitment case, without any suggestion that *Wallace* limited *Huftile*. *See Rhoden v. Mayberg*, No. 09-15420, 2010 WL 76366, at *1 (9th Cir. Jan. 11, 2010) (unpub.).

Padilla also emphasizes *Heck*'s statement—quoted in *Wallace*—that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." Padilla Br. 19. This statement, of course, pre-dates *Huftile* and thus provides no basis for disregarding that decision. But in any event, the Supreme Court has made clear in later cases that the *Preiser-Heck* principle turns on the habeas statute's "linguistic specificity" and its historical role as the means for challenging detention: "[T]he language of the habeas statute is more specific" than Section 1983, and so *Heck* and its progeny "indicate that a state prisoner's [Section] 1983 action is barred (absent prior invalidation) . . . if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 79, 81-82 (2005) (emphasis omitted). Those textual and historical justifications for finding an "implicit exception" to

Section 1983 apply with equal force to non-criminal detentions, including military detention as an enemy combatant. *Id.* at 79. And because they are strong enough to overcome even the express "language of [Section] 1983," which "literally covers [such] claims," they are surely strong enough to preclude the judiciary from *creating* an implied cause of action under *Bivens. Id.* at 78.²

3. Grasping at straws, Padilla claims that his transfer to civilian custody "was a 'favorable termination' sufficient to satisfy *Heck*." Padilla Br. 19. But the purpose of the favorable-termination requirement is to demonstrate that the underlying confinement has already been declared invalid. *See Heck*, 512 U.S. at 484-87. The government's transfer of Padilla to face terrorism charges in civilian custody did not remotely suggest the invalidity of his confinement as an enemy combatant.

² For this reason, Padilla is incorrect to accuse Professor Yoo of "attempt[ing] to cram *Heck*'s rule . . . into the *Bivens* analysis . . . because he knows he cannot argue *Heck* directly." Padilla Br. 17 (citing *Cunningham v. Gates*, 229 F.3d 1271 (9th Cir. 2000)). Padilla does not dispute that this Court may consider the *Preiser-Heck* doctrine in its *Bivens* analysis, and for good reason: The *Bivens* issue, including the alternative-remedy inquiry on which *Preiser-Heck* bears, is indisputably appealable under *Wilkie*, 551 U.S. at 549 n.4. In any event, Padilla is wrong that Professor Yoo could not "argue *Heck* directly"—*i.e.*, contend that Padilla's claims would be barred under the *Preiser-Heck* doctrine even if he had a valid cause of action. That issue is "inextricably intertwined" with the alternative-remedy prong of the *Bivens* inquiry, and review of the *Preiser-Heck* issue is also "necessary to ensure meaningful review" of the qualified-immunity issues, which (unlike in *Cunningham*, 229 F.3d at 1285) bear directly on the validity of Padilla's detention. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42-43 (1995).

Indeed, Padilla's argument on appeal is squarely contrary to his own amended complaint, which alleges that "the 'enemy combatant' designation ... remains in effect." E.R. 228 ¶ 6; *see also*, *e.g.*, E.R. 243 ¶ 76 ("Mr. Padilla continues to suffer ... from the unlawful 'enemy combatant' designation, including the threat that he will once again be militarily detained"). Padilla also alleges that "it [is] the government's position that the 'enemy combatant' designation ha[s] not been rescinded and that the government could therefore militarily detain Mr. Padilla at any time based on his alleged past acts." E.R. 243 ¶ 77; *see also* D.E. 27, at 49 (arguing, in opposition to Professor Yoo's motion to dismiss, that "[t]he [enemy combatant] designation has not been withdrawn" and therefore that "the threat of re-detention as an enemy combatant" is not "conjectural").

Padilla's allegations below not only refute any argument that his detention as an enemy combatant ended with a "favorable termination," they also establish that he continues to satisfy the "in custody" requirement for bringing a habeas petition. *See* Yoo Br. 26-27. Padilla claims that Professor Yoo has waived this argument, Padilla Br. 20 n.5, but Professor Yoo clearly raised the argument that habeas-corpus review satisfied the alternative-remedies prong of *Bivens*, *see* D.E. 24, at 21 n.15, and the district court recognized and ruled on that argument, E.R. 57. Padilla cannot now fault Professor Yoo for supporting that argument on appeal by pointing to Padilla's *own* allegations. *See*, *e.g.*, *United States v*. *Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("[I]t is claims that are deemed waived or forfeited, not arguments.").³

But even if this Court were to conclude that Padilla no longer may bring a habeas petition, that still would not preclude application of *Preiser-Heck*: Except in "limited circumstances" not present here, *Preiser-Heck* applies even if habeas relief is no longer available. *Huftile*, 410 F.3d at 1141; *see also* Yoo Br. 25-26. Padilla presents no argument to the contrary.

4. Finally, Padilla contends that the availability of habeas relief is irrelevant to any "'constitutional claims that merely challenge the conditions of [his] confinement" because those claims could not have been raised in a habeas petition. Padilla Br. 15 (quoting *Nelson v. Campbell*, 541 U.S. 637, 643-44 (2004)). But Padilla's challenges to the conditions of his confinement turn on his contention that he was *not* an enemy combatant. *See*, *e.g.*, E.R. 227 ¶ 4. That was, indeed, the primary argument he advanced below in claiming his constitutional rights were clearly established. *See* D.E. 27, at 40; *see also* Padilla Br. 4-5, 11, 46 n.16.

³ In any event, this Court may consider an issue not raised below if it is, as here, "purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985).

Padilla attempts to recharacterize his amended complaint on appeal, arguing that "even someone properly detained has the right to be free of torture." Padilla Br. 16 n.3. Of course, OLC's analysis—written for a legal audience and addressing only conduct *abroad*—was designed precisely to *avoid* torture by identifying the line between permissible but harsh interrogation techniques and impermissible (indeed criminal) torture. E.R. 356. Although "torture" is a legal conclusion that this Court need not credit, *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), Padilla does not present any argument that the conditions of *his* detention constituted torture, let alone that this was clear at the time of the August 2002 memorandum, *cf. Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93-94 (D.C. Cir. 2002) (holding that "kicking, clubbing, and beatings" did not "evinc[e] the degree of cruelty necessary to reach a level of torture").

Perhaps Padilla means only that he believes the conditions of his confinement—"torture" or not—would be unconstitutional regardless of whether he was correctly designated as an enemy combatant. This would itself be a recharacterization of the amended complaint, but in any event such claims could be pursued consistent with *Preiser-Heck only* under the assumption that Padilla was properly detained, since any claim that relies on his belief that he is *not* an enemy combatant would, if successful, "necessarily impl[y] the unlawfulness of [his] custody," *Wilkinson*, 544 U.S. at 81. But his enemy-combatant status simply

emphasizes that Padilla's claims implicate special factors counseling hesitation, *see infra* Part I.B, and also are barred by qualified immunity, *see infra* Part II.

B. "Special Factors" Preclude The Creation Of A Judicial Remedy Against Government Lawyers For Their Legal Advice To The President On National-Security Issues.

Even where Congress has not created an alternative remedy, as it has here, a *Bivens* remedy is inappropriate where there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). The district court wrongly conflated these two prongs of the *Bivens* analysis, holding that, in order to find "special factors counseling hesitation," there must exist "an alternate scheme" that provides "an avenue for redress for the claimant." E.R. 60. Padilla makes no effort to defend this conclusion but instead maintains that a lawsuit challenging advice to the President on the constitutionality of policies for the capture and interrogation of enemy combatants in an ongoing war presents *no* "special factors counseling hesitation." He is wrong.

1. Creating A Damages Remedy For Legal Advice On Proposed Executive Policies Would Effect A Vast And Unworkable Expansion Of *Bivens*.

The *en banc* Second Circuit recently emphasized, in declining to imply a *Bivens* remedy for extraordinary rendition, that "*Bivens* has never been approved as a . . . vehicle for challenging government policies." *Arar v. Ashcroft*, 585 F.3d

559, 579 (2d Cir. 2009) (*en banc*). Padilla relegates *Arar* and the other "*Bivens* cases Yoo cites" to a single footnote, arguing that they "involve[d] non-citizens allegedly mistreated outside the U.S." Padilla Br. 32 n.9. This misses *Arar*'s point: Using *Bivens* suits to challenge government policies would only magnify the separation-of-powers concerns that have led the Supreme Court to refrain from creating a new *Bivens* action in the last three decades. Because *Bivens* actions do not lie against high-level policymakers, they most assuredly do not lie against those who *counsel* the policymakers on the legality of proposed policies. Yoo Br. 30-31.

This case is a perfect example: Because Padilla cannot sue the President directly for his wartime policy of detaining and interrogating enemy combatants, he has chosen instead to go after one of the President's legal advisors. Unlike the typical *Bivens* suit, which holds ground-level government employees liable for individual decisions, such a suit would unavoidably bring the Judiciary into conflict with the Legislative and Executive Branches. *See* Law Professor *Amici* Br. 17 (explaining "what the judicial branch must tell the Executive in this case").

Rather than confront *Arar*, Padilla asserts that Professor Yoo's argument "contradicts controlling authority." Padilla Br. 21. None of the three cases he cites—*al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), and *Nurse v. United States*, 226 F.3d 996 (9th Cir.

2000)—is relevant. Indeed, none of these cases even *addresses* the propriety of implying a *Bivens* action.

In *al-Kidd*, this Court addressed only whether the former Attorney General enjoyed absolute or qualified immunity from a particular *Bivens* action. Nowhere did the Court address whether the *Bivens* action was proper, much less conduct a "special factors" analysis.

In *Harris*, the plaintiff sued law-enforcement officers for injuries sustained in the shootout at Ruby Ridge. No one contested the propriety of a *Bivens* action given the facts of the case. Padilla evidently believes *Harris* is relevant because one of the plaintiff's claims was that the ground-level officers had conspired to disregard the FBI's official policy on the rules of engagement and had instead formulated their own "Special Rules of Engagement." 126 F.3d at 1193, 1200. There is simply no analogy between ground-level officers formulating an ad-hoc "policy" and the high-level policymaking that the *en banc* Second Circuit held was not proper grist for *Bivens* suits—and certainly no analogy to lawyers who provide legal advice on such policies.

In *Nurse*, this Court expressly declined to address the propriety of a *Bivens* action because the putative individual defendants had not been served with the complaint. 226 F.3d at 1004. Although the only properly served defendant—the United States—urged at oral argument that a *Bivens* action was inappropriate, the

Court declined to address that issue: "[B]ecause counsel for the United States purports not to represent the individual defendants in this appeal, we will abstain from addressing these issues at this time." *Id.* at 1004 n.3.

Padilla also dismisses (at 22-24) the serious problems with extending *Bivens* to those who give legal counsel to primary actors, relying largely on *Mitchell v*. Forsyth, 472 U.S. 511 (1985); see also Legal Ethics Scholars Amici Br. 20-23. Like Padilla's other citations, his reliance on *Mitchell* is perplexing. *Mitchell* (like Bivens itself) involved a Fourth Amendment claim, but it contained no discussion of whether a *Bivens* remedy was appropriate, nor did it involve any analysis of "special factors." Instead, the issue presented was whether to extend absolute immunity to Justice Department officials not acting in a prosecutorial capacity. Mitchell, 472 U.S. at 520. In addition, the defendant was not, like Professor Yoo, a lawyer who had advised policymakers about the legality of particular policies; rather, he was the official who had actually ordered the illegal wiretap. See id. at 513. Padilla quotes snippets from *Mitchell* about the need for high-level officials to follow the law, but if that alone were sufficient to justify the creation of a new Bivens action, there would be no "special factors" analysis at all.

Padilla nevertheless argues that, "[t]hough Yoo puts his 'national security prerogative' under the 'special factors counseling hesitation' heading, and Mitchell put his under the 'absolute immunity' heading, the concerns are the same." Padilla Br. 23. According to Padilla, "Yoo essentially attempts to obtain absolute immunity where established law precludes such a claim." *Id.* at 28.

Padilla's argument is not new: It was made by Justice Brennan in *United States v. Stanley*, 483 U.S. 669 (1987)—and squarely rejected by the majority. The "availability of a damages action under the Constitution for particular *injuries*," the Court said, "is a question logically distinct from immunity to such an action on the part of particular *defendants*"—an immunity that applies to both court-created and statutory causes of action. *Id.* at 684 (emphases in original). Justice Brennan's (and Padilla's) argument that a *Bivens* action should be coextensive with the scope of immunity "is not an application but a repudiation of the 'special factors' limitation upon the inference of *Bivens* actions" because that "limitation is quite hollow if it does nothing but duplicate pre-existing immunity from suit." *Id.* at 685-86.

Finally, Padilla attempts to dismiss the workability problems posed by his suit by noting that he "do[es] not allege simple bad lawyering" but instead "intentional illegality and cover-up." Padilla Br. 22. This is, indeed, the *sole* basis on which three former government attorneys support Padilla's suit. *See* Fein *et al. Amici* Br. 21 (distinguishing "mere legal error on the part of an OLC attorney" from "the attorney's *knowingly* rendering advice that is distorted or unbalanced" (emphasis in original)).

This purported distinction is illusory: Any plaintiff dissatisfied with a government lawyer's analysis could allege that the lawyer gave that advice in bad faith. *Cf. Wilkie*, 551 U.S. at 561. In any event, Padilla has no "factual content" that would allow a court to "draw the reasonable inference" that Professor Yoo intentionally gave incorrect legal advice, *Iqbal*, 129 S. Ct. at 1949, and that alone is sufficient to reject his proffered distinction here.

Padilla's *amici* would go even further, urging that Padilla's allegations of intentional wrongdoing by a lawyer themselves *require Bivens* liability. *See* Legal Ethics Scholars *Amici* Br. 5 ("Defendant Yoo clearly violated his professional responsibilities such that *Bivens* liability is appropriate.").⁴ These allegations are frivolous. *See* Pa. R. Prof'l Conduct 1.2(d) (2003) (noting that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and

⁴ The *amici* brief filed by three former government lawyers similarly charges that Professor Yoo "violated professional standards reflected in OLC practice" and "disregarded the obligations attendant on his office." Fein *et al. Amici* Br. 2. *Amici* have no discernable expertise on OLC practice—two of them never worked there, and the third served at OLC only briefly in a junior position—but instead parrot a list of *proposed* standards that was promulgated after the fact and reflects only partisan disagreement with the policies of the previous administration. *See Guidelines For The President's Legal Advisors*, 81 Ind. L.J. 1345, 1354 (2006) (listing authors, all of whom served in OLC under President Clinton); *see also* Dawn E. Johnsen, *What's A President To Do? Interpreting The Constitution In The Wake Of Bush Administration Abuses*, 88 B.U. L. Rev. 395, 396 (2008) ("Motivated by this administration's actions, many commentators (including me) have proposed reforms and principles to guide future administrations...").

may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"). The most senior nonpolitical official in the Justice Department has recently cleared Professor Yoo of all allegations of professional misconduct after a years-long inquiry, finding no evidence that Professor Yoo "knowingly provide[d] inaccurate legal advice to his client." Memorandum for the Attorney General from David Margolis, Associate Deputy Attorney General, *Memorandum Of Decision* 67 (Jan. 5. 2010), *available at* http://judiciary.house.gov/issues/issues_OPRReport.html.

The lack of any plausible allegation of misconduct is clear even for the handful of issues where the Supreme Court later disagreed with Professor Yoo's analysis. The purported ethics scholars claim, for instance, that Professor Yoo violated his professional responsibilities by concluding that "the Geneva Conventions were inapplicable to detention and interrogation" of al Qaeda members. Legal Ethics Scholars *Amici* Br. 12; *see also* Fein *et al. Amici* Br. 13 (labeling Professor Yoo's conclusion "intentional misconduct"). Yet Professor Yoo's view was shared by the D.C. Circuit, *see Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005) (Randolph, J.; joined by then-Judge Roberts), and it garnered two votes on the Supreme Court, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 719 (2006) (Thomas, J., dissenting; joined by Scalia, J.), even with The Chief Justice recused because of his D.C. Circuit vote in favor of Professor Yoo's position and

Justice Alito "find[ing it] unnecessary to reach" the issue, *id.* at 725 (Alito, J., dissenting). If this is professional misconduct, then every lawyer is guilty.⁵

In any event, none of the alleged concerns that *amici* raise have anything to do with constitutional issues. Nor, for that matter, do they bear on the *Bivens* analysis. Padilla identifies (at 25-27) several cases that have imposed liability for "willfully disregard[ing] the law in giving legal advice," but only one of these cases—an unpublished district court decision—involved a *Bivens* claim, and even that decision did not address whether to *create* the cause of action. *See Anoushiravani v. Fishel*, No. CV 04-212, 2004 WL 1630240, at *5 (D. Or. July 19, 2004). The remaining cases each involved established causes of action.

Even more egregious is the invocation of the Nuremburg Trials—by both Padilla (at 28) and *amici* legal ethics scholars (at 19-20). The factual differences between Professor Yoo and the head of the legal department for the Nazi armed forces should be obvious; although Padilla ignores them, even he acknowledges

⁵ The purported ethics scholars' claim that Professor Yoo did not "exercise independent professional judgment and render candid advice" (at 7) is equally absurd. He is a respected legal scholar whose views on presidential authority and war powers were articulated and defended in academic commentary well before they appeared in OLC memoranda. *See, e.g.*, John Yoo, *The Continuation Of Politics By Other Means: The Original Understanding Of War Powers*, 84 Cal. L. Rev. 167 (1996); *see also* Charlie Savage & Scott Shane, *Terror-War Fallout Lingers Over Bush Lawyers*, N.Y. Times, Mar. 9, 2009, at A1 (noting that Professor Yoo "had pushed an aggressive theory of presidential power long before the administration recruited him").

that the Nazi officer in question was convicted of drafting "orders and decrees" for summary executions, Padilla Br. 28, whereas Padilla does not allege that Professor Yoo could or did direct any government official to do *anything*. But Padilla's attempt at *reductio ad Hitlerum* would fail in any event: The government's decision to prosecute Nazi lawyers for war crimes does not remotely support the judicial creation of an implied civil damages remedy.

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

Padilla misunderstands the separation-of-powers concerns that undergird the "special factors" analysis. He claims that *Stanley* does not stand for the proposition that areas of lawmaking explicitly devoted to a coordinate branch are not subject to *Bivens* remedies. That is a misreading of the case. What *Stanley* said is that "an explicit congressional authorization" to make law—as opposed to merely an implicit congressional authorization through the Necessary and Proper Clause—strongly disfavors a *Bivens* action. 483 U.S. at 681-82 & n.6.

Although Padilla attempts to cabin *Stanley* to functional concerns related to the disciplinary structure of the military, Padilla Br. 29-30, *Stanley* rooted its *Bivens* analysis in "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches." 483 U.S. at 682. The Constitution no less insistently devotes the power over warfare, including the

treatment of enemy combatants, to the political branches. *See* U.S. Const. art. I, § 8, cls. 10-16; *id.* art. II, § 2, cl. 1. That express textual commitment of power to a coordinate branch strongly disfavors the judiciary's creation of a new cause of action, as much (if not more so) for enemy combatants as for American soldiers.

Padilla argues that previous congressional activity in this area somehow *justifies* the judicial creation of a damages remedy that Congress has not seen fit to enact. Padilla Br. 30-31. This argument turns the Supreme Court's *Bivens* cases The lack of a statutory damages remedy in a field in which on their head: Congress has legislated is a ground for the courts to stay their hand. See, e.g., Schweiker, 487 U.S. at 423 (courts must "include an appropriate judicial deference to indications that congressional inaction has not been inadvertent"). That is In addition to criminalizing torture committed precisely the situation here. "outside the United States," 18 U.S.C. § 2340A(a), Congress created an express private right of action against defendants who commit torture "under actual or apparent authority, or color of law, of any foreign nation," Torture Victims Protection Act of 1991, Pub. L. No. 102-256, § 2(a)(1), 106 Stat. 73. Even assuming that Padilla could somehow allege "torture," but see supra at 11, creating a judge-made remedy would improperly supplant Congress's decision to provide a damages remedy to some plaintiffs but not others, see Bricker v. Rockwell Int'l *Corp.*, 22 F.3d 871, 876 (9th Cir. 1993).

Padilla's *amici* urge that judicial creation of a damages remedy is necessary to bring the United States into line with "express treaty obligations" since "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." Law Professors Amici Br. 11-12. CAT is non-selfexecuting, however. See, e.g., Pierre v. Gonzales, 502 F.3d 109, 119-20 (2d Cir. 2007). "The point of a non-self-executing treaty is that it 'addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." Medellín v. Texas, 552 U.S. 491, 516 (2008) (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)). Because Congress's authority to "implement a non-self-executing treaty derives from the text of the Constitution," id. at 526, amici's argument is contrary to the constitutional separation of powers.⁶

⁶ Padilla invokes the State Department's representation to the United Nations that *Bivens* remedies are available to torture victims. Padilla Br. 31. He neglects to include the Department's opening qualification: The availability of *Bivens* and other remedies "depend[s] on the location of the conduct, the actor, and other circumstances." United States Written Response To Questions Asked By Committee Against Torture ¶ 5 (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm. Here, the "circumstances" are the detainment of an enemy combatant during wartime under a congressional authorization for the use of force, and the "actor" is not alleged to have himself engaged in torture but to have advised the Executive Branch that, with respect to non-citizens held abroad, certain interrogation techniques did not meet the statutory definition of "torture."

Finally, Padilla has no good answer to the disruption that *Bivens* actions would create, including the need to disclose and debate confidential intelligence reports. See, e.g., E.R. 219 ("The facts provided to us establish that Padilla is properly considered an enemy combatant"). Padilla states only that all of the relevant memoranda are public. Padilla Br. 33. That would not be true for all or even most future lawsuits against government lawyers, which is the relevant inquiry under the special-factors analysis. And regardless of whether the memoranda are public, Padilla has not disputed that a factfinder would be required to analyze confidential intelligence reports to evaluate whether it was reasonable to conclude that Padilla was an enemy combatant. Indeed, Padilla's amended complaint accuses Professor Yoo of being "deliberately indifferent to the constitutional inadequacy of a significant portion of the evidence upon which he based his recommendation." E.R. 236 ¶42. It is difficult to imagine a greater disruption of military and intelligence operations than to have confidential material subject to disclosure at the whim of any enemy combatant who sues anyone in the chain of advice and decision-making that had something to do with his detention.

* * *

Padilla concludes his *Bivens* analysis with the supremely ironic accusation that Professor Yoo's opening brief "avoid[ed]" the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The holding of

that case, of course, is that by seizing steel mills, President Truman had impermissibly encroached onto congressional lawmaking authority. *See id.* at 588-89. "The Founders of this Nation," the Court held, "entrusted the law making power to the *Congress alone* in both good and bad times." *Id.* at 589 (emphasis added). The irony of citing *Youngstown* to justify the judicial creation of a cause of action that Congress has not seen fit to enact evidently eludes Padilla.

II. Professor Yoo Is Entitled To Qualified Immunity.

As Padilla's counsel have explained elsewhere, they "represent Mr. Padilla in a damages action that seeks to settle the question of executive detention of U.S. citizens once and for all." Yale Law School, Lowenstein International Human Rights Law Clinic, *Civil Liberties & National Security After September 11*, *available at* http://www.law.yale.edu/intellectuallife/balancing911.htm (noting that the "[p]ower to detain people seized in the United States absent criminal charge . . . remains only partly resolved by the Supreme Court"). The very purpose of Padilla's suit, however, compels its dismissal: The rights asserted by Padilla were not "settle[d]" when they were allegedly violated, just as many remain unsettled today. For that reason, and because Professor Yoo was not personally responsible for the alleged violation, qualified immunity bars Padilla's suit.

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

As Professor Yoo explained in his opening brief, Yoo Br. 41-45, the amended complaint fails to satisfy the threshold requirement of sufficiently alleging Professor Yoo's personal participation in Padilla's detention or treatment. Padilla responds by invoking general concepts of tort liability, but he ignores a basic rule of qualified-immunity jurisprudence: The personal-participation inquiry "must be individualized and focus on the duties and responsibilities of *each individual defendant* whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (emphasis added).

1. Padilla Has Not Adequately Alleged Professor Yoo's Involvement In Promulgating Any Unlawful Policies.

Although the amended complaint is devoted almost exclusively to the legal memoranda that, Padilla claims, "justif[ied] the Executive's already concluded policy decision[s]," E.R. 233 ¶ 29, Padilla now shifts his focus, arguing primarily that Professor Yoo caused the alleged constitutional violations by "'participat[ing] directly in developing policy in the war on terrorism," Padilla Br. 36 (quoting E.R. 229 ¶ 15). This argument is difficult to square with Padilla's earlier assertion that "the issues relevant to [his] claims have been publicly aired," *id.* at 33, since none of the disclosed memoranda even remotely suggests Professor Yoo's

involvement in promulgating particular policies. Padilla's brief identifies only two policies that he believes Professor Yoo helped develop, Padilla Br. 36, but neither assertion is supported by "specific, nonconclusory factual allegations" in the amended complaint, *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).

First, the amended complaint alleges that, "[a]s Defendant relates in his book 'War By Other Means,' Defendant and others developed an extra-judicial, ex parte assessment of enemy combatant status followed by indefinite military detention" that "completely precluded judicial review of the designation." E.R. 235 ¶ 36. This is precisely the sort of "naked assertio[n]' devoid of 'further factual enhancement" that the Supreme Court has declared insufficient. Igbal, 129 S. Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 The amended complaint does not provide any factual details about (2007)).Professor Yoo's supposed role, nor does it explain the implausible assertion that an OLC attorney somehow had authority to "promulgat[e] [this allegedly] unconstitutional polic[y]," Padilla Br. 36. The accompanying paragraphs allege only that Professor Yoo made a *legal* determination that Padilla "could qualify ... as an enemy combatant." E.R. 235 ¶ 38.⁷

[Footnote continued on next page]

⁷ The same is true of Padilla's purported source, which states only: "[W]e recommended to the President that an American could be taken into custody as an enemy combatant, but only if several agencies independently agreed." John Yoo,

Second, the amended complaint alleges that Professor Yoo "discussed" various interrogation tactics. E.R. 233 ¶ 28. Yet both relevant paragraphs allege only that Professor Yoo provided *legal* advice, not that he made policy. *Id.* ¶ 27 (alleging that Professor Yoo prepared a legal memorandum "to justify the Executive's already concluded policy decision" to employ these interrogation tactics); *id.* ¶ 28 (alleging that the "War Council" discussed "how to legally justify" particular interrogation techniques). Moreover, as the amended complaint's references to January 2002 and August 2002 memoranda make clear, these legal issues were considered only in the context of *aliens detained abroad*, and thus the discussions could not have caused any harm to Padilla, who is not an alien and was not detained abroad. *Id.* ¶¶ 27-28; *see also* E.R. 289, 356.

2. Professor Yoo Was Not Personally Responsible For Padilla's Designation As An Enemy Combatant.

The decision to designate Padilla as an enemy combatant was made by the President under the authority granted to him by the AUMF and the Constitution. *See* E.R. 506. Professor Yoo's only alleged involvement in that decision was "personally 'review[ing] the material on Padilla to determine whether he could

[[]Footnote continued from previous page]

War By Other Means 140 (2006). Since *Hamdi v. Rumsfeld* concluded that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant," 542 U.S. 507, 519 (2004) (plurality), this legal conclusion was correct.

qualify, legally, as an enemy combatant, and issu[ing] an opinion to that effect." E.R. 235 ¶ 38 (quoting John Yoo, *War By Other Means* (2006)). That memorandum was, in turn, only one component of the extensive legal and factual evaluation that preceded the President's decision. *See* Yoo Br. 42-43.

Padilla protests that the "multiple layers of scrutiny" make "no difference" because it is irrelevant whether an "intervening third party may exercise independent judgment in determining whether to follow a course of action *recommended by the defendant.*" Padilla Br. 39 (emphasis added). But the amended complaint does not allege that Professor Yoo *recommended* that Padilla be detained, only that he evaluated the legality of that detention, E.R. 217—correctly, *see Padilla v. Hanft* ("*Padilla VII*"), 423 F.3d 386, 391 (4th Cir. 2005).

For this reason, Padilla's reliance (at 39) on *dictum* in *Malley v. Briggs*, 475 U.S. 335 (1986), is misplaced. In *Malley*, the defendant police officer had obtained an arrest warrant that (allegedly) was unsupported by probable cause. *Id.* at 337-38. Although the issue was not before it, the Supreme Court noted in a footnote that "the judge's decision to issue the warrant" does not "brea[k] the causal chain between the application for the warrant and the improvident arrest." *Id.* at 344 n.7. But while in *Malley*, "the decision of the police officer to bring the matter to the magistrate [was] the active cause of the search or arrest," *Briggs v.* *Malley*, 748 F.2d 715, 721 (1st Cir. 1984), here Professor Yoo neither ordered nor recommended Padilla's detention as an enemy combatant.

Padilla is similarly misguided in invoking *White v. Roper*, 901 F.2d 1501 (9th Cir. 1990). *White* held only that Section 1983 liability could be imposed for a "foreseeable risk that the defendant created." *Id.* at 1506. Likewise, *Kerman v. City of New York* found causation where an officer personally entered the plaintiff's apartment and ordered him taken into custody at a mental hospital. 374 F.3d 93, 126-27 (2d Cir. 2004). Since Professor Yoo neither made the decision to detain Padilla nor recommended such a decision, he did not cause any constitutional violation.

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

Padilla's amended complaint identified only a single memorandum (alleged to exist "[u]pon information and belief") that addressed the conditions of Padilla's confinement. See E.R. 231 ¶ 19(f), 240 ¶ 60. Padilla has now abandoned that purported memorandum—doubtless because there is no reason to believe it exists. Without it, however, *none* of the legal memoranda cited in the amended complaint address the conditions of Padilla's confinement—or, indeed, any issues regarding the treatment of citizens detained in the United States.

Padilla identifies only "[t]wo memoranda [that] applied directly to the United States." Padilla Br. 42. The first memorandum addressed only the "use of

military force to prevent or deter terrorist activity inside the United States," E.R. 167; the second memorandum addressed only "whether the detention of United States citizens as enemy belligerents" violates the Non-Detention Act, 18 U.S.C. § 4001, E.R. 204. Neither memorandum addressed interrogation or any other issue regarding conditions of confinement. Padilla claims, however, that by purportedly "[e]viscerating" the Fourth and Fifth Amendments, Professor Yoo "foreseeably caused Padilla's seizure, detention, and submersion in the rights-free world of the Brig." Padilla Br. 42. Yet even Padilla's claim about what these memoranda "foreseeably caused" has little or nothing to do with the *conditions* of his confinement.

At best, Padilla's theory is that Professor Yoo's memoranda, addressing particular constitutional issues raised by particular executive actions, might have been applied by other government officials to the different constitutional issues raised by Padilla's detention. Yet under such a sweeping view of causation, virtually any conduct by a government official could be linked to eventual constitutional violations committed by others far removed from the official or his actions. Instead, Padilla must demonstrate that Yoo was directly responsible for the constitutional violations he allegedly suffered. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001). His attenuated "set in motion" theory fails to do so.

Padilla's reliance (at 42-43) on memoranda addressing the rights of foreign citizens detained abroad is even farther from the mark. According to Padilla, "much of the reasoning in the 'Guantanamo' memoranda ... applied with equal force to suspected enemy citizens on U.S. soil." Padilla Br. 42.⁸ It is implausible that the Department of Defense personnel interrogating Padilla even had access to legal memoranda written in the Justice Department about the proposed detention and interrogation policies at Guantanamo Bay, much less that they relied on those memoranda. But even if the Court were to indulge that fantasy, it should hardly have been foreseeable to Professor Yoo that "interrogators at the Brig" (Padilla Br. 43) would take memoranda that were explicitly inapplicable to Padilla and without requesting clarification or further advice from OLC-apply them to Padilla. Cf. Twombly, 550 U.S. at 556-57 ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.").

⁸ Padilla is forced to mischaracterize the memoranda to support even this strained theory of causation. According to Padilla, the memoranda concluded that "enemy combatants (not defined to exclude U.S. citizens) have no Fifth Amendment rights." Padilla Br. 42. The relevant memorandum instead "conclude[d] that the Fifth . . . Amendmen[t] . . . do[es] not extend to alien enemy combatants held abroad." E.R. 406.

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

It would be difficult to tell from Padilla's brief that the federal courts have spent much of the last decade attempting to define the rights of enemy combatants—largely without success. Armed more with rhetoric than legal support, Padilla casually brushes aside the views of judges who rejected his constitutional theories even after Professor Yoo left government service, dismissing the Fourth Circuit's opinion in *Padilla VII* as an attempt to "rende[r] unclear what was clearly established in 2002," Padilla Br. 46 n.16, and refusing even to discuss Justice Thomas's analysis in *Hamdi, id.* at 48.⁹ Instead, Padilla argues the qualified-immunity issue as if the President's designation of him as an enemy combatant had never occurred: His central argument is that his rights were clearly established because, he claims, they are clearly established in the context of civilian prisoners.

The Supreme Court has cautioned against precisely this reasoning. In *Anderson v. Creighton*, the Court emphasized that "[t]he operation of [the 'clearly established'] standard ... depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. 635, 639 (1987). For

⁹ Padilla introduces a different numbering scheme, under which the Fourth Circuit's decision is sometimes (at 9) but not always (at 48 n.17) "*Padilla V*." Because Padilla's numbering ignores several published decisions, Professor Yoo will continue to use the numbering defined in his opening brief.

instance, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* But such analysis is wrong.

"[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Although "the very action in question" need not "previously [have] been held unlawful," "in the light of pre-existing law the unlawfulness must be apparent." *Id.* To evaluate whether Padilla's rights were clearly established, therefore, the Court must necessarily examine those rights "in the light of pre-existing law" on enemy combatants. *Id.*

To evade this analysis, Padilla accuses Professor Yoo of "*introduc[ing]* the enemy combatant category," Padilla Br. 54 (emphasis added), and then using it to "shield him[self] from responsibility," *id.* at 44. This is nonsense. The Supreme Court recognized enemy combatants as a category of military detainees at least 60 years before Padilla's detention. *See Ex Parte Quirin*, 317 U.S. 1, 37 (1942); *see also, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304, 312, 313-14 (1946); *In re Yamashita*, 327 U.S. 1, 6

(1946). And, from its earliest cases on the issue, the Supreme Court has afforded individuals whom the President designates as enemy combatants fewer rights than civilian prisoners.

In *Quirin*, for instance, the Supreme Court upheld the execution of a citizen enemy combatant without "the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses." 317 U.S. at 24. Sixty-two years later, the Supreme Court explained in *Hamdi v. Rumsfeld* that the rights of citizens designated as enemy combatants "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U.S. 507, 533 (2004) (plurality). Padilla simply ignores this history in arguing that "the rights afforded [convicted] prisoners set a floor" for those of enemy combatants. Padilla Br. 45.

Padilla likewise downplays developments after Professor Yoo's government service that confirm the alleged constitutional rights were not clearly established. He accuses Professor Yoo of treating Justice Thomas's dissenting opinion in *Hamdi* "as if it were the law," Padilla Br. 48, but the significance of the dissent is not that it is binding but that it reveals reasonable disagreement on precisely the issues allegedly addressed by Professor Yoo. *Cf.*, *e.g.*, *Harris v. Young*, 718 F.2d 620, 624 (4th Cir. 1983) ("It would not be fair to hold a state official liable for not fulfilling 'clearly established' obligations when a federal Circuit Court of Appeals

was unable to unanimously decide the same issue."). Similarly, the Fourth Circuit's opinion in *Padilla VII* and Judge Mukasey's decision in *Padilla I*—both of which endorse critical portions of Professor Yoo's analyses—are relevant not because they "rendered [previous law] unclear," Padilla Br. 46 n.16, but because they illustrate either that the law is not as Padilla claims or, at the very least, that it was not clearly so from 2001 to 2003. These opinions did not *cause* Padilla's rights to become unsettled; rather, they were possible only because Padilla's rights were *already* unsettled.¹⁰

1. Denial Of Access To Counsel And Courts.

Padilla ignores *Quirin* in arguing that his alleged rights of access to counsel and the courts were clearly established. *See* Padilla Br. 47. Yet *Quirin* is fatal to his argument: The Supreme Court denied a citizen designated as an enemy

¹⁰ Padilla accuses Professor Yoo of "conceal[ing] new substantive challenges in his 'clearly established' section." Padilla Br. 43. It is unclear precisely what Padilla means: Professor Yoo's argument is, as it was below, that Padilla's "constitutional claims were not 'clearly established' at the time Padilla was designated and detained as an enemy combatant." *See, e.g.*, S.E.R. 22. To be sure, Professor Yoo occasionally demonstrates that the right in question was not clearly established by showing that it does not exist even today, *see, e.g.*, Yoo Br. 56, but Padilla nowhere explains how this Court could address the clearly-established inquiry while ignoring whether the right exists. Even if this Court were somehow to consider these issues waived, however, a court of appeals "always possesses discretion to reach an otherwise waived issue logically 'antecedent to and ultimately dispositive of the dispute before it." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995) (quoting *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993)).

combatant "safeguards . . . which the Fifth and Sixth Amendments guarantee to all persons charged in [civilian] courts with criminal offenses." 317 U.S. at 24. Thus, even if Professor Yoo's memoranda had recommended that Padilla be denied access to counsel or the courts—in fact, they had nothing to say on the issue—it was hardly "apparent" that such denial would be unconstitutional. *Anderson*, 483 U.S. at 640.

Padilla cites only two cases involving the rights of enemy combatants, and he mischaracterizes them both. *First*, although Judge Mukasey noted that Padilla's "need" for a lawyer was "obvious," Padilla ex rel. Newman v. Bush ("Padilla I"), 233 F. Supp. 2d 564, 602 (S.D.N.Y. 2002), he nonetheless concluded that Padilla had no constitutional right to counsel; he granted access to counsel only as a matter of judicial discretion, id. at 600-01; see also Hon. Michael B. Mukasey, Where The U.S. Went Wrong On Abdulmutallab, Wash. Post, Feb. 12, 2010, at A27 ("the basis for my ruling" was "that, as a convenience to the court and not for any constitutionally based reason, [Padilla] had to consult with a lawyer"). Second, Padilla misreads the *Hamdi* plurality's statement that he "unquestionably has the right to access to counsel" on remand. 542 U.S. at 539. The Hamdi plurality was not announcing a new right—let alone a *constitutional* right—but instead explaining why it declined to reach Hamdi's argument that the Fourth Circuit "erred by denying him immediate access to counsel": Because the

government had since granted him counsel, and Hamdi "unquestionably" had the right to that counsel on remand, "[n]o further consideration of this issue is necessary at this stage of the case." *Id*.

In any event, Padilla cannot demonstrate any claim that he was unable to bring as a result of the alleged violations. He argues that he was "unable to file claims objecting to his unconstitutional conditions of confinement," Padilla Br. 47, but the only claim mentioned in the amended complaint is his habeas petition, As Padilla elsewhere acknowledges, Padilla Br. 15, a habeas E.R. 240 ¶ 59. petition is not the proper vehicle for raising conditions-of-confinement claims, see, e.g., Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991). Padilla also contends that he "could not mount a factual challenge" to his designation as an enemy combatant. Padilla Br. 48. But when he was invited to do so, he declined. See Jan. 29, 2009 Hr'g Tr. 70, No. 2:07-cv-410 (D.S.C.) (noting his lawyer's statement that "we don't want to challenge that" and "a letter from Mr. Padilla to that effect"). Padilla can hardly complain about being unable to advance arguments that he expressly declined to pursue.

2. Unconstitutional Interrogations.

Padilla claims that enemy-combatant status is irrelevant to the constitutionality of interrogations because "detention" of enemy combatants is justified by the need "to prevent the prisoners of war from further participation in

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the war," whereas "indefinite detention for the purpose of interrogation is not authorized." Padilla Br. 50 (quoting *Hamdi*, 542 U.S. at 518, 521 (plurality)). This is a non sequitur. Padilla does not accuse Professor Yoo of justifying detention for the *purpose* of interrogation; to the contrary, the President declared that "detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States," E.R. 506. *Hamdi* nowhere suggests that the government may not interrogate enemy combatants *once they are detained*. Neither does it define what (if any) constitutional limitations would govern such interrogations.

Padilla also notes that the amended complaint "nowhere avers that [he] possessed [any] actionable intelligence." Padilla Br. 50. Yet the constitutionality of interrogations cannot turn on an after-the-fact assessment of whether they resulted in "actionable intelligence." Nor can the clearly-established inquiry, since such a test would "mak[e] it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson*, 483 U.S. at 639 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). In any event, Padilla does not claim that Professor Yoo evaluated the legality of interrogating Padilla *in*

particular, and thus he hardly could be held accountable for any mistaken decision by other government officials that Padilla possessed "actionable intelligence."¹¹

3. Denial Of Freedom Of Religion.

Padilla claims that any restrictions on his freedom of religion could not have been legitimate because "the religious restrictions were placed on Padilla not by prison administrators but by Yoo." Padilla Br. 52. This bizarre assertion appears nowhere in the amended complaint, and for good reason: None of the memoranda Padilla cites addressed "religious restrictions." Padilla's exoneration of the "prison administrators" is especially astounding in view of his pending suit against them in South Carolina, which alleges that four named prison administrators, a psychiatrist, and 38 John Does "implemented the unlawful regime devised and authorized" not by Professor Yoo but by Defense Department officials. Third Am. Compl. ¶ 7, D.E. 91, *Padilla v. Rumsfeld*, No. 2:07-cv-410 (D.S.C. filed July 23, 2008).

¹¹ Padilla claims that Professor Yoo "ma[de] no response" to the argument that "Yoo's actions caused a state-created risk of danger." Padilla Br. 51 n.18. The district court did not address this claim, doubtless because it appears nowhere in the amended complaint, *cf.* E.R. 244 ¶ 82(c)-(d) (listing the claims Padilla *does* assert). Padilla cites his opposition to Yoo's motion to dismiss, S.E.R. 11, but "a party is not entitled to amend its complaint through statements made in motion papers," *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998). In any event, Professor Yoo's decision to address all of Padilla's substantive due process claims together, on grounds that apply to them all, does not mean that he "ma[de] no response" to any particular claim.

Even ignoring this critical flaw, Padilla cites no support for his assumption that interrogation is a "*per se* illegitimate purpose" for restrictions on religious freedoms. Padilla Br. 52. It is, at the very least, not clearly established that the First Amendment would prohibit restrictions on religious freedom in the course of interrogating enemy combatants. Indeed, even under the more stringent First Amendment test applicable *outside* the detention context, "the government has a compelling interest in protecting the nation from terrorism." *Tabbaa v. Chertoff*, 509 F.3d 89, 95 (2d Cir. 2007).¹²

4. Denial Of The Right To Information And Association.

Padilla and his mother reduce to a footnote any defense of their claim regarding a right to information and association, Padilla Br. 52 n.19—a right the Fourth Circuit rejected in explaining that "restrict[ions] [on] the detainee's communication" are "not only an appropriate, but also the necessary, course of action" in many instances of military detention. *Padilla VII*, 423 F.3d at 395. Padilla's footnote includes *no* cases discussing the rights of enemy combatants and

¹² As Professor Yoo explained in his opening brief, RFRA does not authorize damages suits against a government official in his individual capacity. *See* Yoo Br. 54-56. Padilla addresses this issue only in a footnote, in which he claims that Professor Yoo's argument is contrary to *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 834-35 (9th Cir. 1999). It is not: *Sutton* held only that a private entity may in appropriate cases be deemed a state actor, and in any event *denied* the plaintiff's RFRA claim. *Id.* at 837-43.

even several cases finding no First Amendment violation. Instead, Padilla again insists that enemy combatants enjoy all the rights of civilian prisoners, and again he is mistaken that any such rule is clearly established (if it exists at all).

5. Unconstitutional Military Detention.

Padilla claims that his detention as an enemy combatant "*clearly* had no legal basis." Padilla Br. 57 (emphasis added). This argument would come as a surprise to Judges Luttig, Michael, and Traxler of the Fourth Circuit, as well as Judge Mukasey—all of whom concluded that Padilla's detention was lawful. Judge Mukasey held that the President can 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 Fourth Circuit reached the same conclusion. *See Padilla VII*, 423 F.3d at 391-97.

Padilla claims that the Fourth Circuit's decision rests on "allegations that Padilla took up arms against the U.S. in a foreign combat zone" that are "conspicuously absent from the record" before OLC. Padilla Br. 38. It is unclear how this could possibly matter in evaluating whether Padilla's detention "clearly had no legal basis," Padilla Br. 57, nor does it address Judge Mukasey's decision, which relied on precisely the same materials before OLC. In any event, the Fourth Circuit's opinion was hardly confined to foreign combat, as Padilla's attorney understood when he characterized the decision as "find[ing] the president has the power to detain indefinitely and without criminal charge any American citizen whom he deems an enemy combatant." Neil A. Lewis, Court Gives Bush Right To Detain U.S. Combatant, N.Y. Times, Sept. 9, 2005, at A1 (quoting Jonathan Freiman) (internal quotation marks omitted; emphasis added). If anything, the Fourth Circuit's decision not only affirmed OLC's opinion, but did so based on stipulated facts *less serious* than the intelligence provided to OLC and *less* analogous to the enemy actions considered in Quirin. Just as Quirin labeled as a "familiar exampl[e] of belligeren[cy]" the "enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property," 317 U.S. at 31, the intelligence provided to OLC reported that Padilla "plan[ned] to commit acts of sabotage that could result in a massive loss of life" in the United States, E.R. 219.

Padilla attempts to distinguish *Quirin* by claiming that it upheld the "criminal trial by military tribunal" of defendants who "actively asserted their membership in the Germany army," whereas Padilla was "seized from a U.S. jail cell." Padilla Br. 55.¹³ This is grossly inaccurate. *Quirin* upheld the trial and

[Footnote continued on next page]

¹³ Padilla notes that *Quirin* arose "during a declared war," Padilla Br. 55, but this has never been relevant to the President's authority to seize enemies, *see* 1 Op. Att'y Gen. 84-85 (1798) (noting such authority during the undeclared Quasi-War with France); *Padilla I*, 233 F. Supp. 2d at 589 (holding that "a formal declaration

execution of an American citizen, Haupt, and its reasoning reveals that "the Court regarded detention alone ... as certainly the lesser of the consequences an unlawful combatant could face." Padilla I, 233 F. Supp. 2d at 595; see Hamdi, 542 U.S. at 519 (plurality) ("[N]othing in *Quirin* suggests that [Haupt's] citizenship would have precluded his mere detention for the duration of the relevant hostilities."). Haupt, far from "actively assert[ing]" his affiliation with the German army, pleaded not guilty and claimed "[h]e never intended to go through with the sabotage plan" but played along only for the "chance of returning to America" from Nazi Germany. Michael Dobbs, Saboteurs: The Nazi Raid On America 224 (Vintage 2005). And just like Padilla, Haupt was arrested in Chicago by law-enforcement authorities and held in civilian jail-until President Roosevelt ordered the military tribunal that ultimately led to his electrocution. Id. at 184-85, 204-05.

Padilla instead proposes *Ex Parte Milligan*, 71 U.S. 2 (1866), as "the governing precedent," Padilla Br. 55, even though "*Quirin* was a unanimous opinion" that "both postdates and clarifies *Milligan*" and that is "the most apposite precedent." *Hamdi*, 542 U.S. at 523 (plurality). At the very least, it was not

[[]Footnote continued from previous page]

of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict").

clearly established that *Milligan* rather than *Quirin* controlled. *See Padilla VII*, 423 F.3d at 397 ("*Milligan* is inapposite here").

Padilla also attempts to demonstrate that a majority of the Supreme Court would have disagreed with the Fourth Circuit and Judge Mukasey, cobbling together the votes of five dissenting Justices—one of whom has since retired—in Rumsfeld v. Padilla ("Padilla V"), 542 U.S. 426, 451 (2004) (Stevens, J., dissenting), and Hamdi, 542 U.S. at 554 (Scalia, J., dissenting). Padilla Br. 57 & n.22. Even the dissenters in *Padilla V* acknowledged that "[e]xecutive detention of subversive citizens ... may sometimes be justified to prevent persons from launching or becoming missiles of destruction." 542 U.S. at 465 (Stevens, J., dissenting). And Justice Scalia's dissent in Hamdi simply dismissed Quirin as "not this Court's finest hour." 542 U.S. at 569; see also id. at 523 (plurality) (faulting Justice Scalia for "brush[ing] aside" *Quirin*). But in any event, Padilla's inventive attempt to conjoin and transmute dissents into clearly-established law proves how far he must stretch to support his argument. Professor Yoo, of course, left government service before even these dissenting opinions were announced.

Similarly, Padilla's argument that he had a clearly established right to a hearing on his enemy-combatant status rests on hindsight. *See Stewart v. Donges*, 915 F.2d 572, 581 (10th Cir. 1990) ("[W]e may consider only those decisions decided prior to the allegedly unlawful arrest of plaintiff."). He invokes the *Hamdi*

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plurality's statement that "[f]or more than a century the central meaning of procedural due process has been clear," 542 U.S. at 533 (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972)), but this simply illustrates Anderson's "level of generality" problem, 483 U.S. at 639. The quoted language comes from a case involving the seizure of household goods, but however "clear" the right in that context, it was hardly "clear" that the Supreme Court would apply it to the detention of enemy combatants. The Fourth Circuit did not believe so when it denied Hamdi's habeas petition. See Hamdi v. Rumsfeld, 316 F.3d 450, 474 (4th Cir. 2003) ("[A] factual inquiry into the circumstances of Hamdi's capture would be inappropriate"). Nor did Justice Thomas. See 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."). These judges were on the losing side of the constitutional issue, but their position makes clear that Padilla's alleged right was not clearly established. Rather, the most apposite precedents during Professor Yoo's government service indicated the legality of war-time detention at executive discretion. See, e.g., Mover v. Peabody, 212 U.S. 78, 84-85 (1909) ("Public danger warrants the substitution of executive process for judicial process.").

CONCLUSION

For the foregoing reasons, as well as those set forth in the principal brief, the judgment of the district court should be reversed.

Respectfully submitted,

February 19, 2010

/s/ Miguel A. Estrada

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

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Dated: February 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2010, an electronic copy of the foregoing Reply 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:

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