No. 11-6480

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, *et al*.

Plaintiffs-Appellants,

v.

DONALD RUMSFELD, *et al*.

Defendants-Appellees.

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

BRIEF OF FORMER ATTORNEYS GENERAL WILLIAM P. BARR, EDWIN MEESE III, MICHAEL B. MUKASEY, AND DICK THORNBURGH AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The *amici curiae* are four former Attorneys General of the United States. They believe that qualified immunity provides important legal protections to federal government officials by allowing them to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. In particular, *amici curiae* support affirmance of the District Court's decision because it correctly recognized that this lawsuit is not only legally defective on multiple grounds, but that it inappropriately intrudes on the ability of high-ranking government officials to fulfill their obligation to defend the homeland from attack and defeat al-Qaeda.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a federal judge

on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

No party or their counsel authored this brief in whole or in part or made any monetary contribution to the preparation or submission of this brief. See Fed. R. App. P. 29(c)(5). All parties to this appeal have consented to the filing of this *amicus* brief.

SUMMARY OF THE ARGUMENT

Jose Padilla and Estela Lebron ("Appellants") have filed a civil action against a number of former Department of Defense officials ("Appellees") under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Appellants seek $1.00 in compensatory damages from each of these high-ranking officials for their role in classifying Padilla as an enemy combatant and detaining him under conditions different from those applicable to the American penal system.[1] According to Appellants, these actions violated the U.S. Constitution and the Religious Freedom Restoration Act. The District Court correctly ruled, however, that *Bivens* should not be extended to this new setting both because creating a private action "in the absence of express Congressional authorization" here would detrimentally impact "the Nation's military affairs, foreign affairs, intelligence, and national security" and out of a concern for "the likely burden of such litigation on the government's resources in these essential areas." *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 800 (D.S.C. 2011). The District Court's decision should be affirmed on this basis alone.

[1] Appellants also sued the Secretary of Defense for injunctive and declaratory relief notwithstanding the fact that Padilla is no longer in military custody and has been tried and convicted in the civilian system. The District Court correctly held that Appellants lacked standing to bring those claims. *See Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 805-07 (D.S.C. 2011).

But even if *Bivens* could be extended to provide a cause of action against these former Department of Defense officials, the lawsuit still was correctly dismissed because Appellees are entitled to qualified immunity. Appellants cannot remotely show that Padilla's classification and detention as an enemy combatant violated any "clearly established" right he held under federal law. *Pearson v. Callahan*, 129 S. Ct. 800, 818 (2009). If anything is clearly established in this case, it is that detaining Padilla as an enemy combatant was lawful. The Supreme Court has repeatedly held that *any* belligerent—whether he be a United States citizen or an alien—caught entering the United States to wage war against America may be detained by the military as an enemy combatant. *Ex Parte Quirin*, 317 U.S. 1 (1942); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Moreover, this Court has held that Padilla, in particular, was properly detained as an enemy combatant. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). In light of the foregoing, it is difficult to conceive of a stronger case for qualified immunity.

Qualified immunity is especially justified here because Appellees all held "a high office in the Government" and because this suit arises "in the area of national security." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086-87 (2011) (Kennedy, J., concurring). Endless lawsuits threatening personal liability undermine a national officeholder's ability to effectively fulfill his public mission. Civil litigation of this kind is expensive, diverts resources and attention from the officer's assigned

functions, and may potentially deter high-ranking officials from "the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citation omitted). These concerns are most acute in the area of national security. Those tasked with defending the homeland from attack often must make critical decisions swiftly, with imperfect information, and under constantly changing circumstances. Allowing the threat of money damages to interfere with the performance of these "urgent responsibilities" does not advance the national interest. *al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring). Put simply, qualified immunity stands as a bulwark against attempts to chill the vigorous exercise of Executive authority.

This case illustrates the point. Padilla has declined to contest the factual predicate for the decision to detain him as an enemy combatant—to wit, that he is "a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets." *Padilla*, 423 F.3d at 389. Appellants nevertheless have filed this lawsuit asking this Court to create a new *Bivens* action and decide complex national-security issues raising serious separation of powers concerns, all so that he may attempt to recover $1.00 from

each of the defendants. It is clear, then, that Appellants have absolutely no interest in recovering money damages for violations of clearly-established law. Instead, Appellants are intent on using *Bivens* to test constitutional issues of first impression that were mooted when Padilla's demand to be transferred to civil custody was granted. The qualified immunity doctrine is designed to ensure that public officials are not forced to bear the burden and expense of defending against such novel legal claims.

At base, Appellants should not be permitted to use civil litigation to settle an ideological score with the only individuals involved in Padilla's classification and detention that are not entitled to absolute immunity. As the District Court noted, qualified immunity is "particularly appropriate" here in light of the fact "that the original detention decision was a direct order of the President of the United States, who is entitled to absolute executive immunity; the challenged interrogation methods were sanctioned at the time by the United States Department of Justice, which has sovereign immunity; and the enemy combatant designation was ultimately approved by Article III judges, who have absolute judicial immunity." *Rumsfeld*, 764 F. Supp. 2d at 805. If anything, cases such as this one may cause the Supreme Court to revisit whether high-ranking federal officials with national-security responsibilities should be afforded the same absolute immunity from suit as the President whose decisions they implement.

ARGUMENT

I. THESE FORMER DEPARTMENT OF DEFENSE OFFICIALS DID NOT VIOLATE PADILLA'S "CLEARLY ESTABLISHED" RIGHTS BY DETAINING HIM AS AN ENEMY COMBATANT.

As the District Court correctly concluded, a *Bivens* action should not be implied in this setting. *See Rumsfeld*, 764 F. Supp. 2d at 795-800. But even if a *Bivens* action could be maintained against these former Department of Defense officials, Appellees are still entitled to qualified immunity. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *al-Kidd*, 131 S. Ct. at 2080 (quoting *Harlow*, 457 U.S. at 818). Importantly, where a right was not "clearly established" at the time of the conduct, the Court need not determine whether a statutory or constitutional violation, in fact, occurred. *Pearson*, 129 S. Ct. at 818. As explained below, Padilla's detention as an enemy combatant did not violate any "clearly established" right he held under federal law. *Rumsfeld*, 764 F. Supp. 2d at 801-05.

Neither at the time that the pertinent decisions were made, nor at any time thereafter, has it ever been "clearly established" that the Executive could *not* constitutionally classify Padilla as an "enemy combatant" and subject him to a military detention under conditions different from those governing the American

penal system. To the contrary, both the Supreme Court and this Court concluded that the exact opposite was clearly established. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Because these decisions hold that an American citizen may properly be classified as an enemy combatant while we are at war with al Qaeda, "existing precedent" does not make Appellants' view of the "statutory or constitutional question[s]" implicated by Padilla's detention as an enemy combatant "beyond debate," *al-Kidd*, 131 S. Ct. at 2083. Indeed, there is likely no clearer entitlement to qualified immunity than that presented by this case.

The qualified immunity doctrine requires that a legal right have been so "clearly established" at the time of the alleged conduct that "every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Wilson v. Layne*, 526 U.S. 603, 617 (1999) (requiring a "consensus of cases of persuasive authority"); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (the law must have "clearly proscribed the actions"). Qualified immunity thus "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It necessarily follows, then, that qualified immunity shields an official where the alleged conduct was in response to a "case of first impression," a debatable issue, or was in accordance

with judicial precedent. *al-Kidd*, 131 S. Ct. at 2085; *see also Francis v. Giacomelli*, 588 F.3d 186, 196 (4th Cir. 2009) ("[E]xecutive actors cannot be required to predict how the courts will resolve legal issues."); *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998) ("[W]e do not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues."); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) ("[O]fficials are not liable for bad guesses in gray areas.").

Perhaps nowhere is qualified immunity more essential than where national-security decisions are concerned. *See infra* at 20-28. Yet Appellants would prefer to ignore the national security justifications for Padilla's detention; they argue that because Padilla is a "citizen," he is *a fortiori* due all legal rights held by prisoners within the criminal justice system. *See, e.g.*, Brief of Appellants at 14, 30-46 (June 7, 2011) ("Appellants' Br."). But in the qualified immunity inquiry, "context matters." *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x. 541, 554 (4th Cir. 2010) (citation omitted). And the "context" of Padilla's classification and detention—indeed, "the immediate factual and legal predicate" for it—"lies in the September 11, 2001 attacks on this country, and the government's response." *Padilla v. Bush*, 233 F. Supp. 2d 564, 570 (S.D.N.Y. 2002). The Supreme Court described the attacks and the response as follows:

> On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States.

> Approximately 3,000 people were killed in those attacks. One week later, in response to these 'acts of treacherous violence,' Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' Authorization for Use of Military Force (AUMF), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

Hamdi, 542 U.S. at 510. Relying on the AUMF, the President designated Padilla an "enemy combatant" and directed that he be held in military custody because the "detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Padilla*, 423 F.3d at 388.

Appellants cannot ignore the context of Padilla's classification and military detention by pointing to legal rights that, "as a general proposition," are clearly established in the criminal justice system "in the way, say, the right to due process is clearly established"—they instead must identify legal rights that were clearly established "in a more particularized, and hence more relevant, sense." *Cole v. Buchanan Cnty. Sch. Bd.*, 328 F. App'x. 204, 208 (4th Cir. 2009); *see also al-Kidd*, 131 S. Ct. at 2084 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("It is important to emphasize that this inquiry must be undertaken in

light of the specific context of the case, not as a broad general proposition.") (citation and quotation omitted). Appellants cannot prevail, therefore, without showing that it was "clearly established" that Padilla's military detention, which did not afford him treatment equivalent to that provided in the civilian detention system, violated some "clearly established" constitutional or statutory right. They cannot. At all pertinent times—when Padilla was classified an enemy combatant and throughout his military detention—the law *supported* his classification and detention. In fact, it *still* is not "clearly established" that Padilla's detention as an enemy combatant was in any respect unlawful.

When Padilla was classified as an enemy combatant in 2002, he had been "associated with forces hostile to the United States in Afghanistan," had taken "up arms against United States forces in that country in our war against al Qaeda," and had been "recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States by blowing up apartment buildings in this country." *Padilla*, 423 F.3d at 388. He had flown to "the United States on May 8, 2002, to begin carrying out his assignment, but was arrested by civilian law enforcement authorities upon his arrival at O'Hare International Airport in Chicago." *Id.*

At that time, relevant precedent "recognized" and "accepted as valid" that "those who during time of war pass surreptitiously from enemy territory into our

own . . . for the commission of hostile acts involving destruction of life or property have the status of unlawful combatants." *Quirin*, 317 U.S. at 35. *Quirin* further explained that, by "universal agreement and practice," the capture and detention of enemy combatants by the military—without the full scope of constitutional rights due those held in the criminal justice system—was an "important incident[] of war." *Id.* at 28, 30. Importantly, citizens were not exempt from being classified as enemy combatants. "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 are enemy belligerents" subject to detention in the military system. *Id.* at 37-38; *see also Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war."); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship . . . necessarily affects the status of one captured on the field of battle.").

In arguing to the contrary, Appellants have apparently abandoned their reliance on *Ex Parte Milligan*, 71 U.S. 2 (1866), a decision that they previously claimed denominated "the governing precedent" on the rights due citizen enemy combatants. *See* Appellants' Br. at 55, *Padilla v. Yoo*, No. 09-16478 (9th Cir. Jan

19, 2010) (Doc. 28). And for good reason. "*Quirin* was a unanimous opinion" that "both postdates and clarifies *Milligan*" and is "the most apposite precedent." *Hamdi*, 542 U.S. at 523 (plurality opinion). *Quirin* confirms that belligerents, including American citizens, who have been designated as enemy combatants by the President, are *not* entitled to the full scope of rights accorded civilian prisoners. *See* 317 U.S. at 24 (affirming execution of citizen enemy combatant without "the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses"). Padilla's classification as an "enemy combatant" and his military detention followed directly from *Quirin* and the decisions applying it; Padilla had fought for al Qaeda and had entered the United States bent on committing hostile acts.

Throughout Padilla's detention, the legal support for his military detention *increased*—and thus did *not* become "clearly established" in Appellant's favor. In no uncertain terms, the Supreme Court held that military detention of enemy combatants "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi*, 542 U.S. at 518 (plurality opinion). Padilla himself did not "den[y] directly the authority of the President to order the seizure and detention of enemy combatants in a time of war." *Padilla*, 233 F. Supp. 2d at 588. This Court agreed. *See Padilla*, 423 F.3d at 391 ("[T]he capture, detention, and trial of unlawful

combatants, by 'universal agreement and practice, are important incidents of war'") (citation omitted); *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) ("It has long been established" that "detention . . . is lawful" of "an 'enemy combatant' who was captured during hostilities.") (citation omitted). Appellees acted in accordance with "the well-established power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946). Appellants' claim that these Department of Defense officials somehow "created" a "self-evidently unconstitutional" detention scheme by "fashioning a previously nonexistent [enemy combatant] label" and "affixing it" to Padilla, *see* Appellants' Br. at 41, 44-45, thus is simply untrue.

Appellants' assertion that Padilla was categorically exempt from military detention because he is a "citizen" is equally unsustainable. *See, e.g.*, *id*. at 2. On this point, the Supreme Court could not have been clearer: "There is no bar to this Nation's holding one of its own citizens as an enemy combatant." *Hamdi*, 542 U.S. at 519 (plurality opinion). This Court was equally emphatic: "If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003); *see also Padilla*, 423 F.3d at 392 ("[T]he AUMF authorizes the President to detain *all*

those who qualify as 'enemy combatants.'") (emphasis added). Judicial decisions issued during Padilla's detention, therefore, did not afford him relief from military detention because of his citizenship. Far from it, these Supreme Court and Fourth Circuit decisions authorized the detention of citizens who, like Padilla, join forces with the enemy to commit hostile acts against America.

Other legal developments also continued to buttress the conclusion that military detention does not carry with it the rights associated with civilian detention. The Supreme Court confirmed that the Executive is entitled to "tailor[]" the rights afforded enemy combatants "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi*, 542 U.S. at 533 (plurality opinion). This Court agreed that those in military detention are not due the full panoply of rights afforded civilian prisoners. *See Hamdi*, 316 F.3d at 465 ("The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict."); *cf. Padilla*, 423 F.3d at 395 ("[I]n many instances criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined—impediments that would render military detention not only an appropriate, but also the necessary, course of action to be taken."). The precise nature of rights due

those in military custody remains an issue of great debate. But one precept is clear—those in military custody are not due all the rights of those in civilian custody. That conclusion entitles Appellees to qualified immunity. Appellants have relied solely on the rights "afforded convicted prisoners" on the ground that they "set a floor" for the rights due enemy combatants in military custody, Appellants' Br. at 43 (citation and alternation omitted), a legal proposition that is most certainly *not* clearly established.

With clearly established law conclusively supporting the legality of military detention of citizen enemy combatants, Appellants' claims are reduced to a general argument that clearly established law should not have allowed Padilla to be so detained. *See, e.g.*, *id*. at 40. But this Court held precisely the opposite—*viz*., that Padilla's "military detention as an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan." *Padilla*, 423 F.3d at 392. In so ruling, this Court considered—and rejected—many of the arguments that Appellants again assert here as if they were "clearly established." For example, this Court described Padilla as "a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the

avowed purpose of further prosecuting that war on American soil, against American citizens and targets." *Id*. at 389. As a consequence, this Court held that "Padilla unquestionably qualifies as an 'enemy combatant,'" *id.* at 391, that "the AUMF as interpreted by the Supreme Court in *Hamdi* authorizes the President's detention of Padilla as an enemy combatant," *id.* at 392, that Padilla's citizenship did not exempt him from military detention, *id.*, that his locus of capture had no effect on the President's power to detain him, *id.* at 394, and that Padilla was not entitled to criminal prosecution in lieu of military detention, *id.* at 394-95. Given the existence of this Court's "directly on point" decision, there is no colorable basis for Appellants' arguments that the law was "clearly established" otherwise. *al-Kidd*, 131 S. Ct. at 2083-84.

In short, this Court's determinations—which were reached during Padilla's military detention—that the "facts unquestionably establish that Padilla poses the requisite threat of return to battle in the ongoing armed conflict between the United States and al Qaeda in Afghanistan," "that his detention is authorized as a 'fundamental incident of waging war' in order 'to prevent a combatant's return to the battlefield,'" and that "Congress 'clearly and unmistakably' authorized such detention when, in the AUMF, it 'permitt[ed] the use of "necessary and appropriate force,"' to prevent other attacks like those of September 11, 2001," *Padilla*, 423

F.3d at 396, make Appellants' argument that binding precedent "clearly established" the opposite untenable.

"Collateral estoppel or issue preclusion forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom issue preclusion is asserted had a full and fair opportunity to litigate." *Ramsay v. INS*, 14 F.3d 206, 210 (4th Cir. 1994) (citation and alteration omitted). In the criminal context, this means that an inmate cannot challenge the legality of his conviction in a tort action where he has not previously had the conviction overturned on direct appeal or in habeas proceedings. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). In this case, it means that Padilla cannot challenge his detention in a tort action because the legality of that detention has been upheld *by this Court*. In any event, whatever the scope of collateral estoppel, qualified immunity is designed to provide protection in just this situation.

To be sure, novel legal questions were implicated by Padilla's classification and detention as an enemy combatant; there was "no well traveled road delineating the respective constitutional powers and limitations" with respect to citizen enemy combatants during the conflict with al Qaeda. *Padilla v. Rumsfeld*, 352 F.3d 695, 727 (2d Cir. 2003) (Wesley, J., dissenting); *see also Padilla,* 233 F. Supp. 2d at 607 ("[I]t would be a mistake to create the impression that there is a lush and

vibrant jurisprudence governing these matters."). As to Padilla's detention in particular, the differences of opinion reflected by the decisions of the various federal courts provide evidence of the unsettled nature of the complicated issues raised by his actions against the United States and the decision of the Executive to detain him militarily. *Compare Padilla,* 233 F. Supp. 2d at 564; *Padilla*, 352 F.3d at 695; *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005); *Padilla*, 423 F.3d at 386. But far from creating a basis for denying qualified immunity, the "strikingly varying judicial decisions" with respect to this case *confirm* that qualified immunity must apply. *Rumsfeld*, 764 F. Supp. 2d at 803.

Given the unsettled state of the law, and the difficult issues implicated by Padilla's decision to join with al Qaeda in its plan to further attack the United States, it is inconceivable that "every reasonable official would have understood" precisely what to do, *al-Kidd*, 131 S. Ct. at 2083, when confronted with Padilla's arrival in the United States "to continue prosecution of the war in the United States by blowing up apartment buildings in this country," *Padilla*, 423 F.3d at 388. If anything, Appellees made the correct decisions under the law as it existed then and as it exists now. The classification and military detention of Padilla followed directly from Supreme Court precedent and was affirmed by this Court. If ever qualified immunity were justified, it is justified in this case.

II. QUALIFIED IMMUNITY IS ESPECIALLY APPROPRIATE GIVEN THAT THIS *BIVENS* ACTION CONCERNS SENSITIVE NATIONAL SECURITY DECISIONS MADE BY HIGH-RANKING FEDERAL OFFICIALS.

The special context from which Padilla's lawsuit arises should inform this Court's qualified immunity analysis. "[H]igh officials require greater protection than those with less complex discretionary responsibilities" because of "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807 (citations and quotation omitted)). The Supreme Court thus has refused to "close [its] eyes to the fact that" a *Bivens* action "against high government officials in their personal capacities based on alleged constitutional torts . . . almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels." *Id*. at 817 n.29 (citation and quotation omitted). In particular, "[t]he passions aroused by matters of national security and foreign policy and the high profile of the Cabinet officers with functions in that area make them 'easily identifiable targets for suits for civil damages.'" *Mitchell*, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment) (quoting *Nixon v. Fitzgerald*, 457 U.S.

731, 753 (1982)).[2] At the pleading stage, then, courts "are impelled 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." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

Broad qualified immunity for high-ranking officials is in the public interest. Ceaselessly defending against novel lawsuit challenging sensitive decisions made at the highest levels of the national government interferes with the effective performance of the duties entrusted to these officeholders. These lawsuits thus come "at a cost not only to the defendant officials, but to society as a whole" through the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."

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[2] In *Mitchell*, Justice Stevens concluded that the Attorney General was "entitled to the same absolute immunity as the President of the United States" given the national security implications of the litigation. 472 U.S. at 542 (Stevens, J., concurring in the judgment). In his view, "absolute immunity may be justified for Presidential 'aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy . . . to protect the unhesitating performance of functions vital to the national interest" because "the President cannot 'discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.'" *Id*. at 540 (quoting *Harlow*, 457 U.S. at 812 n.19). The majority concluded, however, that qualified immunity is appropriate in this setting. *See id*. at 524. To the extent that current law precludes granting absolute immunity to Appellees, civil actions such as this one may convince the Supreme Court to revisit that judgment. In cases such as this, in which high-ranking Department of Defense officials are sued for "exercising the discretionary 'power of the President' in the area of national security," there is a strong argument "that absolute immunity" should "attach[] to the special function . . . being performed" by those officials. *Id*. at 540 (Stevens, J., concurring in the judgment).

Harlow, 457 U.S. at 814. As Justice Stevens explained, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." *Mitchell*, 472 U.S. at 542 (Stevens, J., concurring in the judgment); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 382 (2004) (recognizing "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties").

Worse still, "there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (citations, quotations, and alterations omitted). Subjecting a public official to civil liability undoubtedly diminishes the official's "willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). By chilling the official's willingness to act decisively, *Bivens* actions imperil public safety: "executive branch officers must often act swiftly and on the basis of factual information supplied by others, constraints which become even more acute in the atmosphere of confusion, ambiguity, and swiftly moving events created by a civil disturbance." *Butz v. Economou*, 438 U.S.

478, 497 (1978) (citations and quotations omitted). The consequences are particularly troubling in the area of national security. *See Halperin v. Kissinger*, 807 F.2d 180, 187 (D.C. Cir. 1986) ("[T]he harm produced by dampening the ardor of public officials in the unflinching discharge of their duties is particularly severe in the national security field.") (citation, quotations, and alterations omitted). Qualified immunity allows "government officials breathing room" to make judgments about "open legal questions" without fear that they will be subjected to burdensome litigation as a result. *al-Kidd*, 131 S. Ct. at 2085. If the national government is to function, high-ranking officials must be permitted to fulfill their oath without the constant threat of civil litigation.

All of these concerns recently led Justice Kennedy to reiterate an important point that directly bears on this litigation: the fact that a public official "holds a high office in the Government must inform what law is clearly established" for the purposes of the qualified immunity inquiry. *Id.* at 2086 (Kennedy, J., concurring) (citing *Mitchell*, 472 U.S. at 525). A "national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule. If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national

security." *Id*. at 2087 (citing *Iqbal*, 129 S. Ct. at 1950). As Justice Kennedy explained, "nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities." *Id*. In other words, the imperative of qualified immunity is at its apex when a lawsuit challenges the legality of national security decisions made by high-ranking federal officials.

This litigation perfectly illustrates the problem Justice Kennedy identified. Appellees were among those in government "charged with responding to a national and international security emergency unprecedented in the history of the American Republic." *Iqbal*, 129 S. Ct. at 1945 (citations and quotations omitted). Then and now, al Qaeda and its terrorist allies "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of operations of the United States Government." Military Order, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001). The lethal threat posed by this warring foe not only demanded a swift military response, but the rapid creation of a legal regime for the detention of captured al Qaeda operatives. Appellees thus wisely called on Department of Justice lawyers to help them answer "novel and difficult legal questions" in the midst of "an

unprecedented conflict involving a non-sovereign enemy." Mem. for the Att'y Gen. from David Margolis, Assoc. Dep. Att'y Gen. 2, 25 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf. This was unquestionably the correct and proper way to proceed. *See* Brief of Appellees Hanft, Haynes, Jacoby, Marr, and Wolfowitz, at 42-44 (July 11, 2011).

There has been (and continues to be) strong disagreement as to the legality and wisdom of this detention regime. *See supra* at 18-19. But there can be no dispute that Appellants have asked the federal courts to wade into one of the most complex national security issues this Nation has ever confronted. *See Rumsfeld*, 764 F. Supp. 2d at 799 ("The designation of Padilla as an enemy combatant and his detention incommunicado were made in light of the most profound and sensitive issues of national security, foreign affairs and military affairs."). Like the extraordinary rendition case the Second Circuit recently addressed, identifying the precise legal rights of enemy combatants under federal law involves a "complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached." *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010). These are precisely the type of national-security questions that

the federal judiciary should be reluctant to decide. *See al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring).[3]

Beyond their generalized challenge to the detention policy, Appellants ask this Court to review the specific judgment made by the President to classify and detain Padilla as an enemy combatant. *See supra* at 16-19. But because the President is absolutely immune from suit, *see id*. at 21 n. 2, Appellants have instead taken aim at the high-ranking officials at the Department of Defense that advised the President and implemented his decision. *Rumsfeld*, 764 F. Supp. 2d at 802 ("The President's order was issued by the President in his capacity as Commander in Chief, and the named defendants were all subordinate civilian or military officials of the American government."). Among those being sued here are two former Secretaries of Defense, "the highest-ranking civil official in the

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[3] It is worth noting that perspective often shapes an individual's view as to the legality of difficult national-security decisions made by the President or those acting pursuant to authority delegated by his Office. *Compare, e.g.*, Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 Stan. J. of Int'l Law 247, 249 (1991) (arguing "that the Constitution did not permit the President to order U.S. armed forces to make war without meaningfully consulting with Congress and receiving its affirmative authorization"), *with* Harold Hongju Koh, Testimony on Libya and War Powers, Senate Foreign Relations Committee at 13, June 28, 2011 ("Reasonable minds may read the Constitution and the War Powers Resolution differently—as they have for decades. Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us [regarding the] mission in Libya.") *available at* http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf.

U.S. Department of Defense," Third Amended Compl. ¶¶ 14, 20 (July 23, 2008) (Doc. 91), the Department's former General Counsel, *id*. ¶ 15, the former Deputy Secretary of Defense, *id*. ¶ 16, the former Director of the Defense Intelligence Agency, *id*. ¶ 17, the former Special Advisor to the Undersecretary of Defense for Policy, *id*. ¶ 18, and a number of supervisory officials at the Brig where Padilla was detained, *id*. ¶¶ 22-27, 29. These are precisely the type of high-ranking officials whose sensitive national-security judgments should not be second-guessed through the foggy lens of *Bivens* litigation—especially in the absence of clearly established Supreme Court precedent to guide them.

Circumstances may arise that will compel federal courts to evaluate the legality of national-security decisions of this kind. *See Rumsfeld*, 764 F. Supp. 2d at 800 n.4. But the instant lawsuit, which asks this Court to create a *Bivens* action in an entirely new setting in order to obtain $1.00 in damages from each defendant, as well as injunctive and declaratory relief that Appellants lack standing to pursue, *see Rumsfeld*, 764 F. Supp. 2d at 805-07, is exactly the *wrong* circumstance to address these issues. Appellants should not be permitted to use civil litigation to test novel constitutional claims that the federal courts should avoid deciding if at all possible. *Cf. Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) ("That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against

addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical."). A novel *Bivens* claim against high-ranking Department of Defense officials for $1.00 may not technically be a hypothetical case on which an advisory opinion is sought; but it is not far off.

In the end, adjudicating the merits of Appellants' constitutional and statutory claims will necessarily result "in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case" given the absence of clearly established Supreme Court or Fourth Circuit precedent supporting their position. *Pearson*, 129 S. Ct. at 818. As the Supreme Court has explained, "[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id*. This is just such a case. Accordingly, this Court should affirm the District Court's decision granting qualified immunity to Appellants.

CONCLUSION

For the foregoing reasons, *Amici* Former Attorneys General respectfully urge this Court to affirm the judgment of the District Court dismissing all of Plaintiffs' claims.

Dated: July 18, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,780 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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

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Dated: July 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011, I electronically filed the foregoing Brief of Former Attorneys General William P. Barr, Edwin Meese III, Michael B. Mukasey, and Dick Thornburgh As Amici Curiae In Support Of Affirmance with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I further certify that eight copies of the foregoing brief will be filed via first-class mail with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit.

/s/ William S. Consovoy