No. 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.

Appeal from the United States District Court for the District of South Carolina in Case No. 2:07-cv-00410-RMG, Judge Richard M. Gergel

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BRIEF FOR DEFENDANTS-APPELLEES HANFT, HAYNES, JACOBY, MARR, AND WOLFOWITZ

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July 11, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, each Defendant-Appellee states 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. No publicly held corporation has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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2. Whether Defendants are entitled to qualified immunity.

3. Whether Plaintiffs have adequately pled personal participation by each Defendant in alleged constitutional violations.

STATEMENT OF FACTS

Jose Padilla, who the President determined to be an enemy combatant acting in concert with al-Qaeda and who a federal jury convicted of supporting al-Qaeda's terrorist acts, seeks damages from military officials for advising the President and approving and implementing governmental policies in the course of a Congressionally-authorized armed conflict.

As al-Qaeda attacked U.S. embassies in 1998 and a U.S. warship in 2000, Padilla was in Pakistan and Afghanistan meeting with al-Qaeda leaders and training with al-Qaeda operatives to attack within the United States. JA116-18.

On September 11, 2001, al-Qaeda killed more than 3,000 people in New York, Washington, D.C., and Pennsylvania. Congress authorized a military response against the nations, organizations, and persons that the President "determines planned, authorized, committed, or aided" the attacks "or harbored

such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) ("AUMF"). In October, 2001, the President deployed military forces to strike al-Qaeda camps and Taliban forces in Afghanistan, where Padilla was plotting to launch his own attack within the United States. JA1205. Padilla later left Afghanistan and in May 2002 flew to Chicago carrying thousands of dollars and an Arabic contact list containing information about suspected al-Qaeda associates. JA1146. When Padilla evaded questions about his entry into the United States (*id*.), FBI agents arrested him. JA76.

On June 9, 2002, the President designated Padilla an enemy combatant and ordered the Secretary of Defense to have the military detain him. JA122. The President concluded that Padilla was "closely associated with al-Qaeda," had "engaged in conduct that constituted hostile and war-like acts," and posed a "continuing, present and grave danger to the national security" – and that Padilla's detention was "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces." *Id.* Padilla was detained in the Navy Brig in Charleston, South Carolina. JA120.

Two days later, Padilla's court-appointed attorney filed a writ of habeas corpus in New York federal court, challenging Padilla's designation as an enemy combatant and military detention. *See Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) ("*Padilla I*"). The Government moved to dismiss Padilla's

petition based upon the declaration of a senior Defense Department official, Michael Mobbs, setting forth an unclassified summary of the factual basis for the President's order. *Id*. at 572.

That declaration establishes that after his release from prison for murder, Padilla in 1998 moved to Egypt, took the name Abdullah al Muhajir, and traveled to Saudi Arabia and Afghanistan. JA116-17. In 2001, Padilla approached senior al-Qaeda leaders in Afghanistan and proposed an attack within the United States. JA117. Padilla researched such an attack at an al-Qaeda safehouse in Lahore, Pakistan, and discussed various proposals with al-Qaeda officials. JA117-18. Padilla was sent to the U.S. to carry out such an attack. JA118. Based upon the Mobbs declaration, the court concluded that Padilla "had contact with and was acting on behalf of al-Qaeda." 233 F. Supp. 2d at 604. It held that the President was authorized to detain U.S. citizens such as Padilla pending further habeas proceedings to review the evidence supporting the detention. *See id*. at 569-70.

A divided panel of the Second Circuit reversed. The majority agreed that the Government's evidence supplied "ample cause to suspect Padilla of involvement in a terrorist plot," *Padilla v. Rumsfeld*, 352 F.3d 695, 699 n.2 (2d Cir. 2003) ("*Padilla II*"), but held that the President lacked authority to detain U.S. citizens captured within the United States. *Id*. at 724.

On June 28, 2004, the Supreme Court vacated the Second Circuit's decision because Padilla's attorneys had filed in the wrong court. *See Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) ("*Padilla III*"). That same day, the Court also held, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), that Congress through the AUMF authorized detention of U.S. citizens who join enemies fighting against the United States and that review of such detention is appropriately tailored to alleviate the "uncommon potential to burden the Executive." *Id.* at 533-34.

Four days later, Padilla re-filed his habeas petition in the U.S. District Court for the District of South Carolina. Citing *Hamdi*, the Government argued that the President was authorized to detain Padilla as an enemy combatant based upon facts set forth in the declaration of a military official. The declaration expanded upon the facts previously disclosed in the Mobbs declaration and detailed Padilla's armed support of the Taliban in Afghanistan. JA1205-09.

At a status conference soon thereafter, the Government made clear that interrogation of Padilla had ceased and would not continue without prior notice and opportunity for a hearing. JA1219-20. Padilla elected to challenge only the President's legal authority to detain him under the Government's facts. JA1230-34, 1269-75. The district court reluctantly agreed, cautioning that Padilla could not later complain that he was not provided the opportunity to challenge the factual basis for his detention. Padilla acknowledged and accepted these consequences.

JA1247, 1268-73, 1275, 1279. The district court thereafter concluded that Padilla could not be detained because he was captured in the U.S. *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005) ("*Padilla IV*").

This Court unanimously reversed, holding that the President is authorized to detain U.S. citizens in Padilla's circumstances. *See Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) ("*Padilla V*"). The Court found the location of capture irrelevant, *id*. at 393, and, under the Government's facts, Padilla's detention as an enemy combatant was lawful, *id*. at 397. Subsequently, Padilla was indicted and the Government sought to transfer Padilla for trial in federal criminal court for supporting terrorists overseas. This Court refused to vacate its decision. 432 F.3d 582, 583 (4th Cir. 2005).

The Government at trial presented evidence that Padilla left the U.S. for Egypt in 1998 to engage in violent jihad and continued such efforts through at least October 2001. JA1125-28, 1143-45. An al-Qaeda "Mujahideen Identification Form," recovered by the U.S. military in Afghanistan, linked Padilla directly to al-Qaeda. JA1126, 1145. This form, issued by al-Qaeda's military personnel department and completed by Padilla in July 2000, contained Padilla's fingerprint, one of his aliases, and other corroborating information. JA1145. Intercepted communications established that, by July 2000, Padilla trained in firearms, explosives, and battlefield tactics at an al-Qaeda training camp in Afghanistan.

JA1128-29, 1131-32. A jury convicted Padilla on all charges, including conspiring to provide material support to al-Qaeda and associated terrorist groups. JA1124-26. Padilla is serving his sentence of more than 17 years in a high security prison in Colorado. JA1125, 1514. Padilla's appeal of his conviction, and the Government's appeal of his sentence, are pending. JA1125.

Plaintiffs' Third Amended Complaint, filed in July 2008, seeks damages from present and former government officials for alleged injuries arising from Padilla's designation, detention and interrogation as an enemy combatant from 2002-2005. Padilla has since dismissed from the suit the interrogators, guards, medical personnel, and mid-level supervisors responsible for directly overseeing his detention, leaving only senior military policy-makers and Brig Commander Defendants. ECF No. 236. Padilla contends that military policy-makers and supervisors are individually liable for damages because they advised the President and were "involved in setting interrogation policies and conditions of confinement for other detainees," JA1384, or "knew what was going on at the brig, and they permitted it to continue." JA1385.

The complaint asserts that Padilla is not an enemy combatant but proffers no contrary facts and denies none of the facts underlying the President's determination. Indeed, the complaint attaches and incorporates exhibits, including the Mobbs declaration itself, containing the facts and processes supporting the

President's designation and detention order, including Padilla's close ties to al-Qaeda, and the confinement policies allegedly approved and implemented by Defendants. *See* JA77-78, 80-82. These exhibits also contradict the complaint's conclusory allegations concerning Padilla's designation and conditions of confinement by detailing the legal analysis underlying the designation process; the government deliberations about the legal framework for detaining enemy combatants; the concern with humane treatment of enemy combatants at the Charleston Brig; the handling of infractions concerning detainee treatment through the military disciplinary system; and the reasons for restricting Padilla's external communications at the outset of his detention. *See infra* pp. 31-32, 37-40.

On February 17, 2011, the district court granted Defendants' motions to dismiss all of Padilla's claims. JA1506-37. Noting that the Supreme Court has refused to extend *Bivens* claims for more than 30 years in increasingly strong terms, the district court held that "special factors counseling hesitation" barred Plaintiffs' implied damages claims where, as here, they would adversely affect "the most profound and sensitive issues" related to "the Nation's military affairs, foreign affairs, intelligence, and national security." JA1522, 1525. The court carefully canvassed the decades of cases, including recent cases addressing counter-terrorism policies, that preclude *Bivens* actions involving such separation of powers considerations. JA1517-25. Without passing judgment on the policies

at issue while "sitting comfortably in a federal courthouse nearly nine years after those events," the court readily concluded that Plaintiffs' claim would "by necessity entangle[] the Court in issues normally reserved for the Executive Branch." JA1522. Implying a cause of action was especially inappropriate because "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." *Id.* And, the litigation consequences of recognizing a *Bivens* action here constituted a separate source of "special factors counseling hesitation." JA1523-24. Such a case "unavoidably … probes government secrets" and could involve "a massive discovery assault on the intelligence agencies of the United States Government," and "could be used by our enemies to obtain valuable intelligence" while distracting "government officials … from their vital duties to attend depositions or respond to other discovery requests." JA1523.

The district court separately held that Defendants were entitled to qualified immunity because their conduct violated no "clearly established statutory or constitutional rights which a reasonable person would have known." JA1527 (internal quotation marks omitted). The court found it "hard … 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." JA1529.

Indeed, "[t]he 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." *Id.* Even assuming that the allegations regarding Padilla's conditions of confinement were true, the court observed that "[t]o say the scope and nature of Padilla's legal rights at that time were unsettled would be an understatement." JA1530. Qualified immunity was compelled because "[n]o 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." JA1530-31. In addition, determining the rights due to enemy combatants would require a "'particularized balancing' of interests" that "precludes a finding of clearly established law." JA1531. Qualified immunity likewise was due to Defendants for Plaintiffs' claim under the Religious Freedom Restoration Act ("RFRA") because the statute, particularly in this context, called for a "sophisticated balancing of interests [that] is the very type of discretionary decision making that prevents a finding of clearly established law on the issue." JA1533 (internal quotation marks omitted).

The court also found that Plaintiffs lacked standing to assert claims for declaratory and injunctive relief against Secretary Gates. JA1536.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court correctly assessed the "special factors" precluding extension of *Bivens* to this context. From his supermax federal prison cell and having been convicted of materially supporting al-Qaeda in its terrorist attacks, Padilla seeks token damages of one dollar from each of the remaining military officials for their role in designating him an enemy combatant for his work with al-Qaeda and detaining him from 2002-2005 in the Charleston Navy Brig. It is difficult to imagine a more compelling set of special factors. As the Second and D.C. Circuits have determined in closely related contexts, *Bivens* claims addressing counter-terrorism measures raise the most profound separation of powers, national security, military affairs, and privilege issues and thus cannot proceed. Separately, the specific separation of powers concerns identified in *United States v. Stanley*, 483 U.S. 669, 678-79 (1987), bar any *Bivens* action directed, as here, toward military affairs or conduct arising incident to military service. That the plaintiff is an enemy combatant rather than a U.S. serviceman only further strengthens the case against creating a new *Bivens* action.

Bivens actions are also precluded by the existence of an alternative remedy. Padilla's extensive habeas proceedings provided him every opportunity to raise the arguments he pursues here – which the district court specifically encouraged him to do years ago. Padilla seeks only nominal damages now in this second wave of

litigation to continue the advocacy that his criminal prosecution truncated, but there is no suggestion that Congress intended to provide such second bites at the apple.

The district court also correctly found Defendants entitled to qualified immunity. The President's designation decision was based upon, *inter alia*, Congressional authorization and the controlling Supreme Court precedent holding that U.S. citizens who seek to attack the United States may be treated as enemy combatants. The Supreme Court subsequently reaffirmed the vitality of this principle, as have at least five members of this Court. Padilla's most serious allegations of mistreatment fail because they *conflict with* the policies that Defendants are alleged to have approved and implemented. And, for all the allegations, Defendants cannot be held vicariously liable for alleged misdeeds of their subordinates under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which requires specific facts indicating Defendants' personal responsibility for constitutional violations before a suit can proceed. The official policies that are attached to the complaint and allegedly approved and implemented by the Defendants were also the product of extensive debate among a range of expert officials, lawyers and policy makers. The district court properly rejected Padilla's narrow view of qualified immunity, and *Ashcroft v. al-Kidd*, No. 10-98 (U.S. May 31, 2011), makes clear that the district court was correct in doing so. Under *al-Kidd*, federal

officials are entitled to qualified immunity unless "every reasonable official" would know "beyond debate" that the "particular conduct" was unconstitutional under "controlling authority." *Id.*, slip op. at 9-10 (quotation omitted). *Al-Kidd* further holds that cases establishing "general propositions of law" or stated "at a high level of generality," rather than addressing the "particular circumstances" at issue, cannot be such "controlling authority." Plaintiffs rely only on such cases and for that reason alone fail to meet the *al-Kidd* standard.

While Plaintiffs or their counsel may wish to put military policies on trial or add a damages remedy to their advocacy arsenal, multiple lines of cases are designed to prevent just those results. Plaintiffs have sued the wrong parties (those without personal responsibility) for wrongs that Plaintiffs fail to establish with sufficient allegations. They have directed their suit to the type of military and national security matters that most compellingly preclude a *Bivens* remedy, and have done so even after many years of litigation pursuing an adequate alternative remedy. Plaintiffs seek judicial resolution of the most contentious and hotly debated issues of law and policy, but can secure damages only where the unlawfulness of the challenged conduct is authoritatively settled "beyond debate." Here, to the contrary, the law squarely supports Defendants' conduct, and the district court was right to dismiss Plaintiffs' complaint.

ARGUMENT

I. A *BIVENS* DAMAGES REMEDY SHOULD NOT BE EXTENDED TO ENEMY COMBATANTS' SUITS AGAINST MILITARY OFFICIALS.

Padilla urges this Court to become the first court of appeals to create a damages claim for an enemy combatant against high-level military officials and military commanders. This Court should reject this invitation because (1) special factors counsel hesitation where implying a remedy would directly implicate matters committed to the political branches and could, as a practical matter, impair the effectiveness of military operations; and (2) alternative processes, including habeas proceedings and military policies already receiving careful attention from Congress, preclude the implication and assertion of a damages claim here.

A. Padilla's *Bivens* Claims Directly Implicate National Security And Military Matters Committed To The Political Branches.

Since 1980, the Supreme Court "has consistently declined to extend *Bivens* beyond … well-demarcated boundaries." *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006) (collecting cases declining to extend). Because "[a] *Bivens* cause of action is implied without any express congressional authority whatsoever," *id.*, and is thus "disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 129 S. Ct. at 1948 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)); *see also Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007). In particular, recognizing a *Bivens* claim must be

"the best way to implement a constitutional guarantee" and cannot be done where there are "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (internal quotation marks omitted). As explained in a closely related counter-terrorism context, the "special factor" threshold "is remarkably low," and "'hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

This case is replete with such special factors. Padilla sues senior military policymakers personally for advising the President and for reviewing interrogation policies; and he sues those officials and other supervisory military officers down the chain of command for implementing the President's order to detain him. Such activities and the regulation of the chain of command are core functions that the Constitution commits to Congress and the President. Implying a damages claim in this context would present fundamental separation of powers concerns more serious than those underlying the "special factors" precluding the extension of *Bivens* claims to other new contexts for the past three decades. Here, those factors include: (i) the commitment of responsibility for enemy designation and detention matters to the political branches, (ii) the direction that courts refrain from second-guessing military policies and operations, (iii) the risk of multifarious pronouncements from different branches on matters of foreign and military affairs,

and (iv) the burdens and risks imposed on military operations, high-level policy formulation, and Presidential advice arising from a civil cause of action brought by the enemy against the chain of command.

Indeed, two lines of cases focusing on these special factors require dismissal of Plaintiffs' complaint. One recognizes that fundamental separation of powers principles preclude the judiciary from intruding without express authorization into the areas implicated here – military affairs, national security, and foreign affairs – that the Constitution commits to the political branches. As the district court recognized, the Supreme Court, this Court, and other courts of appeals have consistently and uniformly given effect to these principles in refusing to create damages claims in new contexts.[1] Independently, *United States v. Stanley*, 483 U.S. 669 (1987), and cases applying that decision also require dismissal of a *Bivens* claim that, as here, requires courts to second-guess military officers' conduct and thus risks interference with military operations and the chain of command. Far from falling in the "heartland" of *Bivens* (Br. 18), this case instead focuses on the senior officials' counter-terrorism and war-fighting policies,

[1] Plaintiffs suggest (Br. 17) that no new context or new category of defendants exists here. Courts have since 9/11 struggled with legal issues arising in this novel context of enemy combatant detention, and *Bivens* damages have never been awarded against military officials for counter-terrorism measures, much less policy-making addressing enemy combatants. Whether judges should add a damages remedies to the "lawfare" arsenal of those who sue to change U.S. military policy is a significant – and entirely novel – issue.

implicating core separation of powers considerations, and does so through an attack on core military operations and chain of command issues.

1. "[U]nless Congress has specifically provided otherwise, courts 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, 529-30 (1988); *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *North Dakota v. United States*, 495 U.S. 423, 443 (1990). Applying this principle, courts have widely precluded *Bivens* claims addressing national security and foreign affairs – including counter-terrorism and specifically enemy combatant issues – because they present special factors counseling hesitation.

a. The D.C. Circuit has found that "[t]he danger of obstructing U.S. national security policy" is a "special factor" precluding extension of *Bivens* to claims of abuse by enemy combatants confined at Guantanamo, *see Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009), and Iraq and Afghanistan, *see Ali v. Rumsfeld*, No. 07-5178, slip op. at 18 (D.C. Cir. June 21, 2011). *See also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J., joined by Ginsburg, J.) (danger of "'multifarious pronouncements'" among Branches).

Likewise, the Second Circuit, *en banc*, relied on a range of national security "special factors" in refusing to extend *Bivens* to claims against senior officials who developed and executed a counter-terrorism rendition policy. *See Arar*, 585 F.3d

at 578-79 (noting separation of powers concerns, handling of sensitive information, risk of "graymail" created by damages suit). As the court observed, "[o]ur federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them." *Id.* at 574

The prospect of judicial intrusion into military operations has especially required dismissal of *Bivens* claims brought by enemy combatants. "[A]llowing a *Bivens* action to be brought against American military officials engaged in war would disrupt and hinder the ability of our armed forces to act decisively and without hesitation in defense of our . . . national interests." *Ali v. Rumsfeld*, slip op. at 18 (internal quotation marks omitted). "[A]uthorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively," and "'[s]uch trials would hamper the war effort and bring aid and comfort to the enemy.'" *Id.* at 19 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)). The special factors present in *Rasul*, *Sanchez-Espinoza*, *Arar*, and *Ali* arise in an acute form when, as here, civil damages are sought for the development and execution of military policy in the midst of a conflict authorized by Congress.[2]

[2] Against this authority and that addressed below, *infra* pp. 20-26, Plaintiffs invoke two district court cases that are of little assistance. *See Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *app. docketed*, No. 09-16478 (9th Cir. July 14,

b. Padilla argues (Br. 24 n.5) that these cases are inapplicable because they involved non-U.S. citizen enemy combatants. But, the separation of powers concerns underlying the finding of special factors in these cases, like those compelling the result in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *Stanley*, are unrelated to the citizenship of the claimant and instead arise from the sensitivities surrounding judicial review of national security and military matters. Indeed, *Stanley*, as well as all the other Supreme Court cases that deny *Bivens* relief, involved U.S. citizen plaintiffs, including those who alleged profound constitutional violations at the hands of military officials (*e.g.*, secret administration of LSD without consent).

Those decisions over the past three decades that involved U.S. citizen plaintiffs and that declined to extend *Bivens* rested on separation of powers concerns that were not nearly as significant as those presented here: the development and implementation of policy designed to secure the U.S. homeland

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2009); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010), *app. docketed*, No. 10-1687 (7th Cir. Mar. 22, 2010). These decisions, like Padilla, disregard the clear import of Supreme Court precedent and ignore the well-reasoned opinions of the D.C. Circuit and Second Circuit. Moreover, *Yoo* does not involve military or senior official defendants, and *Vance* does not concern the detention of enemy combatants, their designation by the President, or the formulation or implementation of a Presidential order.

against potentially devastating attack by a Congressionally declared enemy.[3] Judicial scrutiny of these matters not expressly authorized by Congress or the Constitution is especially unwarranted where such claims would tend to impede advice provided to the President in these sensitive areas. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It is difficult to imagine a context in which special factors counsel greater hesitation.

2. Drawing on these principles but providing an independent basis to decline to extend *Bivens* to enemy combatants, *United States v. Stanley* squarely bars *Bivens* actions that implicate military decision-making and conduct incident to military service, even when brought by U.S. citizens, because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. at 683. Padilla, who the President determined took up arms against the United States, seeks an implied damages action unavailable even to members of the U.S. military.

a. *Stanley* concerned a *Bivens* suits brought by former servicemen against civilian military officials beyond the chain of command. *See id.* at 672-73.

[3] The principle advanced by Plaintiffs would extend damages claims to a range of ongoing counter-terrorism policies, including detention of enemy combatants at Guantanamo, drone strikes directed against U.S. citizens, and the right to detain, as enemy combatants, terrorists whose criminal trials result in acquittals. *See* Jess Bravin, *Detainees, Even if Acquitted, May Not Go Free*, Wall St. J., July 8, 2009, at A4; *compare Al Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47-48 (D.D.C. 2010) (drone strikes).

Years after his military service, Stanley learned that he had unknowingly been given LSD under an Army program, causing him serious injuries. In rejecting Stanley's ability to use *Bivens* to sue military defendants including civilian Defense Department officials, the Court focused on the separation of powers concerns that arise when courts are called upon to review military decision-making and conduct. The Court declined to construe narrowly an earlier decision invoking those concerns, *Chappell*, 462 U.S. 296, as limited to claims arising within the military chain of command or in which alternate remedies are present (neither was present in *Stanley*).

Instead, the Court pointed to two special factors counseling hesitation whenever a claim addresses military affairs or "arises out of activity 'incident to service.'" *Stanley*, 483 U.S. at 681. *First*, the Court emphasized that military matters are committed to Congressional and Executive regulation rather than judicial oversight in the absence of express authorization: as reflected in art. I, § 8, cl. 14 and otherwise, the Constitution "'contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment'" and "confers authority over the Army, Navy, and militia upon the political branches." 483 U.S. at 679, 682 (quoting *Chappell*, 462 U.S. at 301). *Second*, any suit that "would call into question military discipline and decisionmaking" will present "a degree of disruption" that constitutes a

separate special factor precluding *Bivens* relief. The Court could not accept "the prospect of compelled depositions and trial testimony concerning the details of their military commands," and warned that "[e]ven putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusion would disrupt the military regime." *Id*. at 682-83.[4] And, the Court held that these considerations barred *Bivens* relief even though Stanley had no other source of damages or other relief: "The special factor that counsels hesitation is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion by the judiciary into military affairs by the judiciary is inappropriate." *Id.* at 683 (alterations and internal quotation marks omitted).

b. *Stanley* requires dismissal of Padilla's claims. The President designated Padilla an enemy combatant based upon his findings regarding Padilla's hostile acts against the U.S. This placed Padilla within the military detention system, which is regulated through the Congressional and Executive measures

[4] For these reasons, and contrary to the arguments of Padilla (Br. 23-24) and law professor *amici* (Br. 15-17), the district court properly considered the adverse consequences of litigating his claims. *See also Bush v. Lucas*, 462 U.S. 367, 378, 388 (1983). The prospect of deposing the military chain of command from former Secretary of Defense Rumsfeld to former Brig Commander Captain Hanft about the development and implementation of military policy would present precisely the harms identified in *Stanley*, as well as the risks of "graymail" and mishandling of classified information identified in *Arar*, *see* 585 F.2d at 576-79.

governing the chain of command in the midst of a Congressionally authorized military conflict. *See* U.S. Const. art. I § 8 (Congress war powers and powers over military forces). Padilla's suit against the military chain of command questions the formulation and implementation of military policy concerning enemy combatants, calling upon the court to interfere in matters committed to "the political branches" and threatening "a degree of disruption" of military processes in precisely the ways *Stanley* prohibited. 483 U.S. at 682-83; *supra* p. 20. Indeed, the suit is grounded in Defendants' service and is clearly "incident" to that service and Padilla's placement in military custody.

Padilla argues that *Stanley* is "not remotely applicable" to him because he is not a service member subject to military discipline. Br. 22; *see also* Law Prof. Br. 22-23. But the Supreme Court in *Stanley* rejected such a narrow reading of *Chappell*, holding *Bivens* claims implicating military affairs barred even when brought by a former service member against civilian officials never within his chain of command. And *Stanley*'s own treatment of "special factors" is not so limited.[5] Padilla's damages claims against senior military policy-makers and

[5] The law professor *amici* also fail to recognize that Congress' powers and interests extend to shielding military decision-making from judicial interference. *See, e.g.*, *Stanley*, 483 U.S. at 683; *Malesko*, 534 U.S. at 67; *Berry v. Bean*, 796 F.2d 713, 716 (4th Cir. 1986) ("special considerations obtain when courts are asked to review the judgments of military authorities," who "'have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy'" and whose "power traces in turn to the broad constitutional mandate of those branches

supervisory military officers, no less than Stanley's, constitute "congressionally uninvited intrusion into military affairs," 483 U.S. at 683, 679, and threaten to disrupt military operations through interference with the extensive regulations and disciplinary measures controlling the chain of command. Moreover, a military detainee like Padilla, whether or not a service member, is subject to military command and control by the same officers charged with authority over United States service members. JA593, 598. The comprehensive set of statutes, regulations, and policies governing treatment of detainees and the regulation of the military officials who oversee them, *see* Officers' Br. 11-17, triggers just the considerations that underlie *Chappell* and *Stanley* and reinforce that the political branches have actively exercised their Constitutional authority. *See Stanley*, 483 U.S. at 679. [6]

Furthermore, Padilla's lack of service in the U.S. military does not entitle him to damages remedies barred to U.S. servicemembers. *Stanley*'s "special factors" analysis applies even to claims brought by a civilian "so long as military affairs are implicated." *Middlebrooks v. Leavitt*, 525 F.3d 341 (4th Cir. 2008)

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in military affairs") (citing Supreme Court cases); *United States v. Moussaoui*, 382 F.3d 453, 470 (4th Cir. 2004); *supra* pp. 16-17.

[6] This Court in *Dunbar Corp. v. Lindsey* recognized that "in the military sphere," the political branches "wield the constitutional authority to enforce constitutional values," 905 F.2d 754, 761 (4th Cir. 1990), but found that the peacetime land title dispute there did not implicate such concerns.

(dismissing *Bivens* action directed against discriminatory denial of entry to military), *cert. denied*, 129 S. Ct. 581 (2008). The intrusion Padilla seeks into military affairs is not lessened – and cannot be disregarded – simply because he is not a service member. *See Hamdi*, 542 U.S. at 533 (traditional due process rights of a U.S. citizen enemy combatant yield "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."); *see also Munaf v. Geren*, 553 U.S. 674, 693 (2008) (separation of powers-related "prudential concerns" barred habeas relief to U.S. citizens held by U.S. military officials abroad). The President determined that Padilla joined forces with our enemies in a conflict against our military. Implying a damages claim in such circumstances is unwarranted.

B. Padilla's Habeas Proceedings Foreclose A *Bivens* Remedy.

Independent of the special factors identified above, habeas proceedings provided precisely the "alternative, existing process," *Wilkie*, 551 U.S. at 550, that also forecloses extending *Bivens* liability to this new context.

Plaintiffs challenge the lawfulness of Padilla's detention and imprisonment, making the same arguments – against some of the same Defendants – that Padilla previously made in extensive habeas proceedings regarding the Government's authority to detain him. Indeed, the district court pressed Padilla's counsel in those habeas proceedings, unsuccessfully, to assert all legal and factual issues related to

his detention. JA1243-44; *see infra* p. 26 & n.8. By now seeking nominal damages of one dollar from each Defendant, Padilla seeks to continue the issues pursued in his habeas proceedings and avoid the consequences of his counsel's tactical decision there.[7]

Contrary to Plaintiffs' assertion (Br. 20), a *Bivens* claim is foreclosed here even though habeas does not permit damages against particular defendants or relief for all his asserted injuries. *See Bush*, 462 U.S. at 388 (*Bivens* foreclosed even though "existing remedies [did] not provide complete relief."); *see Malesko*, 534 U.S. at 69; *see also Hall v. Clinton*, 235 F.3d 202 (4th Cir. 2000) (administrative remedy sufficient; that it "does not provide the remedy [plaintiff] would prefer is of no moment"); *W. Radio Servs. v. U.S. Forest Serv.*, 578 F.3d 1116 (9th Cir. 2009) (APA remedy precludes *Bivens* suit), *cert. denied*, 130 S. Ct. 2402 (2010). "So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69.

Padilla's extensive habeas proceedings were not only an "alternative, existing process," *Wilkie*, 551 U.S. at 550, but also an exclusive one. *Preiser* and *Heck* bar other proceedings, including statutory claims but especially claims based

[7] Because Padilla raised or had the opportunity to raise all the issues that he presses here, his habeas proceedings collaterally estop him on the issues decided by the Fourth Circuit in *Padilla V*.

on an implied cause of action, that would bypass habeas proceedings to challenge the decision to detain Padilla. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994).[8] Indeed, Padilla has already *unsuccessfully* challenged the same issues for many years in his habeas proceedings. And as the Magistrate Judge emphasized repeatedly below, Padilla had a full and fair opportunity to litigate all legal and factual issues in connection with his habeas petition, but he made a strategic decision to proceed with a purely legal challenge to his detention, which he lost. *E.g.*, JA1294-96, 1352. Without a favorable determination in the underlying proceedings, the Court should not imply a damages action for him to relitigate and collaterally attack the results of those proceedings.[9]

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[8] See Defs.' Motion to Dismiss (ECF No. 36), at 41 n.24; JA1295 (Magistrate Judge Carr suggesting Padilla's *Bivens* claims are "an end run around the [habeas] system"). Even outside the sensitive military context, courts routinely dismiss *Bivens* claims that would imply the invalidity of the judgment of another court. *See, e.g.*, *Omar v. Chasanow*, 318 F. App'x 188, 189 n.* (4th Cir. 2009) (per curiam) (dismissing *Bivens* action based on *Preiser/Heck* doctrine); *Wilson v. Crouch*, 283 F. App'x 154 (4th Cir. 2008) (per curiam) (same); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139-40 (9th Cir. 2005) (applying *Heck* principles to civil detainees committed under California's Sexually Violent Predators Act); *Cohen v. Clemens*, 321 F. App'x 739, 742 (10th Cir. 2009) (alien detainee); *Huff v. Attorney Gen.*, No. 3:07cv744, 2008 U.S. Dist. LEXIS 65438, at *12 (E.D. Va. Aug. 26, 2008) (civil detention pending a sexually violent predator determination), *aff'd*, 323 F. App'x 293 (4th Cir. 2009).

[9] *Heck*'s application is not affected by Padilla's release from military detention. Unlike in *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008), where the former prisoner would have been "left without access to a federal court," *id.* at 268,

Unlike the damages action he asks this Court to imply, the judiciary's role in reviewing Padilla's habeas petition was "invited" by the Constitution, *see* art. I § 9, and ratified by Congress. *See* 28 U.S.C. § 2241. Such injunctive relief adequately and better protects rights in such sensitive contexts. *See Stanley*, 483 U.S. at 683 (only injunctive relief is traditionally available in the military context; collecting examples).

Plaintiffs (Br. 20) and *amici* law professors misapprehend the Military Commissions Act ("MCA") § 7 and its relation to habeas relief in arguing that Congress' denial of any civil action to alien enemy combatants implied, *sub silentio*, that U.S. citizen enemy combatants could pursue a *Bivens* action. Congress passed the MCA to limit the statutory rights for alien enemy combatants detained at Guantanamo as newly announced in *Rasul v. Bush*, 542 U.S. 466 (2004), and section 7 specifically restricted those rights of those enemy combatants. The MCA did not address U.S. citizen enemy combatants like Padilla, much less make "crystal clear" that *Bivens* stands alongside habeas as a parallel and complementary cause of action. *See Carlson v. Green*, 446 U.S. 14, 20 (1980). Indeed, because Congress legislated against the background rule that implied rights such as *Bivens* claims were "disfavored" and was fully aware that U.S. citizen

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Padilla pursued years of habeas litigation and argues that his habeas remedy survives his release. *See* Pet. Supp. Br. 25-26, *Padilla v. Hanft*, No. 05-6396 (4th Cir. filed Dec. 16, 2005).

enemy combatants were pursuing habeas – and only habeas – remedies, Congress' limitation on relief in MCA § 7 without any effort to expand U.S. citizens' (or other enemy combatants') rights thus shows, if anything, that Congress understood habeas to provide an adequate and exclusive remedy.

II. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

Plaintiffs' claims also fail because, as the district court correctly held, Defendants are entitled to qualified immunity. Government officials acting in the context of national security retain immunity unless they cross "bright lines" defining rights established in "particular contexts" that are "beyond debate" and known to "every reasonable official." *al-Kidd*, slip op. at 9. None of the authority cited by Padilla and addressed abstractly to the civilian context comes close to establishing "beyond debate" he had clearly established rights that were violated by Defendants (indeed, ample authority directly addressing relevant facts establishes just the opposite). And, his own complaint, including the exhibits attached to the complaint which Plaintiffs themselves affirmatively plead as establishing the relevant facts, separately establishes that Defendants' determinations related to Padilla's detention and conditions of confinement were entirely reasonable.[10] JA77-78, 80-82.

[10] Where the complaint's allegations conflict with the documents appended to it, the latter control. *See, e.g., Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 222 (2d Cir. 2004) (discrediting

A. No Clear Authority Established The Unlawfulness Of Defendants' Conduct In This Particular Context.

Immunity applies unless, "at the time of the challenged conduct, 'the contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right.'" *Al-Kidd*, slip op. at 9 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). The challenged actions must have in this sense violated clearly established law, which "do[es] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*." *Id.* (emphasis added). The challenged conduct's unlawfulness must be clearly established by "'controlling authority'" or "a robust 'consensus of cases of persuasive authority.'" *Id*. at 10 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

"'Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'" *Iko v. Shreve*, 535 F.3d 225, 238 (4th Cir. 2008). This analysis is necessarily fact-specific and contextual; courts must "not … define clearly established law at a high level of generality." *Al-Kidd*, slip op. at 10 (collecting cases). "[G]eneral proposition[s]" regarding constitutional provisions

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allegation "belied" by letters attached to the complaint); *Flannery v. Recording Indus. Ass'n of America*, 354 F.3d 632, 638 (7th Cir. 2004) ("when a document contradicts a complaint to which it is attached, the document's facts or allegations trump those in the complaint"); *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (same).

are insufficient; relevant authority must establish "whether the violative nature of particular conduct is clearly established." *Id.; see id.*, slip op. at 3-4 (Kennedy, J., concurring) (the potential for incorrect incentives for national officers "must counsel caution by the Judicial Branch, particularly in the area of national security").

These principles, without more, compel dismissal of the complaint. The district court correctly held, based on the complaint, that the lawfulness of detaining Padilla as an enemy combatant and the conditions surrounding such a combatant's interrogation and confinement – as defined by Plaintiffs' own complaint – were anything but "beyond debate." Numerous reasonable officials and judges have considered, but rejected, the principal arguments that Plaintiffs advance here. Not a single case cited by Plaintiffs establishes that a person in Padilla's position has a right not to be detained as an enemy combatant, or that a person detained as an enemy combatant has the particular rights to counsel and conditions of confinement that allegedly were denied Padilla by these Defendants. Instead, Plaintiffs invoke general principles from cases arising in quite different contexts (generally criminal proceedings) to suggest that "clearly established authority" prohibited Defendants' conduct. Such "general proposition[s]" that fail to address the "particular conduct" at issue do not nearly meet the *al-Kidd* standard.

B. Qualified Immunity Applies To Padilla's Designation And Detention As An Enemy Combatant.

Plaintiffs' own complaint demonstrates that Defendants acted well within established authority, and certainly not contrary to "clearly established law," in determining to detain Padilla as an enemy combatant. Plaintiffs' own complaint demonstrates that this case involves no innocent American plucked from the streets. The complaint's exhibits instead show that Padilla's designation and detention were the product of a careful and rarely used process focused on controlling legal authority, review by multiple agencies and attorneys in various government departments, and action by the President as Commander-in-Chief. The publicly disclosed facts underlying the President's determination are affirmatively pled and attached to the complaint; they make clear that the designation decision was reasonable under then-existing and current legal standards.

In particular, the complaint alleges that Defendants undertook the particular "procedure described by [former Attorney General] Gonzales" and attached to the complaint as an exhibit. JA77, 110-13. That exhibit establishes the Government's reliance on controlling authority (*Ex parte Quirin*, *infra*) and an elaborate, multi-agency process of reviewing and approving the legal and factual bases for Padilla's designation as an enemy combatant. *See* JA111-12. This process included information collected by intelligence agencies and recommendations by the

Attorney General, other Department of Justice officials, the Director of the CIA, and the Secretary of Defense. JA112. Further, the complaint alleges – and concedes – that the 2002 declaration of Michael Mobbs, which is attached to the complaint, sets forth "a significant portion of the evidence" Defendants relied upon in advising the President. JA77. That declaration describes Padilla's travels to Afghanistan and Pakistan before, during and after the U.S. invasion of Afghanistan, his "close[] associat[ion]" with al-Qaeda members, his meeting with one of al-Qaeda's senior officials to discuss an attack on the U.S. and training by al-Qaeda, his stay "at one of the Al Qaeda safehouses," including to research his attack, related training by al-Qaeda, and his return to the U.S. to advance those plans. JA117-18; *see supra* p. 3. Based on that information and the inter-agency process described by Attorney General Gonzales, the President found (in an order also attached to the complaint) that Padilla "is closely associated with al Qaeda," "engaged in conduct that constitutes hostile and war-like acts" including preparation for terrorist acts directed against the U.S., and possessed intelligence of value regarding al-Qaeda. Padilla's complaint does not deny any of the facts set forth in these exhibits or assert facts that contradict them.[11]

[11] Plaintiffs argue (Br. 4) that the information relied upon was "unreliable." This allegation is insufficient to render Defendants' actions unconstitutional, *see Malley v. Briggs*, 475 U.S. 335, 341 (1986), and at any rate, is rebutted by the Mobbs declaration itself, which discloses the issue and explains that the evidence was

The complaint thus shows that Defendants and their lawyers reasonably and correctly evaluated these facts under *Quirin*, the then-controlling authority governing when U.S. citizens may be treated as enemy combatants. Under *Quirin*, enemy combatants lawfully detained within the U.S. include U.S. "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter this country bent on hostile acts … ." *Ex Parte Quirin*, 317 U.S. 1, 37-38 (1942); *see Hamdi*, 542 U.S. at 519 (noting, with approval, *Quirin* standard); *Padilla V*, 423 F.3d at 394. In particular, Padilla's planning with al-Qaeda to attack the United States supported his designation as an enemy combatant.

Three separate sets of subsequent judicial determinations confirm the reasonableness – and indeed, the lawfulness – of Defendants' actions related to Padilla's detention and the absence of any controlling authority to the contrary. *First*, then-Judge Mukasey evaluated the legal basis for detaining Padilla under the very facts that Padilla alleges Defendants unreasonably relied upon. Judge Mukasey concluded that, subject to testing in habeas, these facts were sufficient to trigger the Presidential authority to designate and detain Padilla as an enemy combatant. *See Padilla I*, 233 F. Supp. 2d at 588 (conclusion based on Mobbs

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corroborated and cross-checked. *See* JA115-20. Padilla has not alleged that Defendants falsified facts.

declaration). One judge on the Second Circuit panel agreed with Judge Mukasey. *Padilla II*, 352 F.3d at 726 (Wesley, J., dissenting).[12]

Second, the D.C. Circuit has confirmed that facts establishing "that a petitioner trained at an al Qaeda camp or stayed at an al Qaeda guesthouse 'overwhelmingly' would carry the government's burden" justifying detention as an enemy combatant. *Almerfedi v. Obama*, No. 10-5291, slip op. at 10 n.7 (D.C. Cir., June 10, 2011); *id.* at 7, 9-10 (collecting cases, applying *Hamdi*); *see Al-Bihani v. Obama*, 590 F.3d 866, 871-73 & n.2 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). These are the very facts that Padilla alleges that Defendants acted upon in his case. JA77.

Third, five members of this Court agreed that military detention of a U.S. person captured in the U.S. is lawful when based upon alleged training with al-Qaeda and entering the U.S. to advance terrorist attacks. *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 253, 258 (4th Cir. 2008) (en banc) (detention of person associating himself with al-Qaeda and traveling to the U.S. for "purpose of further prosecuting that war on American soil") (Traxler, J., joined by Niemeyer, J. as to this point); *id.* at 285 (enemy combatant subject to detention if he "attempts or

[12] All judges on the Second Circuit panel agreed that the facts relied upon by Defendants established Padilla's ties to al-Qaeda even as the majority reversed Judge Mukasey based on a narrow construction of the AUMF, *see Padilla II*, 352 F.3d at 723–24, that the Supreme Court later rejected. *See Hamdi*, 542 U.S. at 518-19.

engages in belligerent acts against" the U.S. here or abroad "on behalf of an enemy force" including al-Qaeda) (Williams, C.J., joined by Duncan, J.); *id.* at 297-303 (detention within scope of AUMF and constitutional, without regard to citizenship) (Wilkinson, J.), *vacated*, 129 S. Ct. 1545 (2009). Indeed, the facts at issue in *al-Marri* were considerably less supportive of detention than those set forth in the Mobbs Declaration (which, again, *Plaintiffs* allege served as the basis for Padilla's detention). The decisions separately faulting the habeas protections afforded al-Marri and the Supreme Court's vacating *al-Marri* as moot do not alter the fact that these decisions confirm that Defendants' actions were reasonable as a matter of law.

In addition, in *Padilla V*, this Court specifically rejected the argument that Padilla recycles here (Br. 8-9 & n.2) that his capture within the United States or his status as a U.S. citizen renders his designation and detention unlawful. *Padilla V*, 423 F.3d at 394 ("the locus of capture (within or without the United States) [is not] relevant to the President's authority to detain an enemy combatant who is also a citizen."). While this Court in *Padilla V* relied upon additional facts adduced by the Government related to Padilla's association and activities with the Taliban, it was Padilla's choice to decline to timely challenge these facts in favor of litigating

the legal issue.[13] The decision stands as a broad affirmation of the Executive's detention power, established in the precise context of Padilla's detention, and provides further reasons why Padilla should not now get to re-litigate these issues in the context of a damages action. *See supra* pp. 24-27.

These subsequent judicial opinions, and the facts and review processes that Padilla himself alleges, establish at a minimum that it was not "beyond debate" or "clearly established" by "controlling authority" that Defendants' "particular conduct" was unlawful when they detained Padilla based upon his ties with and activities in support of al-Qaeda. Quite the contrary. The qualified immunity doctrine "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Al-Kidd*, slip op. at 12 (quoting *Malley*, 475 U.S. at 341). With even greater force, it protects public officials who, like Defendants, have carefully followed and applied the then-controlling legal authority – and whose actions are ratified by a range of subsequent judicial determinations.

[13] While the Mobbs declaration, detailing Padilla's association with al-Qaeda, was attached to the complaint, the Rapp declaration, underlying this Court's decision in *Padilla V*, was not. But Padilla cannot, by selectively incorporating pleadings from his prior habeas proceedings, escape the consequence of *Padilla V*. Such a result would run afoul of the Supreme Court's command that the reviewing court "draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

C. Qualified Immunity Applies To Padilla's Circumstances Of Detention.

No court has held that the Constitution prohibits the confinement of an enemy combatant under the conditions Plaintiffs properly allege. In 2002, when Padilla was detained as an enemy combatant, controlling Supreme Court authority permitted officials to use a military commission to try, convict, and punish an American enemy combatant captured inside the United States. *See Quirin*, *supra*. In 2004, while Padilla remained in military custody, the Supreme Court reaffirmed *Quirin* in *Hamdi*, holding that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant" – and without trial – "for the duration of the relevant hostilities." 542 U.S. at 519 (citing *Quirin*). Government officials could reasonably conclude that the Supreme Court's affirmations of the government's actions in *Quirin* and *Hamdi* justified most aspects of the treatment Padilla alleges. In no event could these decisions be construed to make "every reasonable official" understand "that what he is doing violates" the rights of an enemy combatant. *Al-Kidd*, slip op. at 9 (internal quotation omitted). Plaintiffs, however, do not mention *Quirin* at all, and ignore the fundamental holding of *Hamdi*.

1. As an initial matter, Plaintiffs' conditions-of-confinement claims contain numerous unrelated and unsupported allegations. The overwhelming majority of Plaintiffs' conditions of confinement allegations pertain to other people (including Hamdi and Abdul al-Marri) and another place (Guantanamo Bay). *E.g.*,

JA80-89, 97-99.[14] Many other allegations are contradicted by the documents appended to the complaint,[15] which control over Padilla's self-serving allegations. *See supra* n.10.

Padilla's allegations regarding the conditions of his own confinement are almost all (i) conclusory and/or (ii) unconnected to the Defendants who remain in this lawsuit. For example, he alleges that his captors made him smell "noxious fumes," forced him to endure "stress positions," administered "psychotropic drugs," and denied him "adequate medical care." JA90, 95. But he fails to plead who allegedly did so, when, under what circumstances, or any consequences of this alleged treatment. Especially when compared to the detail that Padilla offers regarding other detainees and other detention facilities, the sparse allegations regarding his *own* treatment amount to "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" and " 'naked assertion[s]' devoid of 'further factual

[14] Padilla must allege his own "concrete and particularized" injury, not third-parties' alleged injuries. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 & n.1 (1992). If the government's treatment of third-parties is relevant, it undermines Padilla's allegations. *See* JA592-600 (detainees at Charleston Brig were housed in oversized cells and given comfort items including Korans, mattresses, cable TV, movies, CDs, and access to exercise facilities).

[15] *Compare, e.g.*, JA100 (conditions of confinement in the Brig were "much more severe than [for] detainees" in Guantanamo), *with* JA663 (recommending that a Brig detainee receive a "deck of Pinuckle [*sic*] cards and game boy" – comfort items not permitted at Guantanamo).

enhancement'" that are rightly ignored on a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949.

Even apart from this lack of specificity, the complaint makes clear that the Defendants who remain in this lawsuit did not review, order, or approve most of the acts Padilla alleges – and personally participated in none of them. For example, Padilla alleges that he experienced "[e]xtreme variations in temperature," threats of "death, including threats to cut with a knife and pour alcohol into the wounds," and "[t]hreats to transfer him to a location outside the United States" where he would be tortured. JA90. Such acts are specifically prohibited by the policies instituted by the Defendants, *see* JA419, and there is no allegation that they authorized any deviation from those policies.

Aside from allegations about other detainees and facilities, allegations contrary to documents incorporated into the complaint, and unsupported and conclusory allegations, Padilla arguably has alleged sufficiently that he was not allowed to watch television, listen to the radio, or have a Koran for two years; that he was permitted to exercise "only intermittently"; that he was not given access to a watch; that he did not meet with his family or lawyers for twenty-one months; and that he was deprived of natural light for periods of time. *See* JA91, 93-94.[16]

[16] Some of these allegations are also contradicted by attachments to the complaint. *See* JA593 (describing "rules for all individuals detained at the Brig under an 'Enemy Combatant' designation, including . . . Mr. Jose Padilla").

These conditions, while undeniably restrictive and stringent, did not amount to violations of any clearly established rights in the context of military detention of an unlawful combatant during intelligence questioning – especially in the face of the government's legitimate concerns. The materials incorporated into the complaint make clear that none of the conditions of confinement was imposed for any vindictive, punitive, or arbitrary purpose, but rather, for one, unquestionably legitimate reason: to create an environment in which the United States could gather time-sensitive and perishable intelligence "that is vital to our national security." JA609.

Plaintiffs can point to no decision by any court suggesting – let alone clearly establishing – that enemy combatants are constitutionally entitled to more natural light, television, religious articles, contact with family, and access to counsel than Padilla allegedly received, irrespective of the government's legitimate national-security concerns. In fact, no case suggests that an enemy combatant in military custody such as Padilla is entitled to Fifth Amendment due process rights; a right of access to counsel and the courts (much less one exceeding the habeas access that Padilla received);[17] an Eighth Amendment right against solitary confinement; or a First Amendment right to communicate with family.[18]

[17] *Cf. Hamdi*, 542 U.S. at 539 (declining "to hold that the Fourth Circuit [] erred by denying [Hamdi] immediate access to counsel upon his detention"); *Padilla I*, 233

Plaintiffs rely solely on inapposite cases involving *civilian* prisoners. Br. 30-38.[19] For example, Plaintiffs cite *Hydrick v. Hunter*, 500 F.3d 978 (9th Cir. 2007), which denied qualified immunity to state officials in suits by convicted sexual predators who were committed to sexual-violence treatment programs. But the Supreme Court vacated *Hydrick* in light of *Iqbal*, *see* 129 S. Ct. 2431 (2009), suggesting that the Court disagreed with the Ninth Circuit's qualified immunity holding. In any event, the vacated decision rested on Supreme Court authority regarding the rights of individuals committed to state-treatment programs; Plaintiffs can point to no such cases regarding the rights of enemy combatants.

Plaintiffs nevertheless claim that cases like *Hydrick* teach that detainees bearing the supposedly "new" designation of an "enemy combatant" are entitled to the same rights that have been clearly established for civilians or other detainees. Br. 42-43; *see also* Officers' Br. 10 (arguing the distinction between POWs and "enemy combatants" is "new" and "unfounded"). Not so. Distinguishing among

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F. Supp. 2d. at 599-605 (declining to find constitutional right to counsel for Padilla).

[18] *Cf. Quirin*, 317 U.S. at 27-28 (law of war, not civilian standards, determine enemy combatant's rights).

[19] Plaintiffs mistakenly quote *Hamdi* to claim that "[e]ven a citizen enemy combatant seized on a foreign battlefield 'unquestionably has the right to access to counsel.'" Br. 37. Rather, the Court conspicuously declined to rule that Hamdi should have been given counsel when detained, but observed that Hamdi had "been appointed counsel" after the "grant of certiorari" and therefore will "unquestionably [have] the right to access to counsel in connection with the proceedings on remand." 542 U.S. at 539.

civilians, lawful combatants, and enemy combatants is hardly "new." *See, e.g.*, *Quirin*, 317 U.S. at 31 (distinguishing "lawful combatants" and "prisoners of war" from "unlawful combatants" and "enemy combatant[s]").[20]

More fundamentally, Plaintiffs' suggestion that the same legal rules apply to civilians, POWs, and unlawful enemy combatants is squarely contrary to law. For example, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6-7 (1866), held that an American civilian could not be tried by a military tribunal while access to civilian courts was unobstructed. In *Quirin*, however, the Court distinguished *Milligan* and affirmed the military's prosecution of an American citizen on the ground that "enemy combatants" (even American ones) are not entitled to the protections afforded to civilians under the Fifth and Sixth Amendments. 317 U.S. at 41; *Hamdi*, 542 U.S. at 523 ("*Quirin* . . . provid[es] us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances."); *Padilla V*, 423 F.3d at 396-97 (same).

2. A separate, independently sufficient basis for qualified immunity rests on the legal advice supporting Defendants' actions. As Plaintiffs concede, the

[20] Plaintiffs' own amici make this point. While a "tradition began with George Washington" to afford certain protections to lawful combatants and prisoners of war, Officers' Br. 11, those protections never applied to unlawful enemy combatants. For example, General Washington appointed a "Board of General Officers" to try, summarily convict, and execute a captured British spy. *Quirin*, 317 U.S. at 31 n.9.

government commissioned numerous legal analyses and investigations beginning in 2001 regarding the detention and interrogation of enemy combatants, and these legal opinions uniformly affirmed the legality of Defendants' conduct. *See* JA80-82. Such advice of counsel provides "compelling evidence and should appropriately be taken into account in assessing the reasonableness of [Defendants'] actions." *Wadkins v. Arnold*, 214 F.3d 535, 542 (4th Cir. 2000). Plaintiffs cite no case holding that an official acted in violation of a clearly established right when the Department of Justice's Office of Legal Counsel ("OLC") – whose lawyers are responsible for issuing authoritative legal advice to all Executive Branch agencies, *see* 28 C.F.R. § 0.25 – issued a formal opinion saying exactly the opposite. That legal advice established a bright line approving, not forbidding, the decisions that Plaintiffs now challenge.

Nor can Plaintiffs avoid the reasonableness of Defendants' reliance on this legal advice by pointing to certain *post hoc* criticisms of OLC's work. *See, e.g.*, JA82-83; *see also* Officers' Br. 17-18. *First*, for purposes of the qualified immunity inquiry, subsequent criticisms are irrelevant. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (qualified immunity must be "assessed in light of the legal rules that were clearly established at the time [an action] was taken.") (internal quotation marks omitted). At the time that OLC provided this binding and authoritative advice, the Defendants would have been unreasonable to

have ignored it. At best, Padilla has alleged the presence of dissenting voices and a legal debate over the OLC memos. But that cannot transform the losing side of the argument into a bright-line, "clearly established" right. *E.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("qualified immunity . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law."); *accord* JA1530-31.

Second, even if some *post hoc* criticisms could be relevant, the ones cited by Plaintiffs are not. For example, Padilla does not allege that the "Mora Memo" was communicated to anyone, much less the Defendants, until July 7, 2004, JA82-83 – approximately the same time that Padilla's allegedly unconstitutional conditions of confinement ended. *E.g.*, JA94. Moreover, Mora's criticisms related to interrogation techniques that had been proposed for use at Guantanamo, not Charleston, South Carolina. Similarly, the interrogation techniques questioned by "an FBI special agent" to "FBI legal counsel," JA85, were unrelated to ones Padilla plausibly alleges experiencing. JA435.[21]

Third, subsequent developments confirm the reasonableness of Defendants' reliance on the advice of counsel. In January 2010, the most-senior career official

[21] The complaint exhibits also refute Padilla's allegation, JA83, that unnamed government officials failed to circulate the OLC memos as part of a strategy to "minimize resistance." *See* JA111-12 (describing the "elaborate" inter-agency process for determining to detain Padilla as an enemy combatant).

at the Department of Justice, David Margolis, issued a report rejecting the allegation that the OLC memos were "crafted to provide a veneer of legality." JA80.[22] Citing the unprecedented nature of the 9/11 terrorist attacks, the need to set up a legal structure to respond to impending terrorist threats, and the difficulties inherent in "answering novel and difficult legal questions for a limited audience at a time of national crisis," the Margolis Report concluded that the authors of the OLC memos did not "violate a clear obligation or [ethical] standard." Margolis Report at 21, 25, 68. This conclusively undermines Padilla's argument that the OLC memos were so clearly incorrect that no reasonable official could have believed or relied on them.

Fourth, in criticizing the independent Margolis Report, Padilla offers only conclusory allegations. *See*, *e.g.*, JA80 (alleging that Defendants Haynes and Rumsfeld "directed" OLC to draft the memos "to provide immunity from prosecution for those who implemented them"); *accord* JA82-83. These unsupported allegations are no different from the ones rejected in *Iqbal*, 129 S. Ct. at 1951 (rejecting as conclusory the allegation that former Attorney General Ashcroft was the "architect" of a discriminatory policy), and it is even less

[22] *See* Mem. for the Att. Gen. from David Margolis, Associate Dep. Att. Gen., 1 (Jan. 5, 2010), *available at* http://judiciary.house.gov/issues/issues_OPRReport.html ("Margolis Report").

plausible to suppose that Defense Department officials could "direct" attorneys in the Justice Department.

D. Qualified Immunity Applies To Padilla's RFRA Claim.

Padilla's damages claim under the Religious Freedom Restoration Act ("RFRA") fails for two reasons: (1) RFRA does not authorize individual-capacity suits for money damages in this context and (2) any rights that enemy combatants may have had under RFRA were not clearly established during the period of Padilla's military detention.

1. Padilla cannot sue Defendants in their individual capacities for damages under RFRA. American servicemen – who have at least as many rights as enemy combatants – do not have a statutory right to sue the U.S. government for money damages. *See Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court held that the separation of powers concerns that later were applied in *Chappell* and *Stanley*, *supra*, bar servicemembers from recovering under the Federal Tort Claims Act for injuries incident to military service. *Id.* at 146. Legislating against the backdrop of the *Feres* doctrine, Congress would have had to – but did not – "expressly command" that RFRA apply in the military context. For similar reasons, the doctrine of prudential standing independently bars Plaintiffs' RFRA claim. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 175 (1997)

(plaintiff must prove its asserted interests are "arguably within the zone of interests to be protected or regulated by the statute … in question").[23]

In addition, the statute's plain language makes clear that individual capacity damages claims are not permitted under RFRA. The statute states that "[a] person whose religious exercise has been burdened . . . may . . . obtain appropriate relief against *a government*." 42 U.S.C. § 2000bb-1(c) (emphasis added). RFRA defines "government" to mean "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." *Id.* § 2000bb-2(1). "Branch," "department," "agency," "instrumentality," and "entity" unequivocally refer to the government itself. The term "official (or other person acting under color of law)" likewise refers to an individual who exercises government authority and, therefore, to official-capacity suits – *i.e.*, suits nominally against an official but in reality against the government itself. *E.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991). In *Stafford v. Briggs*, the Supreme Court interpreted similar language to authorize only official-capacity suits, *see* 444 U.S. 527, 535-36 (1980), and the same result is required here.

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[23] *Cf. Rasul*, 563 F.3d at 535-36 (Brown, J., concurring) ("In drafting RFRA, Congress was not focused on how to accommodate the important values of religious toleration in the military detention setting. . . . In 2000, when Congress amended RFRA, jihad was not a prominent part of our vocabulary and prolonged military detentions or alleged enemy combatants were not part of our consciousness.").

RFRA's remedy, limited to "appropriate relief against a government," supports this conclusion. In *Sossamon v. Texas*, 131 S. Ct. 1651, 1654 (2011), the Court held that these same words in RFRA's companion statute, 42 U.S.C. § 2000cc-2(a), "suggest[], if anything, that monetary damages are not 'suitable' or 'proper'" because "the defendant is a sovereign." No basis exists for concluding that Congress intended to allow enterprising plaintiffs to bypass this limitation by claiming monetary damages in individual-capacity suits.

Moreover, nothing in RFRA's legislative history supports claims for individual-capacity damages. Congress enacted RFRA to reverse *Employment Division v. Smith*, 494 U.S. 872 (1990), and re-establish the pre-*Smith* balancing test for resolving free exercise claims, not to provide money damages against former government officials.[24]

2. Even if Padilla could maintain a RFRA claim against Defendants in their individual capacities, Defendants would be entitled to qualified immunity for three distinct reasons.

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[24] Certain courts nevertheless have permitted RFRA claims against individual defendants. *See, e.g.*, *Jama v. INS*, 343 F. Supp. 2d 338, 371-73 (D.N.J. 2004); *Lepp v. Gonzales*, No. 05-566, 2005 U.S. Dist. LEXIS 41525, at *23 (N.D. Cal. Aug. 2, 2005); *cf. Woods v. Evatt*, 876 F. Supp. 756, 771 (D.S.C. 1995) (assuming, without deciding, that RFRA claim could be asserted against state officials in their individual capacity), *aff'd*, 68 F.3d 463 (4th Cir. 1995) (table). These decisions preceded *Sossamon* and provide no basis to distinguish that decision. This Court has not addressed this issue.

First, at the time of the Defendants' alleged actions, "[n]o American court . . . 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 …." JA1532. The Supreme Court recently held that the phrase "appropriate relief" is "open-ended and ambiguous," *Sossamon*, 131 S. Ct. at 1659, confirming the unsettled nature of Plaintiffs' rights here.

Second, it was not clearly established that RFRA applied to Defendants' alleged conduct because Padilla does not challenge "neutral rules of general applicability." *See, e.g.*, *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (holding that "if the regulations are not neutral and generally applicable, [the court] need not address the [RFRA]"); *Omar v. Casterline*, 414 F. Supp. 2d 582, 594 (W.D. La. 2006) (same); *Larsen v. United States Navy*, 346 F. Supp. 2d 122, 137-38 (D.D.C. 2004) (same). As the documents Padilla attached to the complaint make clear, the neutral and generally applicable policy was to "[a]llow[] the free exercise of religion consistent with the requirements of such detention." JA628. Because Padilla does not challenge the validity of that policy, he fails to show any violation of a clearly established right under RFRA.

Third, a right which, like that here, required "'a particularized balancing' that is subtle, difficult to apply, and not yet well defined" would "only

infrequently" be "clearly established" for purposes of qualified immunity. *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (citation omitted); *see McVey v. Stacey*, 157 F.3d 271, 277 (4th Cir. 1998) (The "sophisticated balancing of interests" is decision making that prevents a finding of "clearly established" federal law). As the district court explained, RFRA requires "'striking a sensible balance between religious liberty and competing prior governmental interests,'" and "[t]his 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." JA1533. The balancing of the Executive Branch's authority to conduct war and protect national security against the burden imposed upon religious exercise in light of alternative means available to the government, *see* 42 U.S.C. § 2000bb-1(b)(1)-(2), is just the sort of decision-making by government officials that qualified immunity protects. JA1533; *Al-Kidd*, slip op. at 12.

III. PLAINTIFFS' *BIVENS* CLAIMS ALSO MUST BE DISMISSED BECAUSE PLAINTIFFS FAILED TO PLEAD FACTS SHOWING PERSONAL PARTICIPATION BY EACH DEFENDANT IN A PLAUSIBLY ESTABLISHED CONSTITUTIONAL VIOLATION.

The complaint's focus on senior military decision-making and its vague allegations regarding Padilla's detention conditions provide an additional basis for dismissing the complaint. *Bivens* claims are typically brought against individuals alleged to have personally undertaken unconstitutional acts, but Plaintiffs have

dismissed their claims against those individuals and instead seek to put on trial the general policy decisions of military officials far up the chain of command. The Supreme Court recently rejected this strategy, holding that *Bivens* claims are prohibited against senior Administration officials for their formulation and implementation of counter-terrorism policies unless the factual allegations are sufficiently detailed to establish plausible constitutional violations and establish that each Defendant personally engaged in such unconstitutional conduct. *See Iqbal*, 129 S. Ct. at 1948. Plaintiffs utterly fail to meet this standard.

1. Under *Bivens*, "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Id.* Instead, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 1949. Therefore, a *Bivens* complaint must allege facts showing "that each Government-official defendant, through the official's own individual actions, has violated the constitution." *Id.* at 1948.

In addition, and especially for claims against senior officials, the complaint cannot rest on conclusory allegations and must instead provide sufficient detail to set forth a plausible constitutional violation. To "give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties," a court must scrutinize a

complaint's allegations in two respects. *Id.* at 1954. First, courts must set aside allegations that are "[t]hreadbare recitals of the elements of a cause of action" or "naked assertions devoid of further factual enhancement." *Id.* at 1949 (alteration and internal quotation marks omitted). Such conclusory allegations are not entitled to a presumption of truth. *Id.* at 1949-50. Second, courts must then "determine the plausibility of the factual allegations" and decide whether any plausible allegations, if true, would entitle the pleader to relief. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009). For a complaint to meet the plausibility requirement, it must "plead sufficient facts to allow a court, drawing on 'judicial experience and common sense,' to infer 'more than the mere possibility of misconduct.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950). "Without such 'heft,' the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are 'merely consistent with a defendant's liability' fail to nudge claims 'across the line from conceivable to plausible.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1947, 1949, 1951) (citations omitted).

2. Plaintiffs' complaint seems designed to avoid claims that tie any Defendant's personal actions to particular, plausible constitutional violations – and instead attacks senior officials' military policy decisions with conclusory assertions in precisely the way *Iqbal* prohibits.

Plaintiffs have conspicuously declined to pursue *Bivens* claims against any of the individuals who personally participated in and shaped the conditions of Padilla's confinement. Initially, Plaintiffs sought damages from Defendants including the Brig's technical director, "the senior non-commissioned officer at the Brig [] responsible for ... overseeing Mr. Padilla's day-to-day treatment and conditions of confinement," and the staff psychiatrist – as well as eight other supervisory officers, five medical officers, ten interrogators, and ten guards identified as "John Doe" Defendants. JA72-75. Plaintiffs subsequently dismissed their claims against *all* these Defendants, together with their claims against the only Brig Commander addressed in any detail in the complaint, *see* JA89. *See* ECF No. 236.

The allegations against the two remaining Brig Commander Defendants (Hanft and Marr) rely on the loosest form of *respondeat superior* liability and allege no personal participation. The complaint addresses them personally in a scant four paragraphs, all of which allege nothing more than the group and/or *respondeat superior* liability that *Iqbal* precludes. *See* JA71-72 ("supervising" and "overseeing" Brig personnel and operations), JA67-68 (Hanft and numerous former Defendants collectively "implemented" policies), 89 (had knowledge, but implausibly based on allegations related to former Defendants Seymour and Wright). The remaining allegations pertaining to Padilla's conditions of

confinement allege actions by variously named group entities that include officials in addition to Hanft and Marr. *See, e.g.*, JA92 ("Operational Defendants"), 94 ("officials" and "Brig officials"), 99 ("Military Supervisor Defendants"). Especially in light of the personal responsibility the complaint attributes to other, lower-ranking personnel since dismissed from the case, and the dismissal of a third Brig Commander who served during a period of Padilla's confinement,[25] the complaint's allegations of personal responsibility are completely insufficient.

The allegations against the senior military official Defendants (Rumsfeld, Wolfowitz, Jacoby, and Haynes) are even more attenuated and exceed the boundaries of even *respondeat superior* liability. The policies that Plaintiffs describe in considerable detail and attempt to link to certain Defendants are all directed toward the treatment of enemy combatants held at Guantanamo. *See supra* pp. 37-38. However, the determination to hold Padilla at the Charleston Brig, the extensive process surrounding his detention determination and leading to the President's designation order, *see supra* pp. 31-32, and the Government's conduct during his habeas proceedings all demonstrate that the Government viewed confinement of Padilla as presenting legal and other issues quite different from those arising for alien combatants held at Guantanamo. Beyond this, there

[25] *See, e.g.*, JA71-72 (alleging that defendants Hanft, Marr, and Wright were each "Commander of the Brig" during "*part* of the Relevant Period") (emphasis added).

are only bare allegations that Defendants were informed of what occurred in the Brig and ordered implementation of certain policies. *See, e.g.*, JA85, JA90-91. But the complaint provides no detail that makes such claims plausible under the *Iqbal* standard, and indeed the complaint establishes that such claims are *implausible*.

Lacking any basis to allege a direct link between the policies approved by certain Defendants in other contexts and the treatment of a U.S. citizen combatant such as Padilla, the complaint feebly asserts that the alleged development of the Guantanamo policy somehow "sent the message through military ranks" that such techniques could also be used in settings beyond Guantanamo. JA96. Such an allegation – entirely based on conclusory claims of an uncertain process of cultural osmosis – cannot remotely meet *Iqbal*'s pleading standard that requires plausible allegations of personal responsibility for particular actions amounting to constitutional violations.

Plaintiffs also fail to meet the *Iqbal* pleading requirements as to all Defendants because they do not plausibly allege constitutional violations. Defendants acted in accord with established law at the time (and as it has been further construed since) in advising the President as to Padilla's designation and detention. *See supra* pp. 31-37. With respect to the claims related to access to counsel and courts and the conditions of confinement, Plaintiffs' own complaint

establishes that – leaving aside conclusory allegations – the allegations in the complaint do not plead plausible constitutional violations. *See supra* pp. 37-42. Plaintiffs simply do not present the detailed description of "*who* is alleged to have done *what* to *whom*," *see Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008), for acts plausibly amounting to a constitutional violation, that *Iqbal* requires. Thus, the complaint fails under either or both prongs of *Iqbal*: it fails to establish plausible constitutional violations and fails to link the alleged violations to Defendants' personal actions.

CONCLUSION

The Court should affirm the judgment of the district court dismissing all of Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as well as this Court's Order of June 27, 2011.

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 12,925 words.

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Dated: July 11, 2011

/s/ Jacqueline G. Cooper
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I certify that this brief was filed electronically on July 11, 2011. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties.

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