No. _____

IN THE

Supreme Court of the United States

ESTELA LEBRON and JOSE PADILLA,

Petitioners,

—v.—

DONALD H. RUMSFELD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal officials responsible for the torture of an American citizen on American soil may be sued for damages under the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners in this case are Estela Lebron and Jose Padilla. The respondents are:

1. Donald H. Rumsfeld, former Secretary of Defense;
2. William J. Haynes, former General Counsel to the Department of Defense;
3. Paul Wolfowitz, former Deputy Secretary of Defense and the former head of Detainee Affairs;
4. Vice Admiral Lowell E. Jacoby, former Director of the Defense Intelligence Agency;
5. Catherine T. Hanft, former Commander of the Consolidated Naval Brig in Charleston, South Carolina; and
6. Melanie A. Marr, former Commander of the Consolidated Naval Brig in Charleston, South Carolina.

In the court of appeals, Secretary of Defense Leon E. Panetta was an appellee in his official capacity. The Secretary is not a respondent here.

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JURISDICTIONAL STATEMENT

The Court of Appeals for the Fourth Circuit entered its judgment on January 23, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Fifth and Eighth Amendments to the U.S. Constitution. In relevant part, the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law," and the Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted."

STATEMENT OF THE CASE

1. The Petitioners

The petitioners are Jose Padilla and his mother, Estela Lebron, as next friend.

Jose Padilla is an American citizen. C.A. App. 69 (Third Amended Complaint ("3AC") ¶ 12). On May 8, 2002, he was arrested in Chicago, Illinois as a material witness. C.A. App. 76 (3AC ¶ 35). He was thereafter transferred to a civilian jail in New York. C.A. App. 76 (3AC ¶ 35). On June 9, 2002—two days before Mr. Padilla's motion to vacate the material-witness warrant was to be heard—the President declared Mr. Padilla to be an "enemy combatant," and military officials seized him from the civilian jail and transported him to the Consolidated Naval Brig in Charleston, South Carolina. C.A. App. 66, 76–78 (3AC ¶¶ 2, 36–43).

It would be almost two years before anyone beyond the Brig's doors heard from Mr. Padilla again. During that time, he was placed in solitary confinement and permitted no contact with counsel, courts, or family—aside from a single short message to his mother (after ten months) informing her that he was alive. C.A. App. 91, 93 (3AC ¶¶ 82, 91). His only human interaction was with interrogators or with guards delivering food through a slot in the door or standing watch when he was allowed to shower. C.A. App. 93 (3AC ¶ 90). The windows of Mr. Padilla's cell were blackened. He was alternately subjected to prolonged periods of constant light and complete darkness. He was unable to fulfill his religious obligation to pray five times a day. C.A. App. 90, 93–95 (3AC ¶¶ 81b–c, 94–95, 98, 100).

Removal from his cell entailed additional sensory deprivation, with black-out goggles and sound-blocking earphones. C.A. App. 93–94 (3AC ¶ 94). All outside information—papers, radio, television—was prohibited, and his Koran was confiscated. C.A. App. 94 (3AC ¶¶ 96, 99). Mr. Padilla was denied a mattress, blanket, sheet, and pillow, left with only a steel slab upon which to sleep. C.A. App. 91 (3AC ¶ 81p). His efforts at rest were hindered by deliberate banging, glaring artificial light, noxious odors, and extreme temperature variations. C.A. App. 90–91 (3AC ¶ 81o, c, m, q). Interrogators injected Mr. Padilla with substances represented to be truth serums, shackled him for hours in excruciating "stress" positions, threatened to transfer him to a foreign country or Guantanamo where, he was told, he would be subjected to far worse treatment, and even threatened to kill him. C.A. App. 90, 95–96 (3AC ¶¶ 81g, i–k, 101–03).

2. The Respondents

Respondents—six officials sued in their individual capacities—are responsible for Mr. Padilla's gross mistreatment.

They are Donald H. Rumsfeld, former Secretary of Defense; William J. Haynes, former General Counsel to the Department of Defense; Paul Wolfowitz, former Deputy Secretary of Defense and the former head of Detainee Affairs; Vice Admiral Lowell E. Jacoby, former Director of the Defense Intelligence Agency; and Catherine T. Hanft and Melanie A. Marr, former Commanders of the Brig. C.A. App. 69–72 (3AC ¶¶ 14–17, 22–23).

As the former Secretary of Defense, Mr. Rumsfeld directly oversaw the military's interrogation of suspected "enemy combatants." Along with his high-level subordinates—Haynes, Wolfowitz, and Jacoby—Rumsfeld approved of, and in some cases ordered, the use of brutal methods of interrogation against suspected enemy combatants, including Padilla. C.A. App. 78–79, 84 (3AC ¶¶ 46, 56).

Rumsfeld, Haynes, Jacoby, and Wolfowitz involved themselves directly in the details of interrogation, approving new interrogation techniques and the use of those techniques on individual detainees. C.A. App. 78–79, 84 (3AC ¶¶ 46, 56). The techniques included painful stress positions, isolation, sensory deprivation (including deprivation of light and sound), hooding, and "sleep adjustment." C.A. App. 86–87 (3AC ¶ 69). These techniques were developed in consultation with the Office of the Secretary of Defense, C.A. App. 85 (3AC ¶ 64), and were recommended for Mr. Rumsfeld's approval by Mr. Haynes. C.A. App. 85–87 (3AC ¶¶ 65–69); *see also* C.A. App. 87–89, 97 (3AC ¶¶ 72–78, 107).

Under the supervision of Commanders Marr and Hanft, C.A. App. 71–73, 89 (3AC ¶¶ 22–26, 80), Padilla was subjected to a systematic program of extreme interrogation approved by Rumsfeld, Haynes, Jacoby, and Wolfowitz. C.A. App. 89–90, 96–97 (3AC ¶¶ 79, 81, 105).

3. Proceedings Below

On February 9, 2007, petitioners filed this suit, seeking monetary, injunctive, and declaratory

relief for Mr. Padilla's unlawful designation, seizure, and abuse. C.A. App. 31–34. The district court had jurisdiction over petitioners' claims, in relevant part, under 28 U.S.C. § 1331 and directly under the Constitution.

The core of the suit concerns petitioners' claim that respondents ordered or otherwise directly participated in Mr. Padilla's torture and abuse in an American prison. For that abuse, petitioners sought a declaration that Mr. Padilla's rights had been violated, and one dollar in compensation (under this Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)) from each of the individual-capacity defendants.[1]

Respondents moved to dismiss the lawsuit, principally contending that "special factors" counseled against allowing a *Bivens* remedy for petitioners and, alternatively, that they were entitled to qualified immunity. On February 17, 2011, the district court granted the motions to dismiss on both grounds. Pet. App. 47a–85a.

On January 23, 2012, a three-judge panel of the Fourth Circuit affirmed. Pet. App. 1a–46a. The court held that two special factors counseled against allowing petitioners' damages action to proceed: first, the need to "[p]reserve[] the constitutionally prescribed balance of powers," Pet. App. 16a, and second, that petitioners' claims would entail a

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[1] Petitioners also sought damages from respondents for Mr. Padilla's unlawful detention, and an injunction against the current Secretary of Defense prohibiting Mr. Padilla's re-detention as an enemy combatant. C.A. App. 107 (3AC ¶ 139). These issues are not presented by this petition.

"departure from core areas of judicial competence," Pet. App. 24a.[2]

Because the court dismissed petitioners' *Bivens* claims at the outset, it did "not reach the question of whether the defendants are entitled to qualified immunity or whether Padilla has pleaded his claim with adequate specificity." Pet. App. 33a.

Petitioners seek review by this Court of only one aspect of the court of appeals' decision: that a U.S. citizen subjected to brutal interrogations and horrific conditions of confinement by federal officials on U.S. soil may not seek redress under this Court's decisions in *Bivens* and *Carlson v. Green*, 446 U.S. 14 (1980).

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals conflicts with this Court's decision in *Carlson v. Green*.

Petitioners seek redress for the severe mistreatment of a U.S. citizen held in U.S. custody on U.S. soil. This Court has already held that such suits may proceed. *See Carlson v. Green*, 446 U.S. 14 (1980). The court of appeals' determination to the contrary unsettles established precedent and warrants this Court's review. If there is to be a "national security" exception to the clear rule of

[2] The court of appeals held that an additional special factor barred petitioners' challenge to Mr. Padilla's unlawful detention: his "extensive opportunities to challenge the legal basis for his detention" through habeas corpus proceedings. Pet. App. 31a.

Carlson, it is for this Court, not the court of appeals, to create.

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that an individual alleging a Fourth Amendment violation by federal officers could sue those officers for damages directly under the Constitution. Relying on the uncontroversial proposition that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.* at 395, the Court held that a federal damages remedy was appropriate for Fourth Amendment violations because Congress had not displaced such a remedy and there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Since that time, the Court has elaborated upon the two purposes of *Bivens*. First, as Chief Justice Rehnquist explained in *Correctional Services Corp. v. Malesko*, "*Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts." 534 U.S. 61, 71 (2001). The reason for that deterrence is simple: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell v. Forsythe*, 472 U.S. 511, 524 (1985) (emphasis in original) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (rejecting argument that national security requires dismissal of *Bivens* suit against Attorney General for illegal wiretaps directed at suspected terrorists). Second, *Bivens* "provide[s] a cause of action for a plaintiff who lack[s] any alternative remedy for harms caused by an

individual officer's unconstitutional conduct." *Malesko*, 534 U.S. at 70 (emphasis omitted).

In *Carlson*, the Court extended the *Bivens* remedy to a prisoner's Eighth Amendment claim that federal officials had acted with deliberate indifference to his mistreatment in federal custody. In explaining why "no special factors counsel[ed] hesitation," the Court emphasized two points: First, the defendant officers "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson*, 446 U.S. at 19 (citing *Davis v. Passman*, 442 U.S. 228, 246 (1979)).[3] And second, "even if requiring [the federal prison officials] to defend respondent's suit might inhibit their efforts to perform their official duties, . . . qualified immunity . . . provides adequate protection." *Id.* (citing *Butz v. Economou*, 438 U.S. 478 (1978)).

Petitioners' claims here fall squarely within the heartland of *Bivens* and *Carlson*. As in *Carlson*, petitioners allege mistreatment while in federal custody. And as in both *Bivens* and *Carlson*, the traditional circumstances for permitting *Bivens* relief are plainly present: petitioners seek to hold

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[3] In *Davis*, the "independent status" to which the Court referred was the fact that the defendant, Otto Passman, was a sitting member of Congress. 442 U.S. at 246. Even then, however, the Court held that the "special factors" counseling hesitation were "coextensive with the protections afforded by the Speech or Debate Clause." *Id.*; U.S. Const. art. I, § 6, cl. 1. In other words, either the Constitution expressly immunized Passman, in which case the existence of a *Bivens* cause of action would have been irrelevant, or the Constitution did not confer immunity, in which case no "special factor counseled hesitation."

individual federal officers accountable for grave abuses of a prisoner in federal custody, and there is no adequate alternative remedy. *See Minneci v. Pollard*, 132 S. Ct. 617, 625 (2012) ("the question is whether, in general, [the putative alternative] remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations").

The court of appeals did not dispute that if military agents entered a civilian jail, seized a man from the civilian justice system, transported him to a military prison, and subjected him to a program of extreme interrogations, sensory deprivation, and punishment, the victim of these practices would have a cause of action under *Bivens* and *Carlson*. Rather, the court apparently believed that the victim lost that cause of action as soon as the Executive unilaterally labeled him an "enemy combatant." *See, e.g.*, Pet. App. 13a. But a unilateral change in label cannot effect a change in law. A contrary rule would allow the executive to be the architect of its own immunity, and would effectively overrule *Bivens* in the name of limiting its reach.

Viewed properly, the Fourth Circuit's decision was not a refusal to recognize a "new" *Bivens* remedy, Pet. App. 13a, but rather an impermissible decision not to give effect to an old one.

2. The court of appeals relied upon a sweeping view of "special factors" that would upset decades of settled law.

Even if petitioners' claims could be construed as an extension of *Bivens* and *Carlson*, a remedy

would still be available for a U.S. citizen seeking compensation for his torture on U.S. soil. The court of appeals' decision to the contrary focused upon protection of the *executive's* interests from unwarranted judicial intrusion, *see, e.g.*, Pet. App. 26a ("Padilla's proposed litigation risks interference with military and intelligence operations on a wide scale."), despite this Court's unwavering focus in *Bivens* and its progeny on insulating the *congressional* prerogative from judicial interference.

The unmistakable consequence of this error was to transform a doctrine intended to preserve congressional flexibility in fashioning constitutional remedies into a sweeping "national security" exemption for gross executive misconduct on American soil. This Court rejected that very form of absolute immunity in *Mitchell*, 472 U.S. at 520–24, in favor of individualized claims of qualified immunity. *See also Carlson*, 446 U.S. at 19. Other courts have similarly misinterpreted this Court's special factors jurisprudence. *See* Part 2.b. This Court should grant review to correct the confusion in the lower courts as to the appropriate reach of *Bivens*.

a. The court of appeals transformed the "special factors" analysis into a doctrine of executive immunity.

In considering claims for an extension of *Bivens*, this Court has asked "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." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). If "[i]t would be hard to infer that

Congress expected the Judiciary to stay its *Bivens* hand," this Court has then engaged in the common-law process of "weighing reasons for and against the creation of a new cause of action," including the consideration of any "special factors counseling hesitation." *Id.* at 554, 550.

Although the Court has never provided an exhaustive list of the "special factors" that might "counsel[] hesitation," it has identified three such factors to date: (1) congressional preclusion, whether expressly by creation of an alternative remedy, or implicitly through intentional omission of a damages remedy in an otherwise comprehensive regulatory scheme, *Schweiker v. Chilicky*, 487 U.S. 412, 421–23 (1988); (2) intrusion on "'the unique disciplinary structure of the Military Establishment and Congress' activity in the field,'" *United States v. Stanley*, 483 U.S. 669, 683 (1987) (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)); and (3) "difficulty in defining a workable cause of action," *Wilkie*, 551 U.S. at 555.

Those factors share one overriding concern: they embody judicial deference to the legislative, rather than the executive, prerogative.

In *Chappell*, for example, the Court identified the military's congressionally enacted system of discipline as a "special factor" counseling against the recognition of a *Bivens* claim for racial discrimination brought by enlisted personnel against their superior officers. 462 U.S. at 304; *see also id.* at 302 ("Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate

military life, taking into account the special patterns that define the military structure."). And in *Stanley*, the Court held that "special factors" weighed against inferring a *Bivens* remedy for an action brought by a serviceman claiming that he was secretly administered LSD as part of an Army experiment. 483 U.S. at 683–84. As Justice Scalia there explained, the Constitution's commitment to Congress of the power "'[t]o make Rules'" for the military, *id.* at 679 (quoting *Chappell*, 462 U.S. at 301), and Congress's exercise of that authority to "'establis[h] a comprehensive internal system of justice to regulate military life,'" *id.* (quoting *Chappell*, 462 U.S. at 302), counseled against implying a *Bivens* claim for soldiers seeking redress for injuries "'incident to service,'" *id.* at 684 (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

Chappell and *Stanley* expressly do not stand for the sweeping proposition that *Bivens* claims cannot be brought against military defendants; rather, they bar only claims by servicemembers that implicate Congress's carefully legislated system of military discipline. *See also Bivens*, 403 U.S. at 418 (Burger, C.J., dissenting); *id.* at 428–49 (Black, J., dissenting); *Malesko*, 534 U.S. at 75 (Scalia, J., concurring). And even as the Court has in more recent years declined to expand the scope of *Bivens*, it has justified such restraint as a means of protecting against judicial arrogation of Congress's power to fashion remedies. Concerns over judicial interference with the executive branch, in contrast, have not entered into the Court's "special factors" analysis. Those concerns have manifested themselves, if at all, in the Court's consideration of other, more case-specific considerations, such as

qualified immunity. *See, e.g.*, *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2087 (2011) (Kennedy, J., concurring).

The court of appeals' undue focus on the executive's prerogative caused it to ignore the strongest indication of congressional intent relevant to petitioners' suit: Congress has expressly legislated to foreclose civil actions for *non*-citizens designated by the executive as "enemy combatants," but it has never questioned the availability of such remedies for U.S. citizens. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an *alien* who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant . . . ." (emphasis added)); *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2740, 2741–42 (2005). That Congress saw the need to eliminate causes of action relating to the treatment of enemy combatants demonstrates that it presumed the availability of such remedies; that Congress expressly limited the preclusion to *non*-citizens demonstrates that it did not intend to interfere with *Bivens* for citizens. *See Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) ("we presume legislatures act with case law in mind").

The court of appeals allowed unwarranted concern about intrusion into executive-branch

decisionmaking to infect its *Bivens* inquiry in other ways.

It noted, for example, that a suit by an American citizen seeking compensation for torture on U.S. soil would require "the judiciary [to] review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values." Pet. App. 22a. And it insisted that petitioners' suit would "risk[] interference with military and intelligence operations," Pet. App. 26a, and that it would implicate "practical concerns about obtaining [classified] information necessary for the judiciary to assess the challenged policies," Pet. App. 27a.

These concerns are misplaced in a *Bivens* analysis. Declining to recognize a cause of action on the ground that civil discovery might one day burden the executive puts the cart before the horse. Courts have ample tools at their disposal to address discovery matters, including the possible disclosure of government secrets. The state secrets privilege, not *Bivens* "special factors," is the doctrine by which a district court considers allegations that a deposition or particular piece of evidence might reveal information damaging to national security. That doctrine requires the *government*, not an individual litigant, to assert the privilege after intervening. And it requires that an invocation of the privilege be supported by an affidavit from the head of the relevant government department. *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953). The government did not intervene to assert the privilege

in this case, and no cabinet-level official put his name and reputation behind an affidavit swearing that a particular sort of information was secret and that its disclosure would undermine national security.[4] The government will be free to do so when the case proceeds to discovery.

Judge Calabresi has made this point succinctly: "Denying a *Bivens* remedy because state secrets might be revealed is a bit like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures." *Arar v. Ashcroft*, 585 F.3d 559, 635 (2d Cir. 2009) (en banc) (Calabresi, J., dissenting); *see also id.* at 583 (Sack, J., concurring in part and dissenting in part) ("[H]eeding 'special factors' relating to secrecy and security is a form of double counting inasmuch as those interests are fully protected by the state-secrets privilege."); *id.* at 620 (Parker, J., dissenting) ("Even if Arar's case were viewed as a new context, the 'special factors' cited by the majority do not justify denying him relief because they are not 'special.' They largely duplicate concerns—like state secrets, sovereign immunity, and qualified immunity—amply addressed by other doctrines at the Court's disposal.").

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[4] The court of appeals' speculation is also wrong on the facts. The government itself has publicized, and permitted to be exposed in public court proceedings, the manner of Mr. Padilla's seizure and the role of various senior officials. Moreover, the extreme interrogation methods have been exposed through declassified government reports, orders, and memoranda. *See* C.A. App. 65–1102.

Moreover, the court of appeals' stated purpose of immunizing decisions relating to national security from judicial review creates an impermissible end-run around this Court's decision in *Mitchell*. In that case, the plaintiff sought damages from the Attorney General for authorizing a warrantless wiretap of his communications in the name of national security. *Mitchell*, 472 U.S. at 513–14. The Attorney General insisted that he should be absolutely immune from suit for such decisions. *Id.* at 520. The Court demurred, holding that the availability of qualified immunity provided ample breathing space for national-security decisions. *Id.* at 524 ("We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.").

In focusing its "special factors" analysis on executive concerns, the court of appeals created a broad national-security exception to *Bivens* that this Court has never before recognized and has effectively rejected. As a result, the court's analysis would provide the greatest insulation from judicial review to the most egregious government misconduct. And it would deny a cause of action to all future plaintiffs based on the mere possibility that their suits *might* burden executive-branch officials by requiring them to justify grave constitutional abuses undertaken in the name of national security. Indeed, government officials would not even have to raise these concerns; a cause of action would be foreclosed in any case in which these executive-branch interests arguably were implicated, without regard to the merits.[5]

[5] It is worth emphasizing that petitioners' claims do not involve murky legal questions: torture is prohibited no matter the

The court of appeals' sweeping decision warrants this Court's review.

b. There is confusion in the lower courts on the proper application of *Bivens* in the national-security context.

The proliferation of cases challenging executive misconduct in the military and national-security context and the lack of guidance from this Court have produced conflict and confusion among the lower courts.

Several courts considering claims by foreign citizens of torture by U.S. officials have concluded that national security is a "special factor" that counsels against allowing a damages suit to proceed. *See, e.g.*, *Arar*, 585 F.3d at 574–81; *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (holding that national security is a special factor counseling hesitation in recognizing a *Bivens* suit for allegedly unconstitutional treatment of foreign subjects causing injury abroad); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (same).

Other courts have allowed similar *Bivens* suits by U.S. citizens to proceed.

In *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1019–30 (N.D. Cal. 2009), *appeal docketed*, No. 09-16478

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justification offered by the torturers. President Barack Obama, Statement on United Nations International Day in Support of Torture Victims (June 26, 2009) ("[T]orture is never justified."), *available at* http://1.usa.gov/HS2Zox. For that reason, litigation of petitioners' claims would not require judicial review of any national-security justifications for torture that the court of appeals hypothesized to exist. Pet. App. 26a–27a.

(9th Cir. argued June 14, 2010), a district court allowed a suit by these petitioners to proceed against another executive official who was involved in Mr. Padilla's horrific ordeal. After noting this Court's admonition that "'[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake,'" *id.* at 1012 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)), the court held that none of the putative special factors claimed by the defendant counseled hesitation. *Id.* at 1026 (passage of the Authorization for Use of Military Force not a "special factor"); *id.* at 1027 (same for wartime decisionmaking); *id.* at 1028 (same for national security and state secrets); *id.* at 1029 (same for foreign affairs).

Similarly, in *Vance v. Rumsfeld*, 653 F.3d 591, 611–26 (7th Cir. 2011), *reh'g en banc granted*, No. 10-1687 (Oct. 28, 2011), the Seventh Circuit allowed a *Bivens* suit by American military contractors who alleged that they had been tortured in U.S. custody in Iraq to proceed against former Secretary of Defense Donald Rumsfeld and other defendants. In rejecting many of the same "special factors" recognized by the court of appeals here, the Seventh Circuit noted that "[t]he fact that the plaintiffs are U.S. citizens is a key consideration here as we weigh whether a *Bivens* action may proceed." *Id.* at 619.

As in *Vance*, in *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 106–11 (D.D.C. 2011), *appeal docketed*, No. 11-5209 (D.C. Cir. argued Mar. 19, 2012), a district court allowed a suit by an American defense

contractor who alleged that he was unlawfully detained and tortured by military officials in Iraq to proceed against Mr. Rumsfeld.

Finally, other courts have recognized the availability of *Bivens* suits by civilians against the military, contradicting the court of appeals' sweeping suggestion that *Stanley* and *Chappell* bar such suits. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194 (2001) (excessive force action against a military police officer, decided on qualified immunity grounds), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009); *Roman v. Townsend*, 224 F.3d 24 (1st Cir. 2000) (action against military police officer and Secretary of the Army for improper arrest and treatment in detention); *Morgan v. United States*, 323 F.3d 776 (9th Cir. 2003) (claim against military police for improper search); *Applewhite v. U.S. Air Force*, 995 F.2d 997 (10th Cir. 1993) (action against military investigators for unlawful search and removal from military base).

This confusion among lower courts as to whether national-security considerations foreclose suits by American citizens alleging torture reflects uncertainty about the types of "special factors" that courts may consider. This Court should clarify that *Carlson* governs the torture of a U.S. citizen in U.S. custody, *see, e.g.*, *Vance*, 653 F.3d at 611 ("There can be no doubt that if a federal official, even a military officer, tortured a prisoner in the United States, the tortured prisoner could sue for damages under *Bivens*."), and that the assertion of national-security concerns is not a "special factor" barring such suits in U.S. courts.

3. The decision of the court of appeals frustrates the separation of powers by placing executive misconduct beyond judicial review.

It is hard to conceive of a more profound constitutional violation than the torture of a U.S. citizen on U.S. soil. With the court of appeals' holding that Mr. Padilla's claims of torture—and those of any future victim of similar abuses—are nonjusticiable, our legal system has arrived at the bottom of the slippery slope. By cordoning off the most egregious executive misconduct from judicial review, the court of appeals' holding constitutes an assault not only on Mr. Padilla's right of access to an Article III forum, but to core separation of powers principles. If endorsed by this Court, it would upset the system of checks and balances that sustains our free society. *See The Federalist No. 47*, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.").

It is thus ironic that the court of appeals deemed a "special factor" the preservation of the "constitutionally prescribed balance of powers," even as it wholly disregarded this Court's admonition that the Constitution "envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.[6] More particularly, it is

[6] *See also Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the

precisely the role of the judiciary to ensure that allegations of grave misconduct by Executive Branch officials receive fair adjudication. That vital role does not evaporate simply because those officials contend unilaterally that their actions are too sensitive for judicial review. And when the claims of federal officials take the form not of fact-specific requests for qualified immunity but of sweeping demands that entire categories of future cases be deemed nonjusticiable, our carefully calibrated system of checks and balances requires heightened judicial vigilance.

This Court has long made clear that our Constitution's fundamental commitment to human dignity stands in stark contrast to "governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. . . . So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). Judicial review is essential to maintaining that commitment at least when, as here,

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Executive Branch of Government, whose particular responsibility is to maintain security. . . . A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that 'the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.'" (citation omitted)).

a U.S. citizen is subjected to brutal mistreatment by U.S. officials on U.S. soil.[7]

The court of appeals' insistence that litigation of this case would require a "departure from core areas of judicial competence" was wrong. Courts are plainly competent to review cases implicating even the most sensitive national security issues. Consistent with this Court's admonition that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," *Hamdi*, 542 U.S. at 536, courts have played an active and vital role in evaluating the legality of executive action taken in the name of national security. In the past decade alone, this Court has decided whether the President can detain enemy combatants captured on the battlefield in Afghanistan and whether those captured are entitled to due process, *id.* at 509, whether individuals detained at Guantanamo Bay may challenge their detention, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004), and whether the trial of detainees by military commissions passes constitutional muster, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).[8] Indeed, those

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[7] It is no response to say that Mr. Padilla had available to him injunctive relief to end his torture. He was held incommunicado and denied access to counsel during his worst mistreatment.

[8] From our nation's earliest days, this Court has adjudicated damages claims in cases in which national security interests were at issue, even those involving war or exigent circumstances. *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.) (holding U.S. Navy captain liable in damages to Danish ship owner for illegal seizure of his vessel during war against France); *The Paquete Habana*, 175 U.S. 677, 714 (1900) (awarding damages to foreign citizens for the

cases presented a *greater* risk of intrusion into military and intelligence operations than does this one. The petitioners in *Boumediene*, *Hamdi*, and *Rasul* sought immediate habeas corpus relief, which necessarily must be litigated with urgency and, if successful, can directly compel release of the individual from U.S. custody. Damages claims, by contrast, can be managed and tailored by the court to address the needs of the parties. Moreover, because a damages case is retrospective, the passage of time may alleviate any potential interference with urgent military tasks or battlefield duties. Where the victims are U.S. citizens and the injuries occurred on U.S. soil, the likelihood of intruding upon the Executive warmaking authority is even further attenuated.

In short, this case tests the Judiciary's commitment to "freedom's first principles." *Boumediene*, 553 U.S. at 797. Executive officials have claimed immunity for the torture of a U.S. citizen in South Carolina. In averting its eyes from that misconduct, the court of appeals relegated the defense of a core individual liberty to the political branches alone. Our system of checks and balances cannot tolerate that result.

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wrongful actions of U.S. military authorities arising out of U.S. naval blockade during Spanish-American War).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 19, 2012

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, for herself and as Mother and Next Friend of Jose Padilla; JOSE PADILLA,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, Former Secretary of Defense; CATHERINE T. HANFT, Former Commander Consolidated Brig; MELANIE A. MARR, Former Commander Consolidated Brig; LOWELL E. JACOBY, Vice Admiral, Former Director Defense Intelligence Agency; PAUL WOLFOWITZ, Former Deputy Secretary of Defense; WILLIAM HAYNES, Former General Counsel Department of Defense; LEON E. PANETTA, Secretary of Defense in his official and individual capacities,

No. 11-6480

Defendants-Appellees,

and

JOHN ASHCROFT, Former Attorney General; MICHAEL H. MOBBS, Special Advisor to Undersecretary of Defense for Policy; JOHN DOES, 1-48, in their individual capacities; MACK D. KEEN, Senior Chief

Consolidated Brig; CRAIG NOBLE, Dr.; SANDY SEYMOUR, Technical Director Consolidated Brig; STEPHANIE L. WRIGHT, Commander Consolidated Brig,

Defendants.

JAMES P. CULLEN, Brigadier General, USA (Ret.); MORRIS D. DAVIS, Colonel, USAF (Ret.); EUGENE R. FIDELL, Lieutenant Commander, USCG (Ret.); EVELYN P. FOOTE, Brigadier General, USA (Ret.); DON GUTER, Rear Admiral, JAGC, USN (Ret.); LEIF H. HENDRICKSON, Brigadier General, USMC (Ret.); JOHN D. HUTSON, Rear Admiral, JAGC, USN (Ret.);

DAVID R. IRVINE, Brigadier General, USA (Ret.); CLAUDIA J. KENNEDY, Lieutenant General, USA (Ret.); MERRILL A. MCPEAK, General, USAF (Ret.); RICHARD O'MEARA, Brigadier General, USA (Ret.); CHARLES OTSTOTT, Lieutenant General, USA (Ret.); THOMAS J. ROMIG, Major General, USA (Ret.); STEPHEN N. XENAKIS, Brigadier General, USA (Ret.); ERWIN CHEMERINSKY, Founding Dean University of California-Irvine School of Law; NORMAN DORSEN, Frederick I. and Grace A. Stokes Professor of Law and Co-

Director, Arthur Garfield Hays Civil Liberties Program New York University School of Law; DAVID GOLOVE, Hiller Family Foundation Professor of Law New York University School of Law;

LEE B. KOVARSKY, Assistant Professor University of Maryland School of Law; ALAN B. MORRISON, Associate Dean for Public Interest and Public Service George Washington University Law School; SHELDON H. NAHMOD, Distinguished Professor of Law and Co-Director of the Institute for Law and the Humanities Chicago-Kent College of Law; ALEXANDER REINERT, Associate Professor of Law Benjamin N. Cardozo School of Law; KERMIT ROOSEVELT, III, Professor of Law University of Pennsylvania Law School; MICHAEL E. TIGAR, Professor of the Practice of Law, Emeritus Duke University School of Law; CARL W. TOBIAS, Williams Professor of Law University of Richmond School of Law;

WILLIAM VAN ALSTYNE, Lee Professor of Law William & Mary Law School; STEPHEN I. VLADECK, Professor of Law American University Washington College of

Law,

Amici Supporting Appellants,

WILLIAM P. BARR; EDWIN MEESE, III; MICHAEL B. MUKASEY; DICK THORNBURGH; UNITED STATES OF AMERICA,

Amici Supporting Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Richard M. Gergel, District Judge.
(2:07-cv-00410-RMG)

Argued: October 26, 2011

Decided: January 23, 2012

Before WILKINSON, MOTZ, and DUNCAN,
Circuit Judges.

Affirmed by published opinion.
Judge Wilkinson wrote the opinion, in which Judge Motz and Judge Duncan joined.

COUNSEL

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OPINION

WILKINSON, Circuit Judge:

Plaintiffs Jose Padilla, presently incarcerated due to his conviction after trial for federal crimes of terrorism, and his mother, Estela Lebron, sue for legal and equitable relief based on Padilla's prior military detention as an "enemy combatant." Padilla names as defendants the present Secretary of Defense and a number of former high-level civilian policymakers in the Defense Department, as well as military officers who implemented their orders. He seeks a declaration that defendants' policies were

unconstitutional, an order enjoining his future designation as an enemy combatant, and nominal damages of one dollar from each defendant. The district court dismissed the action. For the reasons that follow, we affirm.

I.

A.

Plaintiff Jose Padilla is a United States citizen and a member of al Qaeda, who has been an active participant in that organization's terrorist mission since at least the late 1990s. He stands convicted of conspiring with others within the United States to support al Qaeda's global campaign of terror, having travelled to Afghanistan in late 2000 to receive combat training at al Qaeda's al Farooq jihadist camp.

After al Qaeda killed over three thousand people in its September 11, 2001 attacks on the United States, Congress empowered the President to use his warmaking authority to defeat this terrorist threat to our nation. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"). Two administrations have and continue to act pursuant to this authority. See Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) ("[W]e continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States.")

While the U.S. military was engaged in combat against al Qaeda and its allies in Afghanistan, Padilla orchestrated his return from Afghanistan to the United States via Pakistan, Egypt, and Switzerland, ultimately arriving at Chicago's O'Hare International Airport on May 8, 2002. There, Padilla was arrested by FBI agents after falsely denying that he had ever visited Afghanistan. Held pursuant to a material witness warrant issued by the U.S. District Court for the Southern District of New York, Padilla was transported to a federal detention center in New York and assigned court-appointed counsel.

On June 9, 2002, acting pursuant to his authority under the AUMF, President George W. Bush issued an order to defendant Donald Rumsfeld, then Secretary of Defense, to detain Padilla as an enemy combatant, the President having determined that Padilla possessed vital intelligence and posed an ongoing threat to the national security of the United States. That day, Padilla was removed from civilian custody and transferred to the Naval Consolidated Brig at Charleston, South Carolina. While in military custody, Padilla claims that he was repeatedly abused, threatened with torture, deprived of basic necessities, and unjustifiably cut off from access to the outside world. Over time, these conditions were relaxed, and he was allowed monitored meetings with his attorneys.

On November 17, 2005, Padilla was indicted on criminal terrorism charges in the Southern District of Florida. The Supreme Court authorized his transfer from the Naval Consolidated Brig into

civilian custody on January 4, 2006. *See Hanft v. Padilla*, 546 U.S. 1084 (2006). On August, 16, 2007, Padilla was convicted after trial of one count of conspiracy to murder, kidnap, or maim persons overseas in violation of 18 U.S.C. § 956(a)(1) and two counts of providing material support to al Qaeda in violation of 18 U.S.C. § 2339A. He is presently serving his sentence for those crimes.

B.

Since his 2002 detention, Padilla has received the regular attention of the federal courts. Two days after Padilla's transfer to military custody, on June 11, 2002, Padilla's counsel filed a petition for a writ of habeas corpus in the Southern District of New York, challenging that detention. *See Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) ("*Padilla I*"). The district court denied the petition, upholding the President's authority to detain Padilla, but a divided panel of the Second Circuit reversed. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) ("*Padilla II*"). The Supreme Court vacated *Padilla II*, ruling that Padilla's petition should have been filed in South Carolina where he was being held. *See Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) ("*Padilla III*").

On July 2, 2004, Padilla refiled his habeas petition in the District of South Carolina. The district court granted Padilla's petition, holding that he could not be detained as an enemy combatant because he had been captured in the United States. *See Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005) ("*Padilla IV*"). This court reversed, upholding the President's authority to detain Padilla under the AUMF. *See*

Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) ("*Padilla V*").

Approximately two months after this decision, while Padilla's petition for certiorari to the Supreme Court was pending, the government unsealed the indictment in the Southern District of Florida and petitioned this court to vacate its prior opinion and authorize Padilla's removal into civilian custody. When this court denied the government's request, *see Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) ("*Padilla VI*"), the Supreme Court directly authorized the transfer, *see Hanft v. Padilla*, 546 U.S. 1084 (2006) ("*Padilla VII*"). The Supreme Court ultimately denied certiorari on Padilla's habeas claim, concluding that such a constitutional challenge to Padilla's military detention presented no live case or controversy once he had been transferred to civilian custody. *See Padilla v. Hanft*, 547 U.S. 1062 (2006) ("*Padilla VIII*").

While a wide range of issues were subsequently litigated in Padilla's criminal case, the only decision relevant to this appeal is *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011), which affirmed Padilla's conviction on terrorism charges, but reversed the district court's sentence, concluding that 208 months' incarceration was unreasonably low.

C.

Padilla commenced this action on February 9, 2007, while in civilian custody awaiting trial in his criminal case. The claims at issue in this appeal are alleged in his Third Amended Complaint, filed on July 23, 2008.

Padilla claims that, as a U.S. citizen captured within the United States, he was unconstitutionally designated as an enemy combatant, and alleges a range of constitutional violations stemming from his ensuing military detention: denial of his right to counsel under the First, Fifth, and Sixth Amendments; denial of access to courts protected by Article III, the First and Fifth Amendments, and the Habeas Corpus Suspension Clause; unconstitutionally cruel conditions of confinement in violation of the Fifth and Eighth Amendments; coercive interrogations in violation of the Fifth and Eighth Amendments; denial of his freedom of religion under the First Amendment and the Religious Freedom Restoration Act; denial of access to information protected by the First Amendment; denial of freedom of association under the First Amendment; and general denial of due process protected by the Fifth Amendment. As relief, Padilla seeks a declaration that his designation, military detention, and treatment in custody were unconstitutional; a declaration that the policies that led to his treatment were unconstitutional; an injunction prohibiting his future designation and detention as an enemy combatant; and one dollar in damages from each defendant.

Padilla initially named sixty-one persons as defendants in this action. He has since dismissed his claims against those defendants who dealt most directly with his custody—specifically, the "legal professional[s]" who allegedly interfered with his access to counsel or the courts, see Third Amended Complaint ¶22; the "medical professional[s]" who monitored his confinement, *id*. at ¶23; and the

interrogators and guards in direct control of his custody, *id*. at ¶¶24-25.

Seven defendants remain. Four are former high-ranking policymakers of the Defense Department sued in their personal capacities: former Secretary of Defense Donald H. Rumsfeld, former Deputy Secretary of Defense Paul Wolfowitz, former Defense Department General Counsel William Haynes, and former Director of the Defense Intelligence Agency Vice Admiral Lowell E. Jacoby. Padilla alleges that these defendants formulated an unconstitutional policy for detaining enemy combatants in the war on terrorism, which included the legal defense of that designation and the harsh interrogation measures used pursuant thereto. He does not charge any of these defendants personally with violating his rights, for example by seizing him in violation of the Fourth Amendment or physically abusing him in violation of the Eighth Amendment. Rather, he holds them liable for developing the global detention and interrogation policies that he contends were unconstitutional both on their face and as applied to him.

Padilla also sues two former Commanders of the Naval Consolidated Brig, Catherine T. Hanft and Melanie A. Marr, alleging that they were responsible for "implement[ing] the unlawful regime devised and authorized by [the] Senior Defense Policy Defendants." *Id*. at ¶7.

Finally, Padilla sues current Secretary of Defense Leon Panetta in his official and individual capacities, seeking both declaratory relief and an injunction against his future designation as an enemy combatant.

On February 17, 2011, the district court granted the defendants' motion to dismiss Padilla's suit. *See Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011). This appeal followed.

II.

Padilla first faults the district court for refusing to imply a new cause of action for money damages against top Defense Department officials for a range of policy judgments pertaining to the designation and treatment of enemy combatants.[9]

A.

We review the district court's ruling on a motion to dismiss de novo. *See Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007). Like the district court, we conclude that a proper regard for the constitutional structure requires us to decline to recognize this novel suit. The designations of persons and groups as special threats to national security may be subject to a variety of checks and to habeas corpus proceedings. But they are not reviewable by the judiciary by means of implied civil actions for money damages.

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[9] Padilla also seeks a retrospective declaration that both his detention and the broader detainee policies were unconstitutional. Inasmuch as equitable relief is prospective in nature, *see Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944), the request for a declaration of unlawful past confinement is in essence an attempt to prove a constitutional violation as the necessary predicate to any award of damages, *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). As such, the requested declaration is part and parcel of the *Bivens* cause of action.

We begin by discussing the historic restraint applicable to implied causes of action and the judicial standards developed with respect to them. As to all but one of his claims,[10] Padilla asks the judiciary to imply a cause of action for constitutional violations by federal officials, as first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, the Supreme Court has long counselled restraint in implying new remedies at law. A *Bivens* action "has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

That judgment is focused not on "the merits of the particular remedy that was sought" but, rather, on "who should decide whether such a remedy should be provided," *Bush v. Lucas*, 462 U.S. 367, 380 (1983), specifically, Congress or the courts. "[B]edrock principles of separation of powers," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001), dictate that the judiciary refrain from implying a remedy when "special factors counsel[ ] hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 397, or when Congress has provided "any alternative, existing process for protecting the interest [that] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," *Wilkie*, 551 U.S. at 550.

In the forty years since *Bivens*, the Supreme Court has monitored the limits of judicial competence

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[10] Padilla's RFRA claims are discussed *infra* Part III.

to design implied remedies, frequently reminding the courts "that Congress is in a better position to decide whether or not the public interest would be served by creating" *Bivens* actions in new situations. *Bush*, 462 U.S. at 390. Exercising this restraint, the Court has itself "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. It only recently declined to "imply the existence of an Eighth Amendment-based damages action . . . against employees of a privately operated federal prison." *Minneci v. Pollard*, No. 10-1104, slip op. at 1, 565 U.S. ___ (2012).

Given these principles, we must approach Padilla's invitation to imply a *Bivens* action here with skepticism. "The *Bivens* cause of action is not amenable to casual extension," *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006), but rather is subject to a strict test adopted by this court. To maintain a *Bivens* claim, Padilla must demonstrate both that "there are no 'special factors counseling hesitation in the absence of affirmative action by Congress'" and that "Congress has not already provided an exclusive statutory remedy." *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000) (citation omitted). We do not require congressional action before recognizing a *Bivens* claim, as that would be contrary to *Bivens* itself. We will, however, refuse to imply a *Bivens* remedy where, as in this case, Congress's pronouncements in the relevant context signal that it would not support such a damages claim.

B.

Special factors do counsel judicial hesitation in implying causes of action for enemy combatants held

in military detention. First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government. Together, the grant of affirmative powers to Congress and the Executive in the first two Articles of our founding document suggest some measure of caution on the part of the Third Branch.

1.

Preserving the constitutionally prescribed balance of powers is thus the first special factor counseling hesitation in the recognition of Padilla's *Bivens* claim. The "Constitution contemplated that the Legislative Branch [have] plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). Indeed, that control is explicit and not merely derivative of other powers: Congress has the enumerated powers to declare war, *see* U.S. Const., art. I, § 8, cl. 11; establish the armed forces, *see id*. cl. 12-13; and "make Rules for the Government and Regulation of the land and naval Forces," *id*. cl. 14. As the Supreme Court has noted, "What is distinctive here is the specificity of that technically superfluous grant of power . . . Had the power to make rules for the military not been spelled out, it would in any event have been provided by the Necessary and Proper Clause—as is, for example, the

power to make rules for the government and regulation of the Postal Service." *United States v. Stanley*, 483 U.S. 669, 682 (1987) (internal citation omitted). As a consequence, "in no other area has the Court accorded Congress greater deference." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

Further supporting judicial deference is the Constitution's parallel commitment of command responsibility in national security and military affairs to the President as Commander in Chief. *See* U.S. Const. art. II, § 2, cl. 1. Here too, judges "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). As a result, the Supreme Court has consistently shown "great deference" to what "the President—the Commander in Chief—has determined . . . is essential to national security." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, 26 (2008).

When, as here, these two branches exercise their military responsibilities in concert –- Congress by enacting the AUMF and the President by detaining Padilla pursuant thereto, *see Padilla V*, 423 F.3d 386—the need to hesitate before using *Bivens* actions to stake out a role for the judicial branch seems clear. It is settled that courts "accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress." *Id.* at 395. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson described the heightened judicial caution signalled by facts such as those presented here: "A seizure executed by the President pursuant to an Act of

Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 637 (Jackson, J., concurring).

The reasons for this constitutional structure are apparent. Questions of national security, particularly in times of conflict, do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case. It is therefore unsurprising that "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004).

This explicit constitutional delegation of control over military affairs is quite relevant to the *Bivens* inquiry. *See Stanley*, 483 U.S. at 683 ("[T]he 'special facto[r]' that 'counsel[s] hesitation' is . . . the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."). Observance of the constitutional structure requires that courts properly consider whether officials of other branches, named in *Bivens* suits, "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson v. Green*, 446 U.S. 14, 19 (1980). Thus, whenever the Supreme Court has considered a *Bivens* case involving the military, it has concluded that "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches . . . counsels hesitation in our creation of damages remedies in this field." *Stanley*, 483 U.S. at

682. Put simply, "such a remedy would be plainly inconsistent with Congress' authority" in military affairs. *Chappell*, 462 U.S. at 304.[11]

These general observations are amply reinforced by the particulars of Padilla's case. To stay the judiciary's hand in fashioning the requested *Bivens* action, it suffices to observe that Padilla's enemy combatant classification and military detention raise fundamental questions incident to the conduct of armed conflict, and that Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy." *Id*. at 304. To the extent the Constitution may require these defendants to justify in court who is and is not an enemy combatant, it does so in the very different context of habeas corpus proceedings, *see Hamdi*, 542 U.S. at 533, proceedings that Padilla took full advantage of up until his transfer to civilian custody. *See supra* Part I.B.

The relevance of these separation of powers concerns is underscored by the nature of Padilla's allegations. The bulk of Padilla's complaint describes the evolution of the "detention and interrogation

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[11] We respect the service to our country of the retired military officers who have offered their views as amici curiae in this case. Their conclusion, however, that this *Bivens* action "will cause no interference with the legitimate mission of our military forces," Retired Military Officers' Amicus Br. at 24, misapprehends the question posed by "special factors" analysis. We do not address the merits of whether a damages remedy would interfere with the military or not. Rather, we defer to Congress as the branch constitutionally charged with addressing that question, and we will not readily displace the legislative role by concluding on our own authority that damages are appropriate.

policies developed by Senior Defense Policy defendants," Third Amended Complaint ¶49, which Padilla contends "proximately and foreseeably" caused the harm he suffered from his detention and conditions of confinement, *id*. at ¶6. In the course of describing the internal debate over detainee policy, however, the complaint makes very clear the extent to which the progression of this lawsuit would draw courts into the heart of executive and military planning and deliberation.

Padilla primarily challenges "the [detainee] policy developed by Senior Defense Policy Defendants." *Id*. at ¶37. Padilla describes how this policy was created as part of the broader effort in the fall of 2001 "to develop policy in the war on terrorism." *Id*. at ¶47. Almost immediately after 9/11, the defendants in this suit sought the advice of the Justice Department, obtaining ten different memoranda from the Office of Legal Counsel discussing the scope of presidential authority under the AUMF, application of the Geneva Conventions to members of al Qaeda, and permissible forms of interrogation. *Id*. at ¶50. Nor was this the only legal advice the defendants received. The FBI weighed in, *id*. at ¶67, as did Alberto Mora, General Counsel of the Navy, *id*. at ¶72.

The debate over what interrogation techniques to use in combating al Qaeda received equally high level attention. According to the complaint, Major General Michael Dunlavey, the commander of Joint Task Force 170 at Guantanamo Bay, Cuba, received input on the appropriateness of specific interrogation techniques from, among others, the Defense Human Intelligence Services, *id*. at ¶60; Col. Steve

Kleinman, the head of the U.S. Air Force's strategic interrogation program; and Dr. Michael Gelles, the Navy's top forensic psychologist, *id.* at ¶71. Kleinman and Gelles presented dissenting positions, objecting to the use of certain techniques. *Id.* The defendants took an approach that reflects this diversity of views—while Haynes told Rumsfeld that some enhanced interrogation techniques "may be legally available," they "should not be the subject of a blanket approval at this time." *Id.* at ¶67.

Later, interrogation policy was directed by the "Working Group on Detainee interrogations in the Global War on Terrorism," which included defendant Haynes, general counsel of the Department of Defense; Michael Mobbs, the head of the Detainee Policy Group; representatives of the Defense Intelligence Agency; and the General Counsels and Judge Advocate Generals of the various departments of the military –- all reporting to the Secretary and Deputy Secretary of Defense. *Id.* at ¶73.

Nor did high-level oversight end with the creation of the detainee policy. The complaint asserts that in May 2004, defendant Rumsfeld ordered the Naval Inspector General, Vice Admiral Albert T. Church, to conduct a review of detentions at the Naval Consolidated Brig where Padilla was held. *Id.* at ¶104. Admiral Church's review included over 100 interviews and a variety of affidavits, JA-627, and frankly acknowledged that "friction occurred between the FBI and DOD" over what interrogation methods were best to use. Third Amended Complaint ¶121.

Finally, even the few allegations specific to Padilla reveal the sensitive nature of the debate into which his suit would draw the courts. Padilla

describes his own detention as deriving from intelligence obtained from "two suspected terrorists detained and interrogated outside the United States." *Id*. at ¶40. Similarly, the specific conditions at the Naval Consolidated Brig were the result of a policy choice that all detainees should receive the same treatment, regardless of where they were held. *See*, *e.g.*, *id*. at ¶107 ("JTF-GTMO [does] not provide [the Geneva Conventions] to their detainees. Accordingly, neither will the NAVCONBRIG.").

In short, Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability.

Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved in decisions of the kind described above. But to date Congress has made no such decision. This was not through inadvertence. Congress was no idle bystander to this debate. Indeed, it devoted extensive attention to the precise questions Padilla presents pertaining to the treatment of detainees and to the legitimacy of

interrogation measures, *see*, *e.g.*, Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190; Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739. For example, Congress provided in the Detainee Treatment Act of 2005 that "No person in the custody . . . of the Department of Defense . . . shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." Pub. L. 109-163 § 1402, 119 Stat. 3475. It further provided that "[n]o individual in the custody . . . of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment . . . as defined in the United States Reservations, Declarations, and Understandings to the United Nations Convention Against Torture." 120 Stat. 2635. And the Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190, prohibits the use of a "statement obtained by the use of torture or by cruel, inhuman, or degrading treatment. . . whether or not under color of law" in the trial of an enemy combatant before a military commission. 123 Stat. 2580.

This history reveals a Congress actively engaged with what interrogation techniques were appropriate and what process was due enemy combatant detainees. In enacting these statutes, Congress acted with a "greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties," *Holly*, 434 F.3d at 290, than we possess, constrained as we are by the limited factual record of a single case. Padilla asks us to ignore this

ample evidence that "congressional inaction has not been inadvertent," *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988), and to do what Congress did not do, namely to trespass into areas constitutionally assigned to the coordinate branches of our government.

This is a case in which the political branches, exercising powers explicitly assigned them by our Constitution, formulated policies with profound implications for national security. One may agree or not agree with those policies. One may debate whether they were or were not the most effective counterterrorism strategy. But the forum for such debates is not the civil cause of action pressed in the case at bar. The fact that Padilla disagrees with policies allegedly formulated or actions allegedly taken does not entitle him to demand the blunt deterrent of money damages under *Bivens* to promote a different outcome. Being judicial requires that we be judicious, and adherence to our constitutional role in this area requires that we await "affirmative action by Congress." Put simply, creating a cause of action here is "more appropriately for those who write the laws, rather than for those who interpret them." *United States v. Gilman*, 347 U.S. 507, 513 (1954).

2.

In addition to these structural constitutional concerns, a second factor causing hesitation in the *Bivens* context is the departure from core areas of judicial competence that such a civil action might entail. This second factor overlaps to some extent with the dangers of intrusion into the constitutional

responsibilities of others described above. But it also raises a discrete set of problems all its own pertaining to the ability of the judiciary to administer a *Bivens* remedy in a case like the one at hand.

The problems of administrability here are at least two-fold. The first has to do with the interruption of the established chains of military command. The Supreme Court has cautioned against entertaining suits that could be so "problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands." *Stanley*, 483 U.S. at 682-83. Padilla's suit proposes to do precisely what the Supreme Court has instructed we not do: "require members of the Armed Services" and their civilian superiors "to testify in court as to each other's decisions and actions," *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) in order "to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." *United States v. Shearer*, 473 U.S. 52, 58 (1985).

Padilla's complaint is replete with references to the hierarchy of the Defense Department and its responsibility for overseeing the nation's armed services. For example, he emphasizes that Secretary of Defense Donald Rumsfeld "exercised command and control over all members of the U.S. military," Third Amended Complaint ¶14, and that the military supervisor defendants at the brig were responsible "for receiving[ ] and implementing orders from higher-ranking members of the chain of command." *Id*. at ¶¶22-27. Padilla's very theory of liability thus

depends upon a probe of the command structure of our military establishment, a hierarchy that the federal courts have heretofore been reluctant to disrupt. The gravamen of Padilla's complaint is that commanders and subordinates should be made to consider the possibility of liability for *Bivens* damages before formulating and implementing directives pertaining to military detentions. If such a check is warranted, the Constitution requires that Congress impose it rather than courts imply it. After all, not only does Congress have authority to regulate the nation's military, it is also "in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf. And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562 (internal quotation marks and citations omitted).

A second difficulty of administering Padilla's proposed *Bivens* action pertains to its practical impact on military intelligence operations. Padilla's proposed litigation risks interference with military and intelligence operations on a wide scale. Any defense to Padilla's claims—which effectively challenge the whole of the government's detainee policy—could require current and former officials, both military and civilian, to testify as to the rationale for that policy, the global nature of the terrorist threat it was designed to combat, the specific intelligence that led to the application of that policy to Padilla, where and from whom that intelligence was obtained, what specific military orders were given in the chain of command, and how

those orders were carried out. As the Second Circuit has noted in an analogous context, "A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns." *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (en banc).

The Supreme Court has taken such administrability concerns seriously. Cautioning against the implication of a *Bivens* cause of action here are practical concerns about obtaining information necessary for the judiciary to assess the challenged policies. Much of the information relevant to the creation of the detainee policy remains classified. While we have no doubt that courts would seek to protect such sensitive information, *see* Classified Information Procedures Act, 18 U.S.C. App. III §§1-16, even inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collecting intelligence. As the Supreme Court has recognized, "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA v. Sims*, 471 U.S. 159, 175 (1985). The chilling effects on intelligence sources of possible disclosures during civil litigation and the impact of such disclosures on military and diplomatic initiatives at the heart of counterterrorism policy often elude judicial assessment. If courts assay such assessments, it should be because the legislative branch has authorized that course.

The problems of administrability are thus compounded by their relative novelty. The inquiries presaged by Padilla's action are far removed from questions of probable cause, *see Bivens*, 403 U.S. 388, or deliberate indifference to medical treatment, *see Carlson*, 446 U.S. 14, routinely confronted by district courts in suits under 42 U.S.C. § 1983 or *Bivens*. In fact, when the Supreme Court has approved *Bivens* actions, it has expressly noted that the questions presented fell within the traditional competence of courts. *See Davis v. Passman*, 442 U.S. 228, 245 (1979) (approving *Bivens* claim for gender discrimination in part because "[l]itigation under Title VII of the Civil Rights Act of 1964 has given federal courts great experience evaluating claims for backpay due to illegal sex discrimination.")

Padilla downplays these administrability concerns. He argues that a *Bivens* action will not require courts to do much more than they are doing already. Appellant's Br. at 27-28. It is inescapable, to be sure, that the branches of government will sometimes interact, and the courts will be called upon to take up sensitive matters. In those instances, however, Congress has often provided courts with specific means and mechanisms to consider delicate questions without imperiling national security. Congress has not just opened up something akin to a *Bivens* action to courts of general federal question jurisdiction and left them without guidelines how to proceed. Padilla also argues that cases like *Stanley* and *Chappell*, which recognized the likelihood that certain *Bivens* actions would interfere with military defense, do not apply to him because he is not a member of the armed forces. But this misconceives the nature of the special factors analysis. The source

of hesitation is the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff.

Numerous examples suffice to illustrate the point that Congress has been cautious about conferring broad discretionary powers on all Article III courts in matters trenching on important national security concerns. For example, even though courts routinely consider applications for telephone intercepts in criminal cases under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, Congress created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of investigations of "a foreign power or an agent of a foreign power." 50 U.S.C. §§ 1803-04. With respect to detainees like Padilla, Congress has provided for limited judicial review of military commission decisions, but only by the District of Columbia Circuit Court of Appeals, and only after the full process in military courts has run its course. 10 U.S.C. § 950g. And to the extent that the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), permitted further judicial examination of the detention of enemy combatants, it did so using the limited tool of the constitutionally guaranteed writ of habeas corpus—not an implied and open-ended civil damages action. *See id.* at 797. And the Court recognized the need for the judiciary carefully to avoid adverse effects on our national security, limiting proper venue for detainee habeas cases to the District of Columbia District Court so as to "reduce administrative burdens on the Government" and "to avoid the widespread dissemination of classified information." *Id.* at 796.

Even a cursory survey thus suffices to illustrate that when Congress deems it necessary for the courts to become involved in sensitive matters, such as those involving enemy terrorists, it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns. Such circumscribed grants and detailed directions as those set forth above stand in stark contrast to the unencumbered discretion that Padilla would invite all Article III courts across this country to exercise. Padilla responds that such constructs as qualified immunity and the state secrets privilege should suffice to allay these concerns. *See* Appellant's Br. at 24-25. But the litigation of such matters still presents the potential of diverting "efforts and attention" from the primary obligations of officials entrusted with the sober responsibilities of protecting the lives and safety of American citizens. *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). Moreover, courts have developed these doctrines to prevent unintended adverse effects on national security from alreadyestablished causes of action. *See Tenet v. Doe*, 544 U.S. 1, 9- 11 (2005). Here, by contrast, Padilla asks for a new *Bivens* cause of action, and the Supreme Court has instructed us to consider any aspect of that claim that would cause us to hesitate before entertaining suit. *See Bivens*, 403 U.S. at 397. We need not await the formal invocation of doctrines such as qualified immunity or state secrets to say that the prospect of adverse collateral consequences confirms our view that Congress rather than the courts should decide whether a constitutional claim should be recognized in these circumstances. *See Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) ("[T]he concerns that underlie the protective

restrictions of the [Intelligence Identities Protection Act] and the Totten [state secrets] doctrine are valid considerations in the *Bivens* analysis and weigh against creating a remedy in this case.").

The factors counseling hesitation are many. We have canvassed them in some detail, but only to make a limited point: not that such litigation is categorically forbidden by the Constitution, but that courts should not proceed down this highly problematic road in the absence of affirmative action by Congress. If Congress were to create a damages remedy here, we would trust that the legislative process gave due consideration to the broader policy implications that we as judges are neither authorized nor well-positioned to balance on our own.

C.

Before recognizing a *Bivens* action, courts must not only consider special factors that would counsel hesitation, but also "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*, 551 U.S. at 550. Here, Padilla had extensive opportunities to challenge the legal basis for his detention.

Padilla challenged his military detention in habeas corpus proceedings before five different courts. In adjudications on the merits before district courts in the Southern District of New York and the District of South Carolina, and on appeals to the Second Circuit and to this court, Padilla was able to present essentially the same arguments that he makes here about the legality of militarily detaining

a U.S. citizen. *See generally Padilla II*, 352 F.3d 695; *Padilla V*, 423 F.3d 386 (characterizing Padilla's arguments). Padilla pursued those claims up until the very moment that they were mooted by his transfer into civilian custody. And if Padilla is again detained by the military, he could presumably avail himself further of whatever "adequate and effective substitute for habeas corpus" is in use for detainees at that time. *Boumediene*, 553 U.S. at 795. With respect to Padilla's claims arising from his enemy combatant designation, this is not a case of "damages or nothing." *Davis*, 442 U.S. at 245. The Supreme Court has warned that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." *Hamdi*, 542 U.S. at 535.

"That [Padilla] considers [his] existing remedies insufficient is simply irrelevant" to whether a court should imply a *Bivens* action. *Judicial Watch v. Rossotti*, 317 F.3d 401, 413 (4th Cir. 2003). *Bivens* "is concerned solely with deterring individual officers' unconstitutional acts." *Malesko*, 534 U.S. at 71. In such circumstances, we cannot regard the legislative failure to provide Padilla with the monetary damages he seeks from each defendant as an invitation to design some preferred remedial regime of our own.

D.

All these sources of hesitation in recognizing Padilla's *Bivens* claim are related. The practical concerns merely serve to illustrate the wisdom of the constitutional design, which commits responsibility for military governance and the conduct of foreign affairs to the branches most capable of addressing

them and most accountable to the people for their choices. Padilla asks us to intervene in a manner courts have not before seen fit to attempt. To say that the cumulative concerns "counsel hesitation" is something of an understatement, and we must decline to create the damages remedy Padilla seeks. Because we conclude that Padilla's *Bivens* action cannot be maintained, we need not reach the questions of whether the defendants are entitled to qualified immunity or whether Padilla has pleaded his claim with adequate specificity.

III.

Padilla also brought suit under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. That statute authorizes "[a] person whose religious exercise has been burdened" to "obtain appropriate relief against a government." *Id*. § 2000bb-1(c). Padilla contends that this provision permits him to recover damages by suing the individual defendants in their personal capacities.

Congress enacted RFRA in response to the Supreme Court's decision in *Emp't Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990), seeking "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). RFRA initially applied to both the states and the federal government, but the Supreme Court concluded in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the statute exceeded Congress's remedial powers over the states under section 5 of the Fourteenth Amendment. *See id*. at 532-36. Congress "sought to avoid *Boerne*'s

constitutional barrier by relying on its Spending and Commerce Clause powers" in enacting the subsequent Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003). Congress has thus created a parallel statutory scheme, using virtually identical language, in which "RFRA continue[s] to apply to the federal government" and RLUIPA "mirror[s] the provisions of RFRA" in suits against the states concerning land regulation or institutionalized persons. *Id*. Because of the close connection in purpose and language between the two statutes, courts commonly apply "case law decided under RFRA to issues that arise under RLUIPA" and vice versa. *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010).

For the reasons that follow, we believe that to permit recovery in this case would be at odds with the positions of the two coordinate branches to whom our Constitution has entrusted primary responsibility for the conduct of military affairs. As we shall explain, it is anything but clear that Congress has created under RFRA a cause of action that Padilla may bring against these federal officers.

As a preliminary matter, we have no occasion to inquire how RFRA applies outside a military setting. Those questions are not before us, and we have no need to address them. The military context is, however, once again important. There exist strong reasons for defendants to believe that RFRA did not apply to enemy combatants detained by the military. Indeed, no authority suggested to the contrary. And the defendants have asserted that, at the very least, they are entitled to the qualified immunity available

to public officials on the grounds that "any rights that enemy combatants may have had under RFRA were not clearly established during the period of Padilla's military detention." Appellee's Br. of Hanft et al. at 46. We agree. This case is an appropriate one for the recognition of the immunity defense because it would run counter to basic notions of notice and fair warning to hold that personal liability in such an unsettled area of law might attach. The following discussion underscores why it would be impermissible for us to conclude that the relevant law was clearly established in anything like a manner that would vitiate a qualified immunity defense. We thus dismiss Padilla's RFRA claim on qualified immunity grounds.

Padilla contends that Congress clearly intended RFRA to authorize "enemy combatants" to challenge the circumstances of their military detention. We are not persuaded. Claims implicating national security and war powers flash caution signals all their own. Courts have long been reluctant to interpret statutes in ways that allow litigants to interfere with the mission of our nation's military, preferring that Congress explicitly authorize suits that implicate the command decisions of those charged with our national defense.

Perhaps the best known example of this principle is the doctrine derived from *Feres v. United States*, 340 U.S. 135 (1950). There, the Supreme Court concluded that even though the Federal Tort Claims Act, 28 U.S.C. § 1346(b), had no express limits on who may recover from the government and even included as possible tortfeasors "members of the military or naval forces," 28 U.S.C. § 2671(1), the

statute did not authorize tort suits by members of the military for injuries sustained while engaged in military service. The *Feres* Court emphasized two principles: first, the unique nature of "authorities over persons [that] the government vests in echelons of command," and second, a "reluctance to impute to Congress such a radical departure . . . in the absence of express congressional command." *Feres*, 340 U.S. at 141, 145. The Court sixty-one years ago expressed the same puzzlement that gives us pause in sanctioning Padilla's RFRA action today: "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to [authorize it]. The absence of any such [provision] is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.* at 144.

This need for hesitation is present in the context of military detention. In *United States v. Joshua*, 607 F.3d 379 (2010), our court recently emphasized the substantial differences between individuals in civilian custody and individuals in military custody. Those in military custody—either through designation as enemy combatants or courts martial—are subject to the UCMJ, a different body of law than applies to those in civilian life. And whereas "a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of . . . activities." *Id.* at 383 (quoting *Parker v. Levy*, 417 U.S. 733, 749 (1974)). Military proceedings are held before military judges who do not enjoy the protections of Article III. *Id.* Nor do the

full measure of traditional civilian "constitutional guarantees" of rights for defendants apply. *Id.* at 383-384.

In *Joshua*, our concern about the "different substantive laws and separate adjudicative proceedings," *id.* at 382, was sufficiently great that we held that the military still retained "custody" over an individual even if his physical place of confinement was in a civilian jail. In interpreting the federal civil commitment statute, 18 U.S.C. § 4248, we found it significant that Congress had created a separate "elaborate mechanism" with "detailed procedures for hospitalizing and civilly committing military defendants" codified in the UCMJ itself. *Id.* at 389 n.7. We held that this "belie[d] the suggestion that Congress intended to bring military prisoners into § 4248." *Id.* In short, when Congress wishes to legislate with respect to the military, it does so both unmistakably and typically in those sections of the U.S. Code that apply to military affairs.

Congress is aware of the reluctance by courts to intrude into matters of military governance, and when it wishes to legislate with respect to the military, it does so with precision. For example, in a case predating RFRA, the Supreme Court denied a free exercise challenge by a Jewish doctor to an Air Force regulation that effectively prohibited him from wearing a yarmulke. *See Goldman v. Weinberger*, 475 U.S. 503 (1986). When Congress wished to overturn that decision, it did so with a carefully drawn statute, 10 U.S.C. § 774. Codified in Title 10, which also contains the UCMJ and other military regulations, the statute authorizes wearing religious apparel, but preserves specific authority for the

Secretary of Defense to prohibit wearing religious clothing that "would interfere with the performance of the member's military duties" or "is not neat and conservative." *See id.* § 774(b). The statute does not sweep broadly, addressing only the limited situation in which a serviceman's uniform interferes with his ability to wear a religious garment, and it does not create a cause of action allowing military regulations to be challenged in civilian courts. The legislative care that was necessary in that context would be equally expected here. Just as Congress did not leave it to the Article III courts to decide when soldiers can vary their attire from the military uniform, so too have we not been given the discretion to decide what practices can safely be permitted to military detainees.

RFRA and the congressional response to *Goldman* present in fact a useful study in contrasts. As noted, RFRA was an effort to reverse the Supreme Court's denial of a free exercise claim in *Emp't Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not require accommodation of a religious practice as long as the challenged government policy is generally and neutrally applicable). Congress passed RFRA to overturn the decision in the civilian context, locating the statute in Title 42 along with other civilian civil rights, and failing to include the exceptions or discretionary authority that only four years before Congress deemed so necessary to achieving the same result in the military context. For unlike Congress's narrowly tailored response to *Goldman* in Title 10, RFRA addresses any free exercise claim, not only the limited facts presented by *Smith*. The contrast is striking, and it is hard to contend that a Congress

that took such pains to ensure that the wearing of religious garments did not unnecessarily interfere with the military mission somehow meant for RFRA to provide a cause of action for a detained terrorist suspect to challenge the conditions of his confinement.

Padilla offers us no evidence to support the conclusion that RFRA supplies an action at law to enemy combatants in military detention. Given the stark differences between civilian and military detentions described in *Joshua*, we would be culpable of a complete transposition of contexts to apply RFRA in the circumstances here. Indeed, the same concerns about judicial interference with the military that caused us to hesitate in implying a *Bivens* action give us pause in interpreting this statute to achieve an equally unanticipated and comparably disruptive outcome. *See Rasul v. Myers*, 563 F.3d 527, 535-36 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009) (Brown, J., concurring) ("Accepting plaintiffs' argument that RFRA imports the entire Free Exercise Clause edifice into the military detention context would revolutionize the treatment of captured combatants in a way Congress did not contemplate. In drafting RFRA, Congress was not focused on how to accommodate the important values of religious toleration in the military detention setting."). Were Congress to prefer damages actions over alternate remedies for those in Padilla's situation, that would be one thing. But we have no indication that Congress even considered the prospect of RFRA actions brought by enemy combatants with anything like the care that it has customarily devoted to matters of such surpassing sensitivity.

The foregoing discussion underscores what we believe are considerable obstacles to applying RFRA in this context. But we need not go so far as to announce such a proposition in its most absolute terms. Under *Pearson v. Callahan*, 129 S. Ct. 808 (2009), we are permitted to explain directly why "there was no violation of clearly established law." *Id*. at 820. As set forth in *Pearson*, the qualified immunity inquiry is hardly an empty one. For here it brings us to the threshold question of whether RFRA even speaks to the military detention setting. We think it anything but clearly established that it does. At the very least, the defendants transgressed no clearly established law in this area, and to hold them personally liable in the absence of clear notice that such a prospect was even possible would run counter to the reasons that the immunity exists. *See Rasul*, 563 F.3d at 533 n.6. For the reasons heretofore expressed, we hold that the defendants have asserted a valid qualified immunity defense to Padilla's RFRA claim.

IV.

Padilla's final claim is that the district court erred in concluding that he lacked standing to seek an order enjoining the government from designating him as an enemy combatant in the future.

The standing doctrine gives practical effect to the Constitution's "fundamental limits on federal judicial power in our system of government" imposed by the case or controversy requirement. *Allen v. Wright*, 468 U.S. 737, 750 (1984). To satisfy this jurisdictional baseline, a plaintiff must demonstrate:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Padilla claims he has sustained two types of "injury in fact": a reasonable fear of future military detention and an ongoing stigma resulting from his prior detention as an enemy combatant. We shall address each in turn.

A.

A plaintiff who seeks, as Padilla does, to enjoin a future action must demonstrate that he "'is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Padilla argues that he has alleged such danger by virtue of his prior enemy combatant designation and the government's failure to deny the possibility that it could designate him an enemy combatant in the future. Padilla's only support for this apprehension is that then-Deputy Solicitor General Gregory Garre informed his attorney in November 2005 that the policy could be reapplied to him. His own brief

acknowledges, however, that the most that can be read into this statement is that "the military *could* therefore detain Padilla at any time." Appellant's Br. at 48 (emphasis added). This proves no more than that there is a possibility that Padilla could be redesignated an enemy combatant.

The Supreme Court has repeatedly rejected such a basis for standing. Time and again, the Court has reiterated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495- 96 (1974)). And it is equally insufficient for a plaintiff claiming standing to observe that the challenged conduct is repeatable in the future. *See Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (noting "that the former Congressman *can* be a candidate for Congress again is hardly a substitute for evidence that this *is* a prospect of immediacy and reality" (emphasis added)). Nor does a claim that the purportedly illegal practice is commonly used suffice to make the threat to the plaintiff sufficiently concrete. *Lyons*, 461 U.S. at 106 ("The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds . . . falls far short of the allegations that would be necessary to establish a case or controversy between these parties.").

Not only has Padilla failed to allege a "real" threat, but he also cannot allege an "immediate" one. Convicted of serious charges of terrorism, and now facing more than seventeen years in jail on resentencing, *see Jayyousi*, 657 F.3d 1115-19, the possibility that the President will exercise "[his] authority to subject those [he] designates as enemy

combatants to military detention even after they complete a civilian jail sentence," Appellant's Br. at 52, will not arise for many years. Much could occur in the interval to head off such an event. Much could occur to change the requirements and procedures of enemy combatant detentions. To resolve the legality of such a remote military detention at present quite simply "takes us into the area of speculation and conjecture," *O'Shea*, 414 U.S. at 497, far removed from "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Indeed, when the Supreme Court denied certiorari on Padilla's habeas petition, mooted by his intervening criminal prosecution, three Justices voiced these precise concerns. "Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical." *Padilla VIII*, 547 U.S. at 1062 (Kennedy, J., concurring, joined by Roberts, C.J., and Stevens, J.). Any "continuing concern that [Padilla's] status might be altered again . . . can be addressed if the necessity arises. . . . Were the Government to seek to change the status or conditions of Padilla's custody, [the Florida District Court] would be in a position to rule quickly." *Id*.

Padilla submits that the district court erred in considering the effect of his criminal conviction and sentence on the imminence of any future injury he might suffer as a result of being designated an enemy combatant. He argues that because those events occurred after his suit was filed, they are

relevant only to mootness, not standing. But both requirements—standing and mootness—address themselves to the actuality, and hence the justiciability, of a dispute. "Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). Thus, whatever label we choose to put on the analysis, the conclusion is the same: the prospect of any justiciable controversy is so remote and contingent that we have no authority to consider Padilla's request. In sum, the district court did not err in considering the fact of Padilla's conviction and sentence, and we also may consider the Eleventh Circuit's affirmance of his conviction and its remand to the district court for imposition of an even lengthier prison term.

B.

Padilla also claims that he suffers a continuing injury from the stigma of being labeled an enemy combatant. "[C]ontinuing, present adverse effects" stemming from "[p]ast exposure to illegal conduct" can suffice to establish standing. *O'Shea*, 414 U.S. at 495. That, however, is not this case. The reputational harm Padilla alleges is still inadequate to satisfy the "injury in fact" requirement.

As the district court correctly concluded, Padilla's criminal convictions for serious terrorism related charges make it unlikely that he suffers any

additional harm as a result of his designation as an enemy combatant. This case presents analogous circumstances to those confronted by the D.C. Circuit in *McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52 (2001). There, that court found that a former federal judge lacked standing to challenge suspensions that had already been completed based on the stigmatizing effect of the records of that punishment. It noted that "[t]he legally relevant injury is only the incremental effect of a record of the suspensions . . . over and above that caused by the . . . explicit condemnations." *Id*. at 57.

Here, Padilla was convicted after trial of three federal crimes of terrorism based on proof that he was a member of al Qaeda who had conspired with leaders of that organization and who was receiving training in an al Qaeda camp in Afghanistan at the very moment that members of that organization were murdering thousands of people with hijacked aircraft on 9/11.[12] It is hard to imagine what "incremental" harm it does to Padilla's reputation to add the label of "enemy combatant" to the fact of his convictions and the conduct that led to them.

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[12] Moreover, Padilla's claim of stigmatic injury is purely derivative of his other claims, giving us added reason to agree with the district court that it is insufficient to support standing. "[T]he Supreme Court has strongly suggested, without deciding, that where an effect on reputation is a *collateral* consequence of a challenged sanction, it is insufficient to support standing." *McBryde*, 254 F.3d at 57 (citing *Spencer v. Kemna*, 523 U.S. 1, 16-17 n.8 (1998)).

V.

Finding Padilla's claims to be without merit, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Estela Lebron, et. al.,

Plaintiffs,

v.

Case No. 2:07-410-RMG

ORDER

Donald H. Rumsfeld, et. al.,

Defendants.

This matter comes before the Court on Defendants' motions to dismiss Plaintiffs' claims, asserting, *inter alia*, that no valid cause of action exists in this matter under the principles of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) and its progeny and that they are entitled to qualified immunity regarding all claims asserted in the Third Amended Complaint. Defendant Gates, sued in his official capacity as Secretary of Defense, further asserts that Plaintiffs have no standing to assert claims for declaratory and injunctive relief arising from an alleged fear of redetention and/or the claimed stigmatizing effects of a continuing designation as an enemy combatant. For reasons set forth below, the Court grants Defendants' Motion to Dismiss (Dkt. Entry 141) and Defendant Gates' Motion to Dismiss

(Dkt. Entry 139) and finds that this Order renders the remaining motions moot.

BACKGROUND

On May 8, 2002, Padilla, an American citizen, arrived at O'Hare International Airport in Chicago from Pakistan via Switzerland and was initially interrogated by Customs and law enforcement officials. After several hours of interrogation, he was served with a material witness warrant and taken into custody. Padilla was transferred to a detention center in New York City, placed under the control of the Bureau of Prisons and the United States Marshals and appointed counsel. Padilla, through counsel, moved on May 22, 2002 to vacate the material witness warrant. On June 9, 2002, President George W. Bush issued a formal directive to Donald Rumsfeld, then Secretary of Defense, designating Padilla as an "enemy combatant" who was "closely associated with [A]l Qaeda, an international terrorist organization with which the United States is at war" (Dkt. Entry 91-3). The President further asserted that Padilla had "engaged in conduct that constituted hostile and war-like acts" and represented "a continuing, present and grave danger to the national security of the United States . . . " (*Id.).* The President further asserted that Padilla possessed valuable intelligence about the personnel and activities of A1 Qaeda and that it was "in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant" *(Id.).* The President declared that his action was "consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *(Id.).*

Two days later, on June 11, 2002, Padilla's counsel filed a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 seeking his release from detention. According to an affidavit filed by Padilla's counsel, she was informed by government officials that Padilla was being transferred to the Naval Brig in Charleston, South Carolina and she would not have the right to visit him or communicate with him in any way. *Padilla v. Busk,* 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002). From that date until March 2004, Padilla was held incommunicado from counsel, family and friends and underwent extensive interrogation by government officials. *Id.* at 574.

Padilla's case was assigned to the Chief Judge of the Southern District of New York, Michael B. Mukasey.[13] In opposition to the petition for writ of habeas corpus, the Government submitted a sworn statement titled "Declaration of Michael H. Mobbs". (Dkt. Entry 91-2). In his declaration, Mr. Mobbs identified himself as a special advisor to the Under Secretary of Defense for Policy and provided the Court information in support of the President's designation of Padilla as an enemy combatant. Mobbs stated that the information provided to the Court derived from "multiple intelligence sources," including two confidential sources that were held at locations outside the United States. According to Mr. Mobbs, these confidential sources "have direct connections with the Al Qaeda terrorist network and claim to have knowledge of the events described." *(Id.* at 3).

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[13] Judge Mukasey was subsequently appointed the 81st Attorney General of the United States, serving from November 2007 until January 2009.

Mobbs further stated that Padilla had previously been convicted of murder and that he had traveled to Pakistan, Afghanistan and the Middle East after being released from prison. *(Id.).* Padilla reportedly had become "closely associated" with known members of Al Qaeda and participated in discussions and training regarding the commission of terrorist acts within the United States. These discussions reportedly included a plan to build and detonate a "radiological dispersal device (also known as a 'dirty bomb')" within the United States, possibly in Washington, D.C. *(Id.* at 4). There were also reportedly discussions regarding the detonation of explosive devices in hotel rooms, gas stations and train stations. *(Id.* at 5). Mobbs further represented that Padilla had returned to the United States "to conduct reconnaissance and/or other attack" on behalf of Al Qaeda when he was detained in Chicago. *(Id.).* The Mobbs declaration concluded by repeating President Bush's finding at the time of Padilla's enemy combatant designation that he posed "a continuing, present and grave danger to the national security of the United States" and his detention was "necessary to prevent him from aiding A1 Qaeda in its efforts to attack the United States . . . " *(Id.).*

In a comprehensive 50 page order issued on December 4, 2002, Judge Mukasey initially found that he had jurisdiction over the case despite the fact that Padilla had been moved by the Government to the Naval Brig in Charleston, South Carolina. *Padilla v. Bush,* 233 F. Supp.2d 564 (S.D.N.Y. 2006). The District Court then turned its attention to the critical question of whether the President of the United States had the authority to designate an American citizen arrested on American soil for

hostile acts on behalf of a foreign enemy as an "enemy combatant" and, thus, deny that citizen the rights normally afforded criminal defendants under the laws and Constitution of the United States. Judge Mukasey concluded that the President had the inherent authority to detain Padilla as an enemy combatant and further determined that the detention had been implicitly authorized by Congress in adopting the Joint Resolution providing the President the authority to take necessary actions against persons and organizations responsible for the attacks on September 11, 2001 and to prevent future terrorist attacks. 233 F. Supp. 2d at 587-589. The District Court's finding regarding Congressional authorization for the President to detain Padilla was in response to Padilla's argument that the Non Detention Act, 18 U.S.C. §4001(a), prohibited the detention of any American citizen unless authorized by Congress.

While Judge Mukasey recognized the President's right to designate Padilla as an enemy combatant and to place him under the control of the Secretary of Defense, he was less comfortable with the detaining of Padilla "incommunicado." *Id.* at 599. The District Court found that Padilla was not entitled to counsel or due process under the Fifth and Sixth Amendments because his detention was not pursuant to any criminal process but concluded that the rights associated with the Great Writ included the right to be represented by counsel. *Id.* at 601-05. He found the right to counsel weighed heavily in Padilla's favor and directed the Government to provide him access to his attorney to assist in the petition for a Writ of Habeas Corpus. *Id.* at 604-05.

The Government moved to reconsider that portion of Judge Mukasey's order which allowed Padilla to have access to counsel and submitted a sworn declaration from Vice Admiral Lowell Jocoby in support of its motion. (Dkt. Entry 91-23). Admiral Jacoby asserted that he "firmly believe[s] that providing Padilla access to counsel risks loss of a critical intelligence resource, resulting in grave and direct threat to national security." *(Id.* at 2). The Admiral explained that the Government's interrogation approach to Padilla was "largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator." *(Id.* at 5).

Judge Mukasey characterized the Jacoby Declaration as "speculative" and criticized with equal force some of the opposing arguments, including the claim that his recent decision was "a repudiation of the Magna Carta." *Padilla v. Rumsfeld,* 243 F. Supp. 2d 42, 51, 57 (S.D.N.Y. 2003). He declined to change his decision to provide Padilla counsel and directed the parties to work out a satisfactory arrangement for counsel's consultation with her client. He noted that it had now been a year and half since the September 11 events and Padilla "is not only the first, but also the only case of its kind." *Id.* at 57. He expressed the hope that it would remain an "isolated" case arising out of the September 11 experience. Both parties thereafter filed appeals with the Second Circuit.

The Jacoby Declaration coincided with a fierce intra-government debate over the use of aggressive interrogation techniques to be utilized with persons designated as enemy combatants with potential

knowledge of Al Qaeda methods, personnel and plans. One group, which included a number of high ranking members of the Department of Defense, favored the use of coercive interrogation techniques which included sensory and sleep deprivation, extreme temperature variations, and use of stress positions, such as prolonged standing in one position. The use of these more aggressive methods of interrogation was endorsed by lengthy opinions of Deputy Assistant Attorney General John Yoo and by William J. Haynes II, General Counsel of the Department of Defense, both of whom concluded that such methods were lawful. (Dkt. Entry 91-5, 91-6, 91-7, 91-8, 91-9, 91-15). Other government officials, including a representative of the FBI and the General Counsel of the Navy, offered opinions that these methods violated the Geneva Convention and American law. (Dkt. Entry 91-12, 91-16). As the Padilla case wound itself through the American judicial system, the issue of the lawful scope of interrogation for persons designated as enemy combatants remained largely unsettled within the Government.

By the time the Second Circuit issued its order in *Padilla v. Rumsfeld,* 352 F.3d 695 (2d Cir. 2003), Padilla had been in the custody of the Department of Defense for nearly 18 months. He had been isolated from counsel, family and friends and subject, by all accounts, to intense interrogation. In a decision split 2 to 1, the majority of Judges' Barrington D. Parker and Rosemary S. Pooler, held that the President did not have the inherent authority to detain an American citizen captured and held on American soil as an enemy combatant. The majority further found that the Joint Resolution adopted by Congress

shortly after September 11, Public Law No. 107-40,115 Stat. 224 (2000), did not provide the President the congressional authorizaiton to hold Padilla, which was required by the Non-Detention Act. 18 U.S.C. § 4001(a). *Padilla,* 352 F.3d at 698. The Government was directed to release Padilla within 30 days or to charge him under federal criminal statutes. *Id.* at 699. Second Circuit Judge Richard C. Wesley dissented, asserting that the President had the inherent authority to detain Padilla as an enemy combatant and Congress had given ample authorization to the President to detain Padilla. Judge Wesley characterized Judge Mukasey's opinion as "thoughtful and thorough" and indicated he would vote to affirm. *Id.* at 726-31.

The Supreme Court granted *certiorari* to *Padilla* and also agreed to hear the other pending case of an American citizen declared an enemy combatant, Yaser Hamdi. The Fourth Circuit had earlier upheld the President's designation of Hamdi as an enemy combatant, but it had been noted that Hamdi was captured on the battlefield in Afghanistan and had surrendered a rifle. *Hamdi v. Rumsfeld,* 296 F. 3d 278, 281 (4th Cir. 2002).

The Supreme Court issued decisions in *Hamdi* and *Padilla* on June 28, 2004. The Supreme Court upheld the designation of Hamdi as an enemy combatant, noting that "[t]here is no bar to the Nation holding one of its citizens as an enemy combatant." *Hamdi v. Rumsfeld,* 542 U.S. 507, 519 (2004). The Court noted the need to weigh the detainee's liberty interest against the government's interest in not allowing the enemy to return to the battlefield. *Id.* at 531. The Court went on to hold that

a citizen detained as an enemy combatant had the right to notice of the factual basis of his detention and a fair opportunity to rebut the evidence before a neutral decision maker. *Id.* at 533-4.

In *Rumsfeld v. Padilla,* 542 U.S. 426 (2004), the Supreme Court found that neither the District Court in New York nor the Second Circuit had jurisdiction over Padilla's habeas petition because he had been transferred to the Naval Brig in Charleston. The 5-4 decision, authored by Chief Justice Rehnquist, upheld the traditional view that any habeas petition must be in the district where the prisoner was physically present. *Id.* at 443. Since there was no jurisdiction, the Court vacated the Second Circuit's decision and directed the petitioner to begin the process again in the District of South Carolina. Justice Stevens, in a dissent joined by three other Justices, asserted that exceptional circumstances existed in *Padilla* which made jurisdiction where the prisoner was originally held proper. *Id.* at 464. Justice Stevens further observed that *Padilla* "raises questions of profound importance to the Nation," *Id.* at 455.

Padilla's case was then transferred to the District of South Carolina and assigned to Judge Henry F. Floyd. On February 28, 2005, Judge Floyd held that the President did not have the inherent constitutional authority to indefinitely detain an American citizen captured on American soil and that Congress had not granted the President such authority. *Padilla v. Hanft,* 389 F. Supp. 2d 678,688-91 (D.S.C. 2005). He granted Padilla's petition for a Writ of Habeas Corpus and ordered the detainee released within 45 days. *Id.* at 691.

The Government appealed the District Court decision to the Fourth Circuit, which on September 9, 2005 reversed Judge Floyd's decision. Judge Luttig, writing for an unanimous panel, found that the President did have the authority from Congress under the 2001 Joint Resolution to detain Padilla as an enemy combatant. The Court described Padilla as an American citizen who "took up arms" against the United States in a foreign combat zone and then "traveled to the United States for the avowed purpose of further prosecuting war on American soil. . . . " *Padilla v. Hanft,* 423 F. 3d 386, 389 (4th Cir. 2005).

Padilla once again sought *certiorari* to the Supreme Court. Within days of the deadline for the Government to submit its brief on the *certiorari* petition, the Government moved before the Fourth Circuit to vacate its recent order and to allow the Government to transfer Padilla to civilian authorities so he could be arraigned on various federal criminal offenses in the Southern District of Florida. The Fourth Circuit characterized the Government's motion as potentially an effort to avoid review by the United States Supreme Court and took the highly unusual position of denying the motions to vacate and to transfer. *Padilla v. Hanft,* 432 F. 3d 582 (4th Cir. 2005). The Fourth Circuit observed that the issues raised by the Government's motion and by Padilla's appeal were "of sufficient national importance as to warrant consideration by the Supreme C o u r t . . . " *Id.* at 586.

The Supreme Court granted the Government's request for Padilla to be transferred to civilian authorities on January 4, 2006, and he was then

transferred to Miami to face federal conspiracy charges pending against him in the Southern District of Florida. On April 3, 2006, the Supreme Court denied Padilla's *certiorari* petition on the basis that the case was now moot since the prisoner had obtained the remedy, prosecution in the United States District Court, which he had sought. Justice Kennedy, writing for the Court, observed that "Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts. . . . ", which he thought unwise to address now since the claims were moot. *Padilla v. Hanft,* 126 S.Ct. 1649, 1650 (2006). Justice Ginsburg dissented from the denial of *ceriorari* and noted the importance of the issues raised by the appeal.

Padilla brought the present civil action on February 9, 2007, alleging that his detention as an enemy combatant and the treatment rendered during his detention violated his federal statutory and constitutional rights. He sought damages against various present and former governmental officials which he alleged were responsible for his detention and treatment. Padilla went to trial on the various federal criminal charges on May 5, 2007 in Miami. He was convicted by a jury on all counts on August 16, 2007. Padilla was thereafter sentenced to 17 years and 4 months in prison. Padilla has appealed his conviction to the Eleventh Circuit, where it is still pending. Padilla is presently serving his sentence in a civilian high security prison in Colorado administered by the United States Bureau of Prisons.

All named defendants have now moved to dismiss Padilla's civil action, asserting, *inter alia,* that there exists no valid private right of action against them and that they are entitled to qualified immunity since the actions being challenged were not matters of settled federal law at the time of their actions. Defendant Gates, sued in his official capacity as Secretary of Defense, further asserts Plaintiffs have no standing to assert claims for declaratory or injunctive relief based upon an alleged fear of redetention or the claimed stigmatizing effects of a continuing designation as an enemy combatant. After extensive briefing on all issues relating to the multiple motions to dismiss, the Court conducted oral argument on February 14, 2011 and now issues this Order.

LEGAL STANDARD

Defendants have jointly moved to dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(6); Defendant Gates has additionally moved for dismissal pursuant to Rule 12(b)(1). For purposes of the motions, the district court must "take all factual allegations as true" and draw all reasonable inferences from such facts in a light most favorable to the plaintiff. *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009); *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250,253 (4th Cir. 2009).[14] The Court need not accept as true, however, "unwarranted

[14] Although Defendant Gates has moved for dismissal pursuant to Rule 12(b)(1) in addition to Rule 12(b)(6), the standards in the context of the present motions are, in effect, the same. See *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see also Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).

inferences, unreasonable conclusions, or arguments" or "legal conclusions, elements of causes of action or bare assertions devoid of further factual enhancement . . ." *Nemet Chevrolet*, 591 F.3d at 256; *Giarratano v. Johnson*, 521 F. 3d 298, 302 (4th Cir. 2008).

ANALYSIS

A. The *Bivens* Claims

Padilla asserts abroad range of constitutional torts against present and former governmental officials, including former Secretary of Defense Donald Rumsfeld; Secretary of Defense Robert Gates; former Deputy Secretary of Defense Paul Wolfowitz; former Department of Defense General Counsel William Haynes; former Director of the Defense Intelligence Agency, Vice Admiral Lowell Jacoby; and the former commanders of the Naval Brig, Catherine Hanft and Melanie Marr. Padilla contends that his designation as an enemy combatant and approximately three and half year detention under the custody of the Department of Defense violated his rights to counsel, access to the courts, freedom of religion, freedom of association and due process, and the manner of his detention and interrogation by government officials violated his right against cruel and unusual punishment. (Dkt. Entry 91).

Since Congress has never created a private right of action against federal officials based upon a deprivation of constitutional rights, such as 42 U.S.C, § 1983, Padilla asserts claims based upon the landmark United States Supreme Court decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). *Bivens*

involved allegations that certain federal narcotics officials made a warrantless entry of the plaintiff's home, conducted an unlawful search and arrested him on narcotics charges-all without probable cause. In recognizing a private civil cause of action for money damages implied from the face of the Constitution, the Supreme Court specifically noted that the "present case involved no special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396. The Court subsequently recognized private rights of action involving a claim against employees of the Department of Agriculture in a dispute with a futures commission merchant, *Butz v. Economou,* 438 U.S. 478 (1978), a former congressional aide allegedly subject to sex discrimination, *Davis v. Passman,* 442 U.S. 228 (1979), and a wrongful death suit involving federal prison officials, *Carlson v. Green*, 446 U.S. 14 (1980).

In the over 30 years since *Carlson v. Green* was decided, the Supreme Court, with increasingly strong and direct language, has refused to extend the *Bivens* claim to other contexts, generally finding present "special factors counseling hesitation". In *Bush v. Lucas,* 462 U.S. 367 (1983), a case involving the First Amendment rights of a federal employee, the Court noted that in the absence of a congressional directive, "the federal courts must make the kind of remedial determination that is appropriate for a common law tribunal, paying particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 378. Thus, the Court declined to create "a new judicial remedy." *Id.* at 388.

The Court subsequently addressed two claims brought by a present and a former serviceman. In *Chappell v. Wallace,* 462 U.S. 296 (1983), a Navy enlisted man sought relief from racial discrimination by superior officers. The Court found that in the military setting, "special factors" strongly counseled against creating a private right of right because of the "peculiar and special relationship of the soldier to his superiors. . .". *Id.* at 299. The Court observed that the "inescapable demands of military discipline and obedience to orders cannot be taught on the battlefield; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Id.* at 300. Similarly, in *United States v. Stanley,* 483 U.S. 669 (1987), the Court declined to allow *& Bivens* action by a former serviceman who alleged he had been provided LSD as part of an experiment. Recognizing that its decision was essentially a "policy judgment", the Court determined that the potential disruption associated with "harmful and inappropriate judicial intrusion upon military discipline" constituted a special factor that counseled against extending the implied right of action to the former serviceman. *Id.* at 681 -82.

The Court has in recent years expressly noted its reluctance to expand *Bivens* to contexts outside the early cases. In *Schweiker v. Chilicky,* 487 U.S. 412 (1988), which involved the Court's refusal to provide a *Bivens* action for Social Security claimants, Justice O'Connor noted that "[o]ur more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Id.* at 421. Chief Justice Rehnquist, writing for the Court in *Correctional Services Corporation v.*

Malesko, 534 U.S. 61 (2001), stated that "[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Id.* at 68. In *Ashcroft v. lqbal,* 129 S. Ct. 1937 (2009), Justice Kennedy observed that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Id.* at 1948.

Lower courts, particularly in cases affecting foreign affairs and national security, have generally followed the Supreme Court's trend and declined to recognize *Bivens* claims beyond the context of the earlier cases. In *Sanchez-Espinoza v. Reagan,* 770 F. 2d 202 (D.C. Cir. 1985), the Court of Appeals for the District of Columbia addressed claims by persons asserting that they had been injured by allegedly illegal government action in support of the Contras in Nicaragua. Then Judge Scalia, writing for his court, concluded that in the areas of military and foreign policy the courts "must stay our hand" because the courts lacked the "institutional competence" to fashion appropriate damage remedies. Where there exist a "host of considerations that must be weighed and appraised" then "we must leave to Congress the judgment whether a damage remedy should exist." *Id.* at 208-09.

A similar approach was taken by the Second Circuit in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) *(en banc), cert, denied* 130 S. Ct. 3409 (2010). The Plaintiffs, foreign nationals, asserted that they had been subject to torture in foreign countries following delivery of them to foreign government agents by United States officials, a practice known as

"extraordinary rendition." Defendants moved to dismiss the *Bivens* claims assertingthat the national security and foreign policy implications of "extraordinary rendition" constituted "special factors which counsels hesitation" that made recognition of such a claim inappropriate. In rejecting the *Bivens* claim, the Second Circuit observed that the "counsels hesitation" standard is "remarkably low", particularly where recognition of such a claim "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation...". *Id.* at 574. The court observed that such a suit "unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers and thereby elicits government funds for settlement." *Id.* The court further observed that it "is a substantial understatement to say that one must hesitate before extending *Bivens* into such a context" because the issues are "complex and rapidly changing" and involve "critical legal judgments...as well as policy choices that are by no means easily reached." *Id.* at 574-75,580. The Second Circuit concluded that if a cause of action was to be created for such claims it should be done by Congress, rather that the courts. *Id.* at 5 80-81; *see also, Mohamed v. Jeppesen Dataplan, Inc.*, 614 F. 3d 1070, 1084 (9th Cir. 2010) (claims relating to "extraordinary rendition" dismissed on state secrets grounds).

The United States District Court for the District of Columbia dealt with a similar claim by foreign nationals in *In re Iraq and Afghanistan Detainees*, 479 F. Supp. 2d 85 (D.D.C. 2007), who alleged that they had been tortured by United States military personnel. In analyzing whether "special

factors counseling hesitation" were present, the court considered the practicalities of such proposed litigation: "There is no getting around the fact that authorizing money damages remedies against military officials engaged in an active war would invite our enemies to use our own federal courts to obstruct the Armed Forces ability to act decisively and without hesitation in defense of our liberty and national interests . . .". *Id.* at 105. The court went on to observe that the "discovery process alone risks aiding our enemies by affording a mechanism to obtain what information they could about military affairs and disrupt command missions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries about the military's interrogation and detention policies, practices and procedures." *Id.* Further, "the spectacle of high ranking military officials being haled into our own courts to defend against our enemies legal challenges" could undermine command leadership and make officers "hesitant to act for fear of being held personally liable for any injuries resulting from their conduct." *Id.* In concluding that Congress must be left the responsibility to create a damage remedy, if any, in this circumstance, the court stated that it "is established beyond peradventure that military affairs, foreign relations, and national security are constitutionally committed to the political branches of our government..,", *Id.* at 107; see *also, Al-Aulaqi v. Obama,* 727 F. Supp. 2d 1(D.D.C. 2010).

In light of the significant Supreme Court and lower court jurisprudence narrowly constricting *Bivens* claims cited above, it is noteworthy that two recent district court cases that have asserted *Bivens* actions in the national security area have survived

motions to dismiss. In a case factually related to the action pending in the District of South Carolina, *Padilla v. Yoo,* 633 F. Supp 2d 1005 (N.D. Cal. 2009), the District Court for the Northern District of California concluded that there were not "special factors" present that would prevent recognizing a *Bivens* action asserted by Padilla against John Yoo, the former Deputy Assistant Attorney General and author of numerous legal memoranda sanctioning the use of coercive interrogation techniques. The Court analyzed the body of Supreme Court case law since the 1980 decision in *Carlson* and concluded that each case individually was factually distinguishable from the facts presented by Padilla in his claim before that court. *Id.* at 1023-26. The District Court for the Northern District of California discounted the Fourth Circuit's decision in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), noting that while it was "still good law, it is questionable whether, should an appeal before the Supreme Court have not been mooted by Padilla's sudden transfer out of military custody, the decision would have been affirmed." *Id.* at 1038. An appeal of the district court's decision is now pending before the Ninth Circuit.

In *Vance v. Rumsfeld*, 694 F. Supp 2d 957 (N.D. 111. 2010), the plaintiffs are American citizens who went to work for a private Iraqi security firm and allege that they were detained and subjected to cruel and degrading treatment by agents of the United States. The court rejected the argument that the Supreme Court had adopted a "steadfast rule" against the adoption of new *Bivens* claims and concluded that court precedent did not support "a 'blank check' for high ranking government officials."

Id. at 973, 975. The *Vance* case is now on appeal to the Seventh Circuit.

In analyzing this substantial body of case law relating to *Bivens* claims, it is useful to soberly and deliberately evaluate the factual circumstances of Padilla's arrival and the then-available intelligence regarding his background and plans on behalf of A1 Qaeda. Padilla arrived in Chicago nearly eight months after September 11, 2001 with reports that he was an A1 Qaeda operative with a possible mission that included the eventual discharge of a "dirty bomb" in the Nation's capital. (Dkt. Entry 91-2 at 4) He also had reportedly engaged in discussions with A1 Qaeda operatives about detonating explosives in hotels, gas stations and train stations. *(Id.* at 5). He was also thought to possess significant knowledge regarding A1 Qaeda plans, personnel and operations. (Dkt. Entry 91-23 at 8-9).

Based on the information available at the time, which reportedly included information from confidential informants previously affiliated with Al Qaeda, the President of the United States took the highly unusual step of designating Padilla, an American citizen arrested on American soil, an enemy combatant. (Dkt. Entry 91-3). As Judge Mukasey would later note, no other similarly situated American citizen was so designated. *Padilla v. Rumsfeld*, 243 F. Supp. 2d at 57. Based upon that designation, the Department of Defense detained Padilla at the Naval Brig in Charleston and prohibited all contact with counsel, family and friends while intensive interrogation was conducted. According to allegations in Plaintiffs' complaint, which for purposes of this motion we must presume

to be true, Padilla's interrogations included at least some of the coercive techniques then being utilized with detainees at Guantanamo.

Because Plaintiffs have asserted a *Bivens* claim, this Court is mandated by United States Supreme Court precedent to consider whether there exist "significant factors that counsel hesitation" in recognizing an implied right of action from the face of the United States Constitution under these circumstances. The designation of Padilla as an enemy combatant and his detention incommunicado were made in light of the most profound and sensitive issues of national security, foreign affairs and military affairs. It is not for this Court, sitting comfortably in a federal courthouse nearly nine years after these events, to assess whether the policy was wise or the intelligence was accurate. The question is whether the Court should recognize a cause of action for money damages that by necessity entangles the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence. This is particularly true where Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances.

In determining whether the Court should create "a new judicial remedy" and authorize "a new kind of federal litigation" under these circumstances, it is important for the Court to evaluate the practical implications of such a decision. *Bush v. Lucas,* 462 U.S. at 378, 388. The Court finds the discussions of the *en banc* Second Circuit decision in *Arar* and the

District Court of the District of Columbia in *In re Iraqi and Afghanistan Detainees* most helpful regarding this issue. The *Arar* Court noted that such litigation "unavoidably...probes government secrets, invades government interests [and] enmeshes government lawyers . . . " and would require the Court's "assessment of the validity and rationale of [the] policy and its implementation . . . ." 585 F.3d at 574-75. The Court in *In re Iraq and Afghanistan Detainees* observed that the discovery procedures could be used by our enemies to obtain valuable intelligence, and government officials could be distracted from their vital duties to attend depositions or respond to other discovery requests. The United States District Court for the District of Columbia noted that after the disruption of the pre-trial discovery, the government would face the spectacle of high ranking officials being summoned to court to answer the claims of our enemies. 479 F. Supp.2d at 105, 107.

Should Padilla's claims survive the Defendants' motions to dismiss, one could easily imagine a massive discovery assault on the intelligence agencies of the United States Government, to include dozens of subpoenas, numerous requests to produce, 30(b)(6) depositions of document custodians at various intelligence and defense agencies, and lengthy and probing depositions of high ranking government officials with national security clearances and personal knowledge of some of the Nation's most sensitive information. The management and conduct of such pre-trial litigation would require the devotion of massive governmental resources, which by necessity would then distract the affected officials from their normal

security and intelligence related duties. In an effort to assess the quality and veracity of the President's designation and the declarations by various government officials, Padilla's counsel would likely seek information on intelligence methods and interrogations of other Al Qaeda operatives. All of this would likely raise numerous complicated state secret issues. A trial on the merits would be an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges. This massive litigation would have been authorized not by a Congressionally established statutory cause of action, but by a court implying an action from the face of the American Constitution.[15]

The Court has carefully considered the recent district court decisions in *Vance* v. *Rumsfeld* and *Padilla v. Yoo,* the latter presenting nearly identical factual and legal issues as the case before this Court. Both the *Vance* and *Yoo* courts reviewed the same Supreme Court and lower court jurisprudence as this Court but reached a different conclusion regarding the appropriateness of recognizing new *Bivens* claims in different contexts. The essential difference is that the *Vance* and *Yoo* Courts view the Supreme Court case law since 1980 as limiting the extension of

[15] Plaintiffs' counsel urged the Court at oral argument to delay consideration of the practical realities of allowing a *Bivens* claim to go forward under these facts and circumstances until after the motion to dismiss stage. This approach, however, would result in the Court failing to timely consider "special factors" counseling hesitation, which include here the potential disruption and burdening of national security, intelligence and military operations arising from discovery under the Federal Rules of Civil Procedure.

Bivens claims in cases which have identical factual presentations but permitting the extension of *Bivens* actions in other contexts. 694 F. Supp. 2d at 972-73; 633 F. Supp. 2d at 1022-26. This Court views the case law as holding that the creation of any new *Bivens* claim is "disfavored" and "rarely if ever applied in new contexts," particularly in such sensitive areas as national security, military affairs and foreign intelligence. *See Ashcroft v. Iqbal,* 129 S. Ct. at 1948; *United States v. Stanley, A*83 U.S. at 681-82; *Chappellv, Wallace*, 462 U.S. at 300-301; *Arar v. Ashcroft,* 585 F.3d at 571-572; *Sanchez-Espinoza v. Reagan,* 770 F. 2d at 208-09; *In re Iraq and Afghanistan Detainees,* 479 F. Supp.2d at 103-07. The *Vance* and *Yoo* cases are presently before the Seventh and Ninth Circuits respectively and it is likely that this Court's order will be appealed to the Fourth Circuit, perhaps one day creating the situation where these difficult and important issues can be definitively resolved.

The Court finds that "special factors" are present in this case which counsel hesitation in creating a right of action under *Bivens* in the absence of express Congressional authorization. These factors include the potential impact of a *Bivens* claim on the Nation's military affairs, foreign affairs, intelligence, and national security and the likely burden of such litigation on the government's resources in these essential areas. Therefore, the Court grants the Defendants' Motion to Dismiss (Dkt. Entry 141) regarding all claims of Plaintiffs arising from the United States Constitution.[16]

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[16] In reaching the conclusion that Padilla does not have a right under these circumstances to assert a claim for money damages

B. Qualified Immunity

Defendants further argue that even if Padilla could assert a viable cause of action, they would still be protected from liability by the doctrine of qualified immunity. This doctrine is a "pure question of law" and is based on the proposition that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of what a reasonable person would have known" at the time the action was taken. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *DiMeglio v. Haines,* 45 F.3d 790, 794 (4th Cir. 1995). The legal violation must be "apparent" and "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *Maciariello v. Sumner,* 973 F.2d 295,298 (4th Cir. 1992). Government officials

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against present and former government officials under *Bivens*, it is not as if the American judicial system has failed to afford him significant opportunities to vindicate his legal rights. He initially sought relief from his detention under a writ of habeas corpus, which was heard ultimately by two district courts, two courts of appeal and the United States Supreme Court. Padilla's use of the Great Writ ultimately resulted, as Justice Kennedy noted, in his obtaining the relief he sought-trial under the Constitution in an United States District Court. 547 U.S. 1062 (2006). The importance of the writ of habeas corpus as "a stable bulwark of our liberties" is eloquently described in *Boumediene v. Bush*, 553 U.S. 723, 739-47. Further, Padilla was allowed in his criminal proceeding to raise issues of his detention in support of his motion to dismiss the criminal charges. *United States v. Padilla*, 2007 WL 1079090 (S.D. Fla. 2007). Padilla's appeal from his criminal conviction is presently pending before the Eleventh Circuit.

"cannot be required to predict how the courts will resolve legal issues," or "to sort out conflicting decisions or to resolve subtle or open issues." *Francis v. Giacomelli,* 588 F.3d 186,196 (4th Cir. 2009); *Mclvey v. Stacey,* 157 F.3d 271,277(4th Cir. 1998). As the Fourth Circuit stated in *Lewis v. Tripp,* 604 F.3d 1221, 1230 (4th Cir. 2010), "[i]f qualified immunity means anything, it must mean that public employees who are just doing their jobs are generally immune from suit." The Supreme Court bluntly stated the force of the qualified immunity defense in *Malley v. Briggs,* 475 U.S. 335, 341 (1986): "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."

The courts have also shown a marked reluctance to deny qualified immunity to officials in circumstances where they were required to balance competing interests of the citizen and the government. " . . . [W]here a sophisticated balancing of interests is required to determine whether the plaintiff s constitutional rights have been violated", the courts "only infrequently" will determine that such rights were "clearly established" and only then where the violations are "egregious." *Mclvey v. Stacey,* 157 F.3d at 277 (4th Cir. 1998); *Medina v. City & County of Denver,* 960 F. 2d 1493, 1498 (10th Cir. 1992). This is because the "particularized balancing" normally required is "subtle, difficult to apply and not yet well defined." *DiMeglio v. Haines,* 45 F.3d at 806 (4th Cir. 1995).

Under prior Supreme Court precedent, a district court reviewing a government official's assertion of qualified immunity privilege was

required initially to determine whether the plaintiff had suffered a deprivation of a constitutional right. Upon a determination that a constitutional right was violated, the court was then mandated to address the question of whether such a right was "clearly established" at the time of the governmental official's action. *Saucier v. Katz*, 533 U.S. 194 (2001). The Court revisited the issue in *Pearson v. Callahan,* 129 S.Ct. 808 (2009), and determined that this two step sequence was no longer required. Instead, the Court left to the sound discretion of the lower courts whether to follow the *Saucier* two step protocol or to address initially only the issue of whether the alleged legal violations were "clearly established" at the time of the challenged governmental action. *Id.* at 818-821. Based upon the particular facts and circumstances of this case, in exercising its discretion as setforth in *Pearson,* the Court has determined that it is most appropriate to address initially the issue of whether the alleged violations of the Plaintiffs legal rights were then "clearly established."

The Plaintiffs' claims fall into three general areas, each which require the Court to determine whether, at the time of the challenged governmental action, there were "clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. at 818. These three areas are as follows:

1. Whether Padilla's designation as an enemy combatant and consequential detention by the Department of Defense violated his clearly established constitutional rights;

2. Whether the treatment afforded Padilla while detained by the Department of Defense as

an enemy combatant, including the alleged use of certain coercive interrogation techniques, violated his clearly established constitutional rights; and

3. Whether the treatment afforded Padilla while detained by the Department of Defense as an enemy combatant violated his clearly established rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

Padilla was designated as an enemy combatant and ordered detained by the Department of Defense on a direct written order of the President of the United States issued on June 9, 2002. (Dkt. Entry 91-3). The President's order was issued by the President in his capacity as Commander in Chief, and the named defendants were all subordinate civilian or military officials of the American government. The President represented that his order was "consistent with U.S. law and the laws of war" and was based on findings that Padilla "represents a continuing, present and grave danger to the national security of the United States" and his detention as an enemy combatant was necessary to prevent him from "aiding [A]l Qaeda in its efforts to attack the United States . . . " *(Id.)*.

Within two days of his designation and detention, Padilla's able counsel moved before Judge Mukasey for a writ of habeas corpus, which allowed an independent judicial officer to hear and consider the detainee's challenge to the President's June 9, 2002 order. The issues were fully briefed and argued before Judge Mukasey and a comprehensive and thorough order was issued by the District Court on December 4, 2002, finding that the designation and detention were lawful. *Padilla v. Bush,* 233 F. Supp

2d 587-594. The *Padilla* case was then appealed to the Second Circuit, which held the designation and detention as an enemy combatant was unlawful, and then appealed to the United States Supreme Court, which vacated the Second Circuit decision on jurisdictional grounds. *Padilla v. Rumsfeld,* 352 F.3d at 698, 712; *vacated* 542 U.S. 426 (2004). Padilla then began the habeas process again in the District of South Carolina, where Judge Henry Floyd held that Padilla's designation and detention were unlawful, but that decision was thereafter reversed by the Fourth Circuit. *Padilla* v. *Hanft*, 389 F. Supp 2d 678 (D.S.C. 2005), *reversed*423 F.3d at 389. The Supreme Court ultimately denied *certiorari,* leaving the Fourth Circuit's decision in place as the final law of the case. 547 U.S. 1062 (2006).

In light of this quite extraordinary litigation history, the remarkable circumstances regarding the President's direct written order designating Padilla an enemy combatant, and the President's direction to subordinate officials to detain Padilla, it is hard for the Court to imagine a credible argument that the alleged unlawfulness of Padilla's designation as an enemy combatant and detention were "clearly established" at that time. The strikingly varying judicial decisions appear to be the very definition of unsettled law, and the Fourth Circuit's order, which is the law of the case, actually finds the detention and designation lawful. Indeed, an argument could be made that the Fourth Circuit's holding constitutes collateral estoppel on the issue of the lawfulness of Padilla's designation and detention. The Court finds it unnecessary to reach the collateral estoppel issue here, but suffice it to say that if a credible argument for collateral estoppel could be made then it would be

difficult to argue that the contrary position of the Fourth Circuit was the then "clearly established" law. Therefore, to the extent that a viable cause of action were found to exist under the Constitution, the Court finds that all defendants are entitled to qualified immunity on all issues relating to Padilla's designation and detention as an enemy combatant.

Next, the Court must address whether the manner in which Padilla was treated while detained as an enemy combatant, which included the alleged use of coercive interrogation techniques, constituted "clearly established" violations of constitutional law. For purposes of these motions to dismiss, the Court must presume the allegations in Plaintiffs' Third Amended Complaint to be true. (Dkt. Entry 91). Padilla was, as noted by Judge Mukasey, essentially a class of one, an American citizen detained on American soil and designated an enemy combatant. 243 F. Supp 2d at 57. To say the scope and nature of Padilla's legal rights at that time were unsettled would be an understatement. As amply documented by the Plaintiffs in attachments to their Third Amended Complaint, the Department of Justice's Office of Legal Counsel issued lengthy memoranda, prior to and after Padilla's detention, concluding that various coercive interrogation techniques, including ones allegedly utilized in Padilla's interrogations, were lawful. (Dkt. Entry 91-5, 91-6, 91-7, 91-8, 91-9, 91-10, 91-11). Some of these conclusions were vigorously challenged within the government, including by the General Counsel of the Navy and a representative of the FBI. (Dkt. Entry 91-12, 91-16). A detailed report issued by a Department of Defense working group on detainee interrogations, issued on March 6, 2003, concluded that the interrogation

techniques being utilized on enemy combatants were lawful. No court during the period of Padilla's detention as an enemy combatant, extending from June 9, 2002 until January 4, 2006, ever addressed the lawfulness of the interrogation techniques utilized on persons designated as enemy combatants.

It is not necessary for the Court to address the lawfulness of Padilla's treatment while detained as an enemy combatant to resolve the defendants' assertion of a qualified immunity defense, and the Court specifically declines to do so.[17] At the time of the Padilla's detention by the Department of Defense, there were few "bright lines" establishing controlling law on the rights of enemy combatants. *Maciarello v. Sumner,* 973 F.2d at 298. No court had specifically and definitively addressed the rights of enemy combatants, and the Department of Justice had officially sanctioned the use of the techniques in question. While it is true there was vigorous intragovemmental debate on this issue during Padilla's detention, the qualified immunity case law makes clear that government officials are not charged with predicting the outcome of legal challenges or to resolve open questions of law. *Francis v. Giacomelli,* 588 F.3d at 196; *Mclvey v. Stacey,* 157 F.3d at 277. Moreover, a final judicial resolution of the legal rights of enemy combatants would require a "sophisticated balancing of interests" of the detainee's asserted rights and the government's profound interests in national security

[17] A well established rule of constitutional construction provides that a court should not pass on questions of constitutionality unless required by the case to do so. *Pearson v. Callahan*, 129 S.Ct. at 821.

and avoiding future terrorist attacks. Engaging in such "particularized balancing" of interests precludes a finding of clearly established law, except in the most egregious circumstances. *Mclvey v. Stacey* at *211; DiMeglio v. Haines,* 45 F.3d at 806; *Medina v. City & County of Denver,* 960 F.2d at 1498.

Taking the allegations of the Plaintiffs' Complaint as true for purposes of this motion, the Court finds that it was not clearly established at the time of his designation and detention that Padilla's treatment as an enemy combatant, including his interrogations, was a violation of law. Therefore, to the extent a viable claim under the Constitution were found to exist, the Court finds that the defendants are entitled to qualified immunity regarding all claims of alleged constitutional violations arising out of Padilla's detention as an enemy combatant.

Finally, the Court must address the issue of qualified immunity under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb. The RFRA provides that the "Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." § 2000bb(1)(a). An exception is provided, however, where the Government can demonstrate that its actions were "in furtherance of a compelling state interest" and it utilized "the least restrictive means of furthering that compelling governmental interest." § 2000bb(l)(b). The Congressional findings accompanying the adoption of RFRA described the exception as "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."

42 U.S.C. § 2000bb(a)(5). Courts have recognized a right of action under the RFRA against government employees in their individual capacities but have also recognized a qualified immunity defense where the alleged violations of the Act were not a matter of settled law. *Jama v. United States,* Case no. C09-0256-JCC, 2010 WL 771789 at *6-7 (W.D. Wash. Mar. 2, 2010); *Harrison v. Watts,* 609 F. Supp 2d 561, 575 (E.D. Va. 2009); *Keen v. Noble,* Case no. CVF04-5645 AWI WMW P, 2007 WL 2789561 at 7 (E.D. Cal. 2007).

Padilla alleges in his Complaint that as part of the interrogation process, his religious materials, including the Koran, were taken from him and he was denied a watch or other means to adhere to prayer times and religious holidays. (Dkt. Entry 91 at 30-32). He alleges that these actions substantially burdened the exercise of his religious faith. For purposes of this motion, the Court assumes such allegations to be true.

During the period of Padilla's detention and interrogation, the legal status of persons designated as enemy combatants was in a state of legal uncertainty. Padilla's own legal journey through the American court system is a testament to the legal uncertainty of his status and his rights. No American court during this period had ever definitively addressed the potential applicability of the RFRA to persons who were undergoing interrogation as enemy combatants. Under the dynamic circumstances then existing, there were no "bright lines" establishing the settled federal law regarding the applicability of the RFRA to enemy combatants. *Anderson v. Creighton,* 483 U.S. at 640. As Judge Janice Rogers Brown

stated in her concurring opinion in *Rasul v. Myers,* "Congress was not focused on how to accommodate the important values of religious toleration in the military detention setting . . . In 2000, when Congress amended the RFRA, jihad was not a prominent part of our vocabulary and prolonged military detentions or alleged enemy combatants were not part of our consciousness." 563 F. 3d at 535. *But see Padilla v. Yoo,* 633 F. Supp. 2d at 1038-39.

Further, the application of the statutory exception for a compelling governmental interest by necessity requires "striking a sensible balance between religious liberty and competing prior governmental interests." 42 U.S.C. §2000bb(a)(5). This form of "sophisticated balancing of interests" is the very type of discretionary decision making that prevents a finding of "clearly established" federal law on the issue. *Mclvey v. Stacey,* 157 F.3d at 277; *Medina v. City & County of Denver,* 960 F. 2d at 1498. For instance, the issue of whether the withholding of a watch or clock might burden a detainee's observation of prayer times might be weighed against the arguably compelling state interest in obtaining control over a critical subject during his interrogation. Another example might be weighing a detainee's desire to engage in prayer every two hours against the governmental interest in sustained interrogation over multiple hours to obtain the critical information sought. This type of "particularized balancing" makes the grant of qualified immunity generally appropriate under these circumstances. *DiMeglio v. Haines,* 45 F. 3d at 806.

The Court finds that under the circumstances then existing during Padilla's detention and interrogation, Defendants are entitled to qualified immunity for Padilla's RFRA claims. There was then no "clearly established" federal law on these issues, and the courts were only then beginning to sort out the legal rights of those designated as enemy combatants. Moreover, the application of the statutory exception for a compelling state interest required the type of weighing and balancing that prevents a finding of "clearly established," settled law regarding enemy combatants under the RFRA.

Therefore, based upon the fact that there was not clearly established federal law on the Plaintiffs' statutory and constitutional claims at the time of the challenged actions by Defendants, the Court hereby finds that Defendants are entitled to qualified immunity on all of Plaintiffs' claims. There were at the time few "bright lines" or "apparent" legal standards to guide governmental officials in addressing the detention and treatment of persons designated as enemy combatants, and one cannot impose the duty on officials to "predict how the courts will resolve legal issues" or "sort out conflicting decisions . . . [and] open issues." *Anderson* v. *Creighton,* 483 U.S. at 640; *Francis* v. *Giacomelli,* 973 F. 3d at 196; *Mclvey* v. *Stacey,* 157 F. 3d at 277; *Maciariello* v. *Sumner,* 973 F.2d at 298. This conclusion appears to the Court to be particularly appropriate where the original detention decision was a direct order of the President of the United States, who is entitled to absolute executive immunity; the challenged interrogation methods were sanctioned at the time by the United States Department of Justice, which has sovereign

immunity; and the enemy combatant designation was ultimately approved by Article III judges, who have absolute judicial immunity.

C. Standing to Assert Claims for Declaratory and Injunctive Relief

Plaintiffs further assert claims for declaratory and injunctive relief against Defendant Gates, in his official capacity as the Secretary of Defense, based upon a fear that he will be redetained as an enemy combatant at some unspecified time in the future and has continuing stigma and psychological harm arising from his designation as an enemy combatant. (Dkt. Entry 91 at 42-43). Defendant Gates challenges Plaintiffs' standing to assert these claims, arguing that Plaintiffs' alleged injuries are insufficiently concrete and imminent to satisfy Article III requirements of a "case" or "controversy."

Article III confines adjudication of disputes in the federal courts to actual "cases" and "controversies". For a litigant to invoke the jurisdiction of a federal court, there must be an "injury in fact". This has been variously described as an injury which is "concrete," "distinct," "palpable," "actual" and "imminent" and not "conjectural" or "hypothetical." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102-103 (1998); *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990); *Allen v. Wright,* 468 U.S. 737,750 (1984). Any alleged threatened injury must be "real and immediate" and the plaintiff must be "immediately in danger of sustaining a direct injury." *City of Los Angeles v. Lyons,* 461 U.S. 95, 110 (1983); *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). Prior exposure to an alleged past wrong is an insufficient basis to provide injunctive relief unless there is a

showing that there is "some cognizable danger of recurrent violation, something more than a mere possibility. . ." *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953); *Bryant v. Cheney,* 924 F.3d 525, 528 (4th Cir. 1991). Alleged psychological harm is insufficient to establish standing, and any stigma based injury must "seriously damage" plaintiffs "standing and associations in the community." *United States v. 5S351 Tuthill Road, Naperville, Illinois,* 233 F.3d 1017, 1022 (7th Cir. 2000); *Zepp v. Rehrmann,* 79 F.3d 381, 388 (4th Cir. 1996). The party asserting the claim carries the burden of establishing standing. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990).

Padilla claims a fear of redetention as an enemy combatant but alleges insufficient facts to suggest that such an event is actual or imminent. He was transferred to civilian control in January 2006 and was tried and convicted in an United States District Court in 2007 for various terrorism related charges. Padilla was sentenced to a prison term in excess of 17 years and is presently serving that sentence in a civilian prison. Based upon the allegations set forth in Plaintiffs' Third Amended Complaint, the Court concludes that he has failed to carry his burden of asserting sufficient facts to show his that his redetention as an enemy combatant is concrete and imminent.[18] Further, in light of

[18] Plaintiffs assert that standing should be determined at the commencement of the suit and it is not proper to consider his subsequent conviction and years of civilian detention in evaluating his claimed fear of redetention. While it is true that generally standing is determined at the commencement of an action, the claims against Defendant Gates in his official capacity were not asserted until the Second Amended

Padilla's conviction on various terrorism related charges, including conspiracy to murder, kidnap and maim persons outside the United States and providing material support to terrorists, it is hard to conceive that his continuing designation as an enemy combatant stigmatizes him in a way that damages his standing and associations in the community sufficient to establish standing under Article III. Similarly, Padilla's alleged psychological injury arising from his continuing designation as an enemy combatant does not satisfy Article III standing requirements. Therefore, the Court grants Defendant Gates' Motion to Dismiss claims for declaratory and injunctive relief asserted against him in his official capacity. (Dkt. Entry 139).

CONCLUSION

For the reasons set forth above, the Court GRANTS Defendants' Motion to Dismiss (Dkt. Entry 141) and GRANTS Defendant Gates' Motion to Dismiss (Dkt. Entry 139). In light of the Court's decision dismissing this action, all other pending motions of Defendants to dismiss (Dkt. Entry 166 and 248) are rendered moot.

Complaint. (Dkt. Entry 78). At the time of the filing of the Second Amended Complaint, Padilla had been in civilian control for over two years and was serving his sentence arising from his terrorism related conviction in Miami. Standing is determined at the time the claim is filed, making consideration of the events at the time of the filing of the Second Amended Complaint appropriate. *See Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332,352 (2006); *Dupree v. Prudential Ins. Co. of America*, Case no. 99-8337-Civ.-JORDAN, 2007 WL 2263892 at *33 (S.D. Fla. Aug. 7,2007); *Trepanierv. Ryan*, Case no. 00-C-2393,2003 WL 21209832 at *6 (N.D. 111. May 21, 2003).

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

February 17, 2011
Charleston, South Carolina