11-6480

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; ROBERT M. GATES, Secretary of Defense in his official and individual capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF *AMICI CURIAE* OF RETIRED MILITARY OFFICERS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL
(*See Inside Cover for List of* Amici Curiae)

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Major General Thomas J. Romig, USA (Ret.)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus curiae* certifies that it is not a publicly held corporation or other publicly held entity, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici curiae* makes the following statement:

No party's counsel has authored this brief in whole or in part. No party or party's counsel has contributed money that was intended to fund preparing or submitting this brief. No person, other than the *amici curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting this brief.

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Amici submit this brief urging reversal of the district court's judgment dismissing these claims for damages arising from the alleged unlawful mistreatment of appellant Jose Padilla while held by appellees under military detention. *Amici* respectfully ask to be heard in order to alert the Court to the corrosive effect of the decision below on good order and discipline on which our military forces must rely in defending the country.

The district court's conclusion that appellees are immune from suit because the unlawfulness of their conduct had not previously been "clearly established" is damaging and plainly wrong. Mistreatment of military detainees has been categorically prohibited under military law, regulation, and tradition since the beginning of the republic, and this prohibition reflects bedrock constitutional norms. Allowing appellants to pursue their claims under *Bivens* and its progeny will impose no undue burdens on military operations that would qualify as a "special factor" precluding such relief. To the contrary, the failure to uphold the clarity of these longstanding norms would be anathema to the codes of honor and duty that govern the conduct of the military.

STATEMENT REGARDING CONSENT TO FILING AND REQUEST TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), this brief is filed with the consent of all parties. Pursuant to Federal Rule of Appellate Procedure 29(g), *amici curiae* respectfully request permission to participate in oral argument.

INTERESTS OF *AMICI*

Amici are retired military officers and scholars of military law and history. They share an interest in preserving our Nation's military tradition of humane treatment of all persons captured and held in military detention and in strictly enforcing military, domestic, and international law requiring such treatment.

Brigadier General James P. Cullen, USA (Ret.) served in the U.S. Army Reserve Judge Advocate General's Corps and was the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.[1]

Colonel Morris D. Davis, USAF (Ret.) was an Air Force judge advocate for 25 years. He was the chief prosecutor for the military commissions at Guantanamo Bay, Cuba, leading a multi-agency prosecution task force from the Department of Defense, Department of Justice, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies. His final military assignment was as director of the Air Force Judiciary where he oversaw the Air Force criminal justice system at sites around the world. He recently was a senior specialist in national security at the Congressional Research Service. He now serves as the executive director of the Crimes of War Education Project, a nonprofit

[1] References to each *amici's* institutional or organizational affiliations are for identification purposes only.

organization that seeks to increase understanding of the laws of armed conflict worldwide.

Lieutenant Commander Eugene R. Fidell, USCG (Ret.) served in the United States Coast Guard as a Judge Advocate and is now a Senior Research Scholar in Law and the Florence Rogatz Lecturer in Law at Yale Law School. He is co-author of Military Justice Cases and Materials (LexisNexis 2007 & Supp. 2010-11), and, since 1991, has been president of the National Institute of Military Justice.

Brigadier General Evelyn P. Foote, USA (Ret.) was Commanding General of Fort Belvoir. She was recalled to active duty to serve as Vice Chair of the Secretary of the Army's Senior Review Panel on Sexual Harassment. She is President of the Alliance for National Defense, a non-profit organization.

Rear Admiral Don Guter, JAGC, USN (Ret.) served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as President and Dean of the South Texas College of Law in Houston, TX.

Brigadier General Leif H. Hendrickson, USMC (Ret.) served as the Commanding General, Marine Corps Base, Quantico, as President of the Marine Corps University, and as Commanding General, Education Command. General Hendrickson amassed over 5,000 flight hours.

Rear Admiral John D. Hutson, JAGC, USN (Ret.) served in the U.S. Navy for 27 years. In his last posting, he was the Navy's Judge Advocate General. Admiral Hutson is Dean Emeritus & Philosopher in Residence at the University of New Hampshire School of Law in Concord, New Hampshire. He also joined Human Rights First's Board of Directors.

Brigadier General David R. Irvine, USA (Ret.) enlisted in the 96th Infantry Division, U.S. Army Reserve and subsequently received a direct commission as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School and taught prisoner of war interrogation and military law for several hundred soldiers, marines, and airmen. His last assignment was Deputy Commander for the 96th Regional Readiness Command. General Irvine is an attorney and practices law in Salt Lake City, Utah. He served four terms as a Republican legislator in the Utah House of Representatives and has served as a congressional chief of staff and a commissioner on the Utah Public Utilities Commission.

Lieutenant General Claudia J. Kennedy, USA (Ret.) is the first and only woman to achieve the rank of three-star general in the U.S. Army. General Kennedy served as Deputy Chief of Staff for Army Intelligence, Commander of the U.S. Army Recruiting Command, and Commander of the 703d military intelligence brigade in Kunia, Hawaii.

General Merrill A. McPeak, USAF (Ret.) served as the Chief of Staff of the U.S. Air Force. Previously, General McPeak served as Commander in Chief of the U.S. Pacific Air Forces. He is a command pilot, having flown more than 6,000 hours, principally in fighter aircraft.

Brigadier General Richard O'Meara, USA (Ret.) is a combat veteran of the War in Vietnam, with 35 years of service. Following his Vietnam service, he earned a law degree and joined the Judge Advocate General's Corps. He earned graduate degrees in History and International Relations and teaches courses in Security Studies, Human Rights and Global Studies at Rutgers University-Newark and Richard Stockton College. He continues to serve as Adjunct Faculty with the Defense Institute of International Legal Studies where he has taught rule of law, governance, and peacekeeping subjects in diverse locations around the world. He is a qualified Emergency Medical Technician and served at the World Trade Center Site in the months after 9/11.

Lieutenant General Charles Otstott, USA (Ret.) served 32 years in the U.S. Army. As an Infantryman, he commanded at every echelon including command of the 25th Infantry Division (Light). His service included two combat tours in Vietnam. He completed his service in uniform as Deputy Chairman, NATO Military Committee, 1990-1992.

Major General Thomas J. Romig, USA (Ret.) served for four years as the 36th Judge Advocate General of the U.S. Army. His significant military legal positions included Chief of Army Civil Law and Litigation and Chief of Military Law and Operations. His other military legal assignments included Chief of Planning for the JAG Corps; Chief Legal Officer for the 32d Army Air Defense Command in Europe; and Chief Legal Officer for U.S. Army V Corps and U.S. Army forces in the Balkans. Prior to becoming a military lawyer, he served six years as a military intelligence officer. He served as Deputy Chief Counsel for Operations and Acting Chief Counsel for the Federal Aviation Administration and is currently Dean of Washburn University School of Law in Topeka, Kansas.

Brigadier General Stephen N. Xenakis, USA (Ret.) served 28 years in the U.S. Army as a medical corps officer. Dr. Xenakis held a wide variety of assignments as a clinical psychiatrist, staff officer, and senior commander, including Commanding General of the Southeast Army Regional Medical Command. Dr. Xenakis has written widely on medical ethics, military medicine, and the treatment of detainees. He has published editorials in the *Washington Post* and a number of other national magazines and journals, including book chapters and legal reviews. Dr. Xenakis now has an active clinical and consulting practice.

STATEMENT OF THE ISSUE

This amicus brief seeks to assist the Court by providing the informed views of the *amici* on two issues: (i) whether the Secretary of Defense and the military officers in the chain of command are entitled to qualified immunity from claims for money damages for torture and other inhumane acts allegedly inflicted on Jose Padilla while he was detained by them as a designated "enemy combatant" at the Naval Consolidated Brig in Charleston, South Carolina; and (ii) whether recognition of a constitutional cause of action for such alleged mistreatment pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 402 U.S. 388 (1971), would unduly impinge on the conduct of military operations.

ARGUMENT

Appellant Jose Padilla is a U.S. citizen initially arrested in this country by civil authorities, subsequently designated by the President as an "enemy combatant," transferred to military custody, and thereafter confined for nearly four years at the Charleston Brig. According to the complaint, during his military detention, Padilla was held incommunicado, including from counsel, and subjected to torture and inhumane treatment at the direction of appellees, the Secretary of Defense and the chain of command responsible for his confinement.

Amici express no view as to the truth of appellants' allegations. The district court properly accepted them as true for purposes of its analysis of appellees'

motion to dismiss. It is clear, however, that the conduct that appellants allege, if true, would violate long-settled and clearly established prohibitions under military law and practice for the treatment of detainees held in military custody and that appellees surely knew that such conduct was illegal and in breach of their duties as military officers.

The district court dismissed appellants' complaint on two grounds of particular interest to these *amici*. The court ruled that appellants had not made out claims for constitutional torts as contemplated under *Bivens*, based on its conclusion that "special factors counseling hesitation" precluded such relief. The court mistakenly concluded, without any genuine analysis, that appellants' claim has a "potential impact" on "the Nation's military affairs, foreign affairs, intelligence, and national security" and this litigation would "likely burden . . . the government's resources in these essential areas." Joint Appendix ("JA")-1525, Opinion at 20. The court further ruled that, even if appellants' claims were tenable under *Bivens*, appellees are entitled to qualified immunity against such claims on grounds that, given Padilla's status as an "enemy combatant," it was not "clearly established" that the mistreatment to which he allegedly was subjected violated his constitutional rights. JA-1527, Opinion at 22.

Invoking *Pearson v. Callahan*, 533 U.S. 223 (2009), the district court declined to decide what had previously been treated as a threshold issue: whether

solely as a consequence of his alleged status Padilla was not entitled to the constitutional rights which any other American citizen detained on U.S. soil inarguably would possess. The court implicitly (and correctly) accepted that U.S. citizens detained in the United States in military custody, like prisoners incarcerated for crimes and others involuntarily confined, have constitutional rights to humane treatment by their jailors. The court ruled, without explanation, that Padilla's status as an "enemy combatant" made him different from all other types of citizen detainees and that the military officers responsible for his custody could not have been expected to understand that he was entitled to humane treatment. As a result, the court ruled that: (i) Padilla's action represents a novel and improper expansion of the remedy approved in *Bivens*, and (ii) appellees acted in good faith in believing that, because he was held as an "enemy combatant," Padilla had no due process rights to be free from torture and inhumane treatment, and they thus are entitled to immunity from any lawsuit by Padilla to hold them accountable for their actions.

For military officers steeped in the long and proud tradition of humane treatment of military prisoners of all stripe, the decision below is dangerous and wrong. As appellants show in their own brief, the Supreme Court long ago unequivocally established that American citizens held in custody in detention facilities in this country, whether by civil or military authority, are entitled to due

process, including protection from torture and inhumane treatment. Until Padilla's capture, there had never been a suggestion that these rights are dependent upon how a detainee's status might be classified. Pretrial criminal suspects, convicted misdemeanants and felons, capital offenders, persons subject to involuntary commitment because designated as sexually violent predators, and other types of detainees all had been recognized as entitled to humane treatment and freedom from torture when confined in this country. These rights had never been deemed to depend on the nature of the detaining governmental authority, be it civilian or military. Under international conventions ratified by the United States and in accordance with U.S. military laws and regulations, prisoners of war, civilian insurgents, and others held in military custody are well recognized to be entitled to basic humane treatment.

Notwithstanding his undisputed status as a U.S. citizen, and, by definition, a "person" who is guaranteed the constitutional right of due process, the district court concluded that Padilla was advancing a novel claim requiring recognition of new rights and remedies. In fact, the court had the issue precisely backwards. Far from avoiding an *expansion* of *Bivens*, the decision below represents a misguided *contraction* of constitutional rights to which all persons detained in this country are entitled. The court reached its decision by carving out a new and unfounded *exception* based on Padilla's status as an "enemy combatant," a classification that,

whatever else its consequences, has no implications for the manner of the treatment of a citizen while in confinement.

The district court's error is especially egregious given its military setting where humane treatment of military detainees has been a fixture in the firmament of military law and practice since the founding of this Nation. The notion that military officers could have been uncertain as to the unlawfulness of inhumane practices against persons detained in this country, whatever their status, is repugnant to this tradition and undermines critically important principles of good order and discipline.

I. Inhumane Treatment of Military Detainees Has Long Been Forbidden by Military Law and Practice.

From the Revolutionary War until the present, the United States military has maintained a tradition of treating captured combatants humanely. This tradition began with George Washington, who, after the Battle of Trenton, ordered his troops to give refuge to hundreds of surrendering Hessian soldiers. Although European military tradition allowed field commanders to put captured enemy soldiers "to the sword" rather than keep them captive, Washington instructed his lieutenants to treat captured soldiers with "humanity," and to "[l]et them have no reason to [c]omplain of our [c]opying the brutal example of the British army."[2]

[2] David Hackett Fischer, *Washington's Crossing*, 377-79 (2004).

The tradition that prisoners of war were to be treated humanely was codified during the Civil War, when President Lincoln signed a General Order known as the Lieber Code declaring that military law "be strictly guided by the principles of justice, honor and humanity – virtues adorning a soldier even more than other men, for the reason that he possesses the power of his arms against the unarmed."[3] The Code forbade the "intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" upon a prisoner of war,[4] and specified that while prisoners of war may be confined "such as may be deemed necessary on account of safety," they "are to be subjected to no other intentional suffering or indignity" and "treated with humanity."[5] The Code expressly forbade the use of violence in extracting information from captured enemy forces.[6]

The Lieber Code has greatly influenced the traditions of the U.S. military and the law of war. It has served as "the basis of every convention and revision" of international law concerning the treatment of prisoners of war, including the Hague Conventions of 1899 and 1907, the first multilateral codifications of the

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[3] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field, United States War Department General Orders No. 100*, § I, art. 4 (Apr. 24, 1863).

[4] *Id.* § III, art. 56.

[5] *Id.* § III, art. 75-76.

[6] *Id.* § I, art. 16.

modern law of war.[7] The brutality of the First World War later prompted the United States and more than forty other nations to enter into the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. At the end of the Second World War, the laws of war were revisited, resulting in the adoption in 1949 of the current four Geneva Conventions.[8]

The United States military has long trained its officers to observe the laws of war and the standards set forth in the Hague and Geneva conventions.[9] These are mandatory and invariable requirements. The 1949 Geneva Conventions provide comprehensive standards for the treatment of persons detained in armed conflicts. The Third Geneva Convention addresses prisoners of war. Since it defines prisoners of war as those lawful combatants who wear identifiable military

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[7] *See* Brig. Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40, 42 (1950).

[8] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively the "1949 Geneva Conventions"). All four conventions were ratified by the United States in 1955. *See* 101 Cong. Rec. 9958-73 (1955).

[9] *See generally* Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 Mil. L. Rev. 112 (2004); United States Dep't of the Army, Field Manual 27-10, *The Laws of Land Warfare* (July 1956).

insignia, openly bear arms, and respond to superior authority, the Third Convention treats a wide array of subjects not limited to rights of humane treatment. However, Common Article Three – so identified because it is repeated in all four Conventions – addresses the bedrock minimum standards for humane treatment of all persons, such as prisoners of war and other types of detainees who are not then actively engaged in combat.[10] Common Article Three:

- Applies without qualification as to their status to all persons held in detention;
- Requires that detainees "in all circumstances be treated humanely;"
- Expressly provides that certain "acts are and shall remain prohibited at any time and in any place whatsoever," including "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."[11]

As contemplated by the broad prohibitions of Common Article Three, the U.S. military has continued to honor its obligation to provide humane treatment to detainees in modern day armed conflicts, regardless of how they might be

[10] Common Article Three, by its terms, is not limited in its application to wars between signatory states. It also applies to detainees held in connection with civil wars and insurgencies.

[11] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3(1).

categorized. During the Vietnam War, the United States extended the protections of humane treatment to all captured combatants – including captured Viet Cong, who did not follow the laws of war.[12]

The law governing the conduct of military personnel is codified in the Uniform Code of Military Justice ("UCMJ"),[13] and Field Manuals issued by the Armed Forces. The multi-service regulation in *Military Police: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*[14] is typical. Its scope is not limited to enemy prisoners of war but includes "civil internees" and "other detainees" in U.S. military custody.[15] It provides that:

- "All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given

[12] *See* United States Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in* Charles I. Bevans, ed., Contemporary Practice of the United States Relating to International Law, 62 Am. J. Int'l L. 754, 766-67 (1968).

[13] 10 U.S.C. Subt. A, Pt. II, Ch. 47.

[14] Department of Defense (Oct. 1, 2007), available at http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf, last visited June 12, 2011.

[15] "Enemy combatant" is not a recognized detainee status under military law and practice. The multi-service regulation defines "enemy prisoner of war" as one who is engaged in combat under orders and identifiable insignia of his government. It defines "civilian internee" as "a civilian who is interned during armed conflict . . . for security reasons . . . or because he has committed an offense against the detaining power." It defines "other detainee" as "persons in the custody of U.S. Armed Forces who have not been [otherwise] classified" and requires that they "shall be treated as EPWs [enemy prisoners of war] until a legal status is ascertained by competent authority." *Id.*, Glossary at 33.

humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation."

- "All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment."

- "All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind."[16]

The requirement of humane treatment extends as well to the interrogation of detainees. For example, Field Manual 34-52 sets forth the U.S. Army's official position on acceptable interrogation techniques.[17] The manual acknowledges that U.S. military policy "expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation."[18] It includes as examples of physical and mental torture: infliction of pain through chemicals or bondage; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged

[16] *Id*. at 1-5(a)(1), (b), (c).

[17] U.S. Dep't of the Army, Field Manual 34-52, *Intelligence Interrogation* (May 1987).

[18] *Id.* at 1-8.

periods of time; any form of beating; mock executions; and abnormal sleep deprivation.[19]

Against this background, the Judge Advocates General of the Navy, Army, and Air Force in 2003 objected to provisions in a draft report for Secretary Rumsfeld that suggested authorization of aggressive techniques for use in interrogating detainees. The Staff Judge Advocate to the Commandant of the Marine Corps warned that the purported authorization would have a number of adverse effects, including criminal and civil liability for offenders.[20] In his comments on the same draft, the Deputy Judge Advocate General of the Air Force urged that the report be revised to contain the following:

> U.S. Armed Forces are continuously trained to take the legal and moral 'high-road' in the conduct of our military operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful.[21]

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[19] *Id.* at 1-8; *see also id.* at D-1-2.

[20] Memorandum from Brigadier General Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, to General Counsel of the Air Force (Feb. 27, 2003), *reprinted in* 151 Cong. Rec. S8794.

[21] Memorandum from Major General Jack L. Rives, Deputy Judge Advocate General of the U.S. Air Force, to SAF/GC (Feb. 6, 2003), *reprinted in* 151 Cong. Rec. S8794-95.

Likewise, the Judge Advocate General of the Army noted that some of the "aggressive counter-resistance interrogation techniques" being considered by the Department of Defense failed to "comport with Army doctrine as set forth in Field Manual (FM) 34-52 Intelligence Interrogation."[22]

In July 2004, the General Counsel to the Navy criticized the interrogation techniques authorized by Secretary Rumsfeld in his December 2, 2002 memorandum,[23] stating:

> [These techniques] should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture . . . . Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute cruel, inhuman, or degrading treatment, another class of unlawful treatment.[24]

The prohibitions against torture and inhumane treatment enshrined in military law are reflected in numerous additional sources of law, all of which are

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[22] Memorandum from Major General Thomas J. Romig, U.S. Army, Judge Advocate General, to General Counsel of the Air Force (Mar. 3, 2003), *reprinted in* 151 Cong. Rec. S8794.

[23] Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Defense, to Donald Rumsfeld, Secretary of Defense (Nov. 27, 2002) (approved by Secretary Rumsfeld on December 2, 2002), available at http://www.defense.gov/news/Jun2004/d20040622doc5.pdf, last visited June 13, 2011.

[24] Memorandum from Alberto J. Mora to Inspector General, United States Department of the Navy at 6 (July 7, 2004) (citation omitted), available at http://www.newyorker.com/images/pdfs/moramemo.pdf, last visited June 12, 2011.

consistent with constitutional due process requirements. The United States is bound by the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").[25] As CAT makes abundantly clear: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[26]

In a 2005 report to the United Nations Committee Against Torture, which oversees compliance with CAT, the United States Government declared emphatically that it accepts no justification for torture:

> No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture . . . . The U.S. Government does not permit, tolerate, or condone torture . . . by its personnel or employees under any circumstances.[27]

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[25] G.A. Res. 39146, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), art.1, 26, opened for signature Dec. 10, 1984. In ratifying CAT, the United States expressed the reservation that cruel, inhuman and degrading treatment was limited to conduct that violated the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. *See* United States Declarations and Reservations to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, § I(1), available at http://www2.ohchr.org/english/law/pdf/cat.pdf, last visited June 13, 2011.

[26] CAT, art. 2(2).

[27] *See* Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America (May 6, 2005), U.N. Doc. CAT/C/48/Add.3 (2005) at 4, available at http://www.state.gov/documents/organization/100296.pdf, last visited June 13, 2011.

In 1997 Congress amended the War Crimes Act of 1996, making it a felony for any member of the Armed Forces of the United States to violate Common Article Three of the 1949 Geneva Conventions, which expressly forbids torture and cruel or degrading treatment in breach of the 1949 Geneva Conventions.[28]

Regardless of what law and treaties may govern its conduct overseas and in zones of active combat, what is important in the present context is that, when it acts within the United States, the U.S. military's obligation and commitment to humane treatment of persons under its custody is grounded in the Constitution's fundamental requirement of due process and its prohibition against cruel and unusual punishment. There is no textual support in the Constitution for the district court's conclusion that there are categories of U.S. citizens to whom due process protections do not apply. Rather, the Constitution's guarantees apply to all "persons," which has long been construed to include all U.S. citizens and residents. The Constitution contains no exception for U.S. citizens who have been designated as "enemy combatants," nor does it permit the government to carve out categories of persons to be denied its protections whenever the government deems it justified.

[28] War Crimes Act of 1996, Pub. L. No. 105-118, 111 Stat. 2436 (Codified as amended at 18 U.S.C. § 2441 (1997)). In September 2006, the War Crimes Act was amended by the Military Commissions Act to limit the violations of Common Article Three that are subject to the War Crimes Act; however, torture and other forms of inhumane treatment continue to be criminal acts. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)-(c), 120 Stat. 2600, 2633-35 (Codified as amended at 18 U.S.C. § 2441(d) (2006)).

II. Military Law and Policy and the Welfare of Our Armed Forces Require That Officials Responsible for Inhumane Treatment of Detainees Be Held Accountable, Not Immunized.

Measured against this history, the court's conclusion that appellees cannot be charged with understanding that they will be held responsible for inhumane treatment and use of brutal interrogation techniques against an enemy combatant in their custody is repugnant to the military's honored traditions. It is indisputable that civilian jailors would be deemed to understand that such unlawful conduct violates the most fundamental precepts of constitutional due process and would subject them to *Bivens* accountability. Military correctional personnel are equally aware of, and trained in, these standards of conduct and the potential consequences of violating them. And unlike civilian jailors, military officers are trained that such conduct would violate as well their sworn duties as officers and that they are accordingly personally accountable for inhumane treatment by their subordinates.

Amici respectfully submit that this case is different from other cases that have arisen in the so-called "War on Terror" declared after the horrific acts of September 11, 2001. Other cases have required the courts to consider the geographic reach of constitutional protections, the precise status of long-term military bases such as Guantanamo Bay, and the status of non-citizens held involuntarily and without charges at such facilities. *See e.g., Rasul v Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008)*; Hamdan v. Rumsfeld*,

548 U.S. 557 (2006). In each of these cases, the government has advanced arguments that sought to distinguish those circumstances from the simple case of a U.S. citizen held in the United States. Now, this Court is faced with that simple case. Padilla is a U.S. citizen detained on U.S. soil. Given the long tradition of assuring humane treatment of all military detainees, a tradition codified in military law and grounded in notions of constitutional due process, appellees cannot plausibly contend that they acted in good faith ignorance of their clear duties and thus should be granted immunity. They plainly cannot contend that they reasonably believed that the government's designation of Padilla as an "enemy combatant" – a status unknown to the Constitution or to military law and regulations – obviated their obligation to provide humane treatment.

For similar reasons, appellees should not be heard to argue that "special factors counseling hesitation" should preclude *Bivens* relief – or, more accurately, should allow the creation of an "enemy combatant" exception to previously clearly-established *Bivens* relief. The district court's opinion in *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1028-30 (N.D. Cal. 2009), deconstructs the insupportable assertion that there are "special factors" here that preclude a remedy under *Bivens*. As that court ruled, the executive branch's "war powers" authority and concerns for national security and the conduct of foreign affairs are not hampered by

allowing damages claims for "American officials' treatment of an American citizen within its own boundaries." *Id.* at 1030.

The district court's formulaic assertion that recognition of Padilla's *Bivens* right to humane treatment could intrude upon the military's ability to carry out its mission has no basis in reality. The court does not explain – because it cannot – how holding appellants accountable for mistreatment of a civilian detainee held in a brig on U.S. soil could possibly interfere with battlefield operations, intelligence gathering, strategic planning, or any other conceivable legitimate military function. The disconnect is even more apparent in the instant setting, where appellants are not called upon to defend their conduct during the heat of battle but in a court of law in proceedings conducted years after the events in question.

Contrary to the decision below, there are "special factors" that should counsel *confirmation* of existing precedent that a *Bivens* remedy is available for the wrongful conduct alleged in this action. The armed forces function on the basis of discipline and strict accountability. The core obligation of every soldier, sailor, airman, marine and coastguardsman to carry out the lawful orders of his or her superiors is matched by the corresponding obligation of such superiors up the chain of command to take individual responsibility for their subordinates' conduct, including their unlawful conduct. The central requirement is responsibility; immunity is its antithesis. Recognition of a *Bivens* action that holds offenders

accountable in money damages for injuries resulting from inhumane treatment of a military detainee held in custody on U.S. soil does not undermine but rather supports the principle of discipline and accountability in which all U.S. forces are indoctrinated. It is a "special factor" that commends confirmation of a *Bivens* remedy here.

The affirmation of a strong norm against torture and inhumane treatment not only will cause no interference with the legitimate mission of our military forces but will provide an incentive to proper and legal decision-making and a bulwark against any failure of discipline within the military.

III. By Not Clearly Holding as a Threshold Matter that Inhumane Treatment of an Enemy Combatant Detainee is Unconstitutional, the Decision Below Will Unsettle Military Law and Command Responsibility.

Clarity of U.S. military policy is particularly undermined by the approach adopted by the district court. By refusing to announce a clear decision on the threshold issue of whether the inhumane treatment allegedly inflicted on Padilla violated his constitutional rights, the decision below creates unacceptable uncertainty. To be sure, *Pearson* permits a district court in the exercise of its discretion to sidestep difficult constitutional issues and dismiss an action on qualified immunity grounds solely on the basis that it previously had not been "clearly established" that the right in question does exist. A potential drawback to this approach, of course, is that it may preclude any pronouncement of the

existence of a constitutional right that will govern future conduct. This drawback is particularly destructive here.

Military discipline is dependent on clear rules and certainty of accountability. *Every* U.S. military officer receives training on his or her rights and obligations under the Geneva Conventions and other applicable legal codes. The decision below, if left to stand, injects uncertainty into the proper bounds for conduct in the treatment of military detainees at a time when operations against international terrorism, especially when they involve our own citizens within our own borders, demand clarity. The U.S. military should not be left to guess at what conduct is proper, what orders are lawful. In these circumstances, it would be entirely proper for the Court not to follow the option afforded by *Pearson*. Whatever decision this Court reaches on the *Bivens* and immunity issues, *amici* urge the Court to directly address and definitively rule on whether, if proven, the claims of inhumane treatment and torture alleged would make out a violation of appellants' constitutional rights.

CONCLUSION

These *amici* intend no endorsement of Jose Padilla. Barring reversal on appeal, he stands convicted of crimes against his own country and is duly sentenced to prison in punishment for these crimes. He will serve his sentence, however, under the basic protections afforded all citizens and persons incarcerated

here: freedom from cruel and unusual punishment and inhumane treatment. These protections are not meant to mitigate the moral gravity of his crimes; they undergird the strength and moral clarity of our system of law. He was entitled to no less when he was in the hands of the U.S. military. Our military, like our civil authority, is governed by and overwhelmingly committed to the rule of law. It would be a pernicious and destructive doctrine that would hold our armed forces to a lower standard of behavior than that applicable to guards in federal and state civilian prisons. The Court should repudiate any such notion and reverse the decision below.

Respectfully submitted,

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Dated: June 14, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6,214 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I certify that this brief was filed electronically on June 14, 2011. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

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Dated: June 14, 2011