No. 09-16478

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE PADILLA, *et al.*
Plaintiffs-Appellees,

v.

JOHN YOO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States of America hereby submits this brief as *amicus curiae*.

The United States has a substantial interest in this matter. Plaintiff Jose Padilla brought this damage action against John Yoo, a former Department of Justice Office of Legal Counsel ("OLC") attorney, in his individual capacity, claiming advice Yoo provided to the Attorney General, the Department of Defense and the White House regarding war powers and matters of national security, was a proximate cause of Padilla's military detention and the alleged harsh interrogations and conditions during that detention. The threshold question presented by this case is whether a court

should recognize a federal common-law damage action addressing the decisionmaking process within the Executive Branch about whether the military should detain and how it should treat those deemed to be enemies during an armed conflict. As we explain below, this context, which directly implicates war powers and matters of national security, presents compelling "special factors" that strongly counsel against judicial creation of such a money-damage remedy, in the absence of congressional action. The Supreme Court and the courts of appeals have consistently refused to extend *Bivens* remedies to new contexts. Where there are special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage action if it so chooses. That course is clearly appropriate here.

In some exceptional instances, the courts are required, by constitutional necessity or by a clear grant of authority by Congress, to adjudicate matters pertaining to war and national security. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The general rule outside of the *Bivens* context, however, remains that, "unless 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, 530 (1988). Consistent with that approach, courts consistently hold that is not appropriate for the judiciary to create

a *Bivens* common-law damage remedy where claims directly implicate matters of national security and war powers. There can be little question that the claims here directly implicate war powers of the President, with respect to the military's detention and treatment of those determined to be enemies during in an armed conflict, that have never been the subject of money-damages actions in our nation's long history. Given this highly sensitive context, the district court erred in recognizing a damage action, absent congressional authorization.

Recognizing a *Bivens* action in this context is especially inappropriate because plaintiff is seeking to impose liability for legal advice relating to war powers and national security. The threat of such personal liability claims could deter frank and full discussions within the Executive Branch regarding such matters. If Congress wishes to provide a damage remedy in this very sensitive setting, it could do so. In the absence of such congressional action, however, such claims should not be recognized as a matter of common law.

That is not to say that the actions of a Department of Justice attorney providing advice should go unchecked. Department of Justice attorneys, if they abuse their authority, are subject to possible state and federal bar sanctions, *see* 28 U.S.C. § 530B, investigation by both the Office of Professional Responsibility and the Office of the Inspector General, as well as criminal investigation and prosecution, where

appropriate. If Congress believes that additional avenues of recourse are necessary in cases where Department of Justice attorneys provide legal advice regarding matters relating to war powers and national security, it could enact appropriate legislation. Given the sensitivities of such claims, and the risk of deterring full and frank advice regarding matters of national security, however, this is a clear case where "special factors" strongly counsel against the recognition of a *Bivens* action.

ARGUMENT

A *BIVENS* ACTION SHOULD NOT BE RECOGNIZED IN THIS CONTEXT, WHICH DIRECTLY IMPLICATES MATTERS OF NATIONAL SECURITY AND WAR POWERS

This appeal presents a dispositive threshold issue, which, in our view, supports dismissal of all of the *Bivens* claims asserted by plaintiffs here. The district court held that it is appropriate to create a common-law damage action in the context here of a Department of Justice OLC attorney providing legal advice to the Attorney General, the Department of Defense and the White House, regarding the detention and treatment of those determined to be enemies during an armed conflict. As we explain below, if Congress were to wish to provide a damage remedy in this setting directly implicating matters of national security and war powers, it could do so. This context, however, presents compelling "special factors" that strongly counsel against judicial creation of a money-damage remedy, in the absence of congressional action.

Resolving the constitutional claims on this basis, without reaching the underlying constitutional issues, is consistent with the Supreme Court's recent decision in *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007), where, without reaching the constitutional issues, the Court dismissed the *Bivens* action based on the special factors presented by the context there. It is also consistent with the well-established rule that courts should avoid deciding difficult or novel constitutional claims where the issues can be more easily resolved on non-constitutional grounds. *See Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). *See also Pearson v. Callahan*, 129 S.Ct. 808, 821 (2009) (citing the avoidance principle in recognizing that a court ruling on a claim of qualified immunity has discretion to decide the case without passing on the constitutional issue).

Here, where Padilla's damage claims directly relate, *inter alia*, to the President's war powers, including whether and when persons captured in this country

can be held in military detention under the laws of war, it would be particularly inappropriate for this Court to unnecessarily reach the merits of the constitutional claims. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-22 (2004), the Supreme Court held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), authorized the military detention of an American citizen, Yaser Hamdi, who was captured in Afghanistan, designated as an enemy combatant by President Bush, and subsequently detained in military custody on U.S. soil. The *Hamdi* plurality specifically recognized that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." *Id.* at 519. The Fourth Circuit thereafter addressed the military detention of Padilla and held that, under *Hamdi*, President Bush possessed authority, pursuant to the AUMF, to designate Padilla as an enemy combatant and to detain him in military custody. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

In this personal damage action, Padilla now argues, *inter alia*, that the Fourth Circuit decision was wrong and that this Court should hold that President Bush had no authority to place him in military detention. We respectfully suggest that that fundamental issue of the President's war powers should not be resolved in this context, when, as we explain below, doing so is unnecessary to dispose of all of Padilla's constitutional claims. As Justice Kennedy noted in the Supreme Court's

denial of review of the Fourth Circuit's ruling after Padilla was transferred to civilian criminal custody, "[t]hat Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against [unnecessarily] addressing those claims." *Padilla v. Hanft*, 547 U.S. 1062, 126 S.Ct. 1649, 1650 (2006) (Kennedy, J., concurring). That advice applies equally to Padilla's claims here.[1]

A. The Supreme Court and the Courts of Appeals Have Consistently Refused to Extend *Bivens* Remedies to New Contexts.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009). The *Bivens* Court held that federal officials acting under color of federal law could be sued for

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[1] We believe that the *Bivens* claims could and should be dismissed based on the special factors presented by this context, without reaching the other alternative grounds for dismissal of the constitutional claims. The alternative arguments for dismissal of those and the other claims are fully addressed in Mr. Yoo's brief. In the circumstances of this case, because those arguments are fully set forth in Mr. Yoo's brief, and to avoid any appearance of a conflict arising from a pending internal Department of Justice investigation relating to the Department's opinions and decision-making process, which could potentially touch on the subject matter of some of the claims, we do not address the other issues in this *amicus* brief. For the reasons set forth above, however, resolving the constitutional claims based on other threshold grounds, such as the law not being clearly established, should be addressed first before reaching the merits of the claims. *See Pearson v. Callahan*, 129 S.Ct. at 821.

money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common law action, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Subsequent to *Bivens*, the Supreme Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). *See Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1119-20 (9th Cir. 2009). Indeed, in "the 38 years since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson* [*v. Green*, 446 U.S. 14 (1980)]." *Arar v. Ashcroft*, __ F.3d __, 2009 WL 3522887 at *8 (2d Cir. Nov. 2, 2009) (en banc). As this Court recently observed, "the Supreme Court has 'consistently refused to extend *Bivens* liability to any new context or new category of defendants.'" *Western Radio Services Co.*, 578 F.3d at 1119 (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). "The [Supreme] Court has focused increased scrutiny on whether Congress intended the courts to devise a new *Bivens* remedy, and

in every decision since *Carlson*, across a variety of factual and legal contexts, the answer has been 'no.'" *Western Radio Services Co.*, 578 F.3d at 1119.

The Supreme Court has explained that, because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," if it is to be exercised at all, it must be undertaken with great caution. *Correctional Services Corp. v. Malesko*, 534 U.S. at 67-70. In *Malesko*, the Supreme Court observed that, in *Bivens*, the Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes," decisions from which the Court has since "retreated" and that reflect an understanding of private rights of action that the Court has since "abandoned." 534 U.S. at 67 & n.3. "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly v. Scott*, 434 F.3d 287, 220 (4th Cir. 2006) (internal quotation marks omitted). *See also Ashcroft v. Iqbal*, 129 S.Ct. at 1948 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"). The Eighth Circuit has described the Supreme Court's recent decisions as erecting a "presumption against

judicial recognition of direct actions for violations of the Constitution by federal officials or employees." *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (internal quotation marks omitted).

In permitting the *Bivens* claims in this case, the district court erroneously focused on whether there would be an alternative remedy or remedial scheme that precluded the *Bivens* claims here. Of course, where there is "'any alternative, existing process for protecting' the plaintiff's interests, such an alternative remedy would raise the inference that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and freestanding remedy in damages.'" *Western Radio Services Co.*, 578 F.3d at 1120 (quoting *Wilkie*, 551 U.S. at 550, 554). The lack of such an alternative remedy does not, however, answer the distinct question of whether the context presents special factors that counsel against recognizing a *Bivens* action. Most recently, in *Wilkie v. Robbins*, the Supreme Court made clear that courts should hesitate to fashion a *Bivens* remedy, even in the absence of an "alternative, existing process." *Wilkie*, 551 U.S. at 550. The Supreme Court explained that, in deciding whether to permit a *Bivens* action, courts still must make an assessment "appropriate for a common-law tribunal" and should "pay[] particular heed * * * to any special factors counseling hesitation." *Ibid*. *See also United States v. Stanley*, 483 U.S. 669, 683 (1987) ("it is irrelevant to a special factors analysis whether the laws currently

on the books afford * * * an adequate federal remedy"). Where, as here, there are special considerations or sensitivities raised by a particular context, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562.

B. Absent Congressional Authorization, A Common-Law Damage Remedy Should Not Be Recognized in this Context, Which Directly Implicates Matters of National Security and the President's War Powers

The context presented by the claims here clearly counsels against the recognition of a *Bivens* action. As detailed above, the Supreme Court and the courts of appeals have consistently refused to extend *Bivens* remedies to new contexts. Where there are special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage remedy if it so chooses. That course is clearly appropriate here, where the claims directly implicate matters of national security and the President's war powers.

1. Even outside the context of implied *Bivens* actions, the courts generally recognize that "[m]atters intimately related to * * * national security are rarely proper

subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality) ("[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) ("[w]e cannot intrude into our government's decision to grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor's sales"); *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking."); *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004) ("the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies"); *Center for*

Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 932 (D.C. Cir. 2003) ("it is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."*)*; *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir.1997) (court cannot adjudicate claims brought by Turkish sailors alleging injuries and wrongful death suffered as a result of missiles fired by a United States Navy vessel during North Atlantic Treaty Organization training exercises); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (refusing to adjudicate claim that bombing of Cambodia during the Vietnam conflict required separate Congressional authorization); *Da Costa v. Laird*, 448 F.2d 1368 (2d Cir. 1971) (court was not competent to judge significance of mining and bombing of North Vietnam's harbors and territories for purposes of determining whether Congressional authorization was required).

In some exceptional instances, the courts are required, by constitutional necessity or by a clear grant of authority by Congress, to adjudicate matters directly pertaining to war and national security. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006). The general rule, however, as stated by the Supreme Court in *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988), is that "unless Congress has specifically provided otherwise, courts traditionally have

been reluctant to intrude upon the authority of the Executive in military and national security affairs." Refusal to adjudicate a claim directly implicating matters of war and national security, however, "does not leave the executive power unbounded." *Schneider*, 412 F.3d at 200. While the aggrieved party may have no remedy for damages, "the nation has recompense, and the checks and balances of the Constitution have not failed * * *. If the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Ibid.*

2. Thus, even outside the *Bivens* context, courts generally require Congressional action before adjudicating matters directly pertaining to national security or armed conflict. Given this well-established general rule, and given the strong background presumption against extending *Bivens* damage actions to new and sensitive contexts, it is hardly surprising that courts have been particularly careful not to intrude upon quintessential sovereign prerogatives by creating a *Bivens* damage remedy in contexts directly implicating armed conflict and/or national security. Where a money-damage claim directly implicates such sensitive executive decision making, the courts have consistently recognized that is generally not an appropriate area for creating a federal common law *Bivens* damage remedy. *See United States v. Stanley*, 483 U.S. 669, 678-85 (1987) ("the Constitution confers authority over the

Army, Navy, and militia upon the political branches. All this counsels hesitation in our creation of damages remedies in this field"); *Arar*, 2009 WL 3522887 at *11-13 ("[i]t is a substantial understatement to say that one must hesitate before extending *Bivens* into such a context"); *Rasul v. Meyers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) ("federal courts cannot fashion a *Bivens* action when "special factors" counsel against doing so * * *. The danger of obstructing U.S. national security policy is one such factor."); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) ("if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994) ("The unreviewability of the security clearance decision is a 'special factor counselling hesitation,' which precludes our recognizing a *Bivens* claim"); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (refusing to recognize a *Bivens* action against "military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.").

3. There can be little question that the claims here directly implicate war powers of the President, with respect to the military's detention and treatment of those determined to be enemies during in an armed conflict, that have never been the subject of money-damages actions in our nation's long history. Padilla was detained

by the military upon the decision of President Bush to designate him an "enemy combatant." He claims that the military detention was unconstitutional and seeks money damages from Yoo for having advised that it was lawful. His detention-related *Bivens* claims ask the courts to determine the legality of a decision by President Bush to detain Padilla as an "enemy combatant." These damage claims, if permitted to proceed to the merits, would also require a court to determine the lawfulness of advice provided by the Department of Justice to the President and the Department of Defense regarding Padilla's legal status. These detention-related *Bivens* claims, if enforced, would create a large shadow over sensitive matters of military discretion. There are good reasons not to allow the prospect of money damages – or defending against personal damage action – to affect the manner in which the Executive deliberates on such matters, at least not without congressional authorization.

Padilla also seeks damages from Yoo in regard to his alleged mistreatment while in military detention. Thus, a court would have to inquire into what the conditions of Padilla's military confinement were and as to what interrogation techniques were employed against him. In seeking money damages against Yoo in regard to his treatment, Padilla cites advice Yoo provided to the military regarding the rights of alien-enemy detainees held abroad during an armed conflict and

addressing what interrogation techniques could be lawfully employed against them. Padilla is asking the federal courts, in the context of this *Bivens* action, to both rule on the lawfulness of the advice provided and hold that this advice caused his alleged injuries.

Because the context of Padilla's *Bivens* claims plainly implicates matters of war and national security it would be inappropriate to recognize a damage action, absent congressional authorization. If Congress were to want to authorize private rights of action for those detained by the military as enemy detainees during an armed conflict, and were to want to expressly permit them to seek money damages against those Executive Branch officials who detain or authorize the military detention, it could do so. Likewise, if it were to believe it desirable, Congress could provide a cause of action for money damages against those who provide advice to the President and/or the military as to who is legally detainable and as to which methods of interrogation can be lawfully employed against those detained as an enemy during an armed conflict. *See Wilkie*, 551 U.S. at 562 ("any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation"). In such legislation, Congress could "tailor any remedy to the problem perceived," and take steps to reduce the possible harmful effects of such civil damage claims. *See Wilkie*, 551 U.S. at 562. *See also ibid.*

("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf") (*quoting Bush v. Lucas*, 462 U.S. 367, 389 (1983)). But in the absence of such legislation, courts should not extend private rights for damage actions against federal officials in this context. *See Arar*, 2009 WL 3522887 at *17 ("if Congress wishes to create a remedy for individuals * * *, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded").

C. Other Factors Further Counsel Against Recognition of a *Bivens* Remedy Here

As discussed above, the fact that the claims here would require a court to decide matters directly related to national security and the President's war powers provides ample reason for the judiciary not to create on its own a common-law damage action. There are additional factors here that further counsel against recognition of the *Bivens* claims. *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (where there are multiple factors counseling against recognition of a *Bivens* claim in a particular context, a court should not weigh each factor separately; rather, the factors must be "[t]aken together").

1. Another factor counseling against the recognition of *Bivens* action in this case is that the threat of such claims could deter the invaluable, frank and full

discussions within the Executive Branch of the government's legal options regarding matters of war and national security. The need for candid advice on such matters is vital. For example, by Executive Order, President Obama established a Special Task Force on Detainee Disposition "to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations." 74 Fed. Reg. 4901 (2009). The Task Force is required to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." *Ibid*. The specter of a *Bivens* action, however, could distort the discussions and even deter some officials from partaking in such vital deliberations at all. Given these potential adverse consequences, such *Bivens* claims, which directly implicate matters of national security and the President's war powers, and which seek redress regarding important legal and policy discussions and choices, should not be permitted absent congressional action. *See Arar*, 2009 WL 3522887 at *17 ("Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions – which are directly related to

the security of the population and the foreign affairs of the country – should be subjected to the influence of litigation").

2. The availability of alternative avenues of recourse further supports the argument that a *Bivens* remedy should not be recognized in this context, which directly implicates national security and war powers.

a. In arguing that a *Bivens* action should not be recognized here, we are not suggesting that the actions of a Department of Justice attorney advising the Attorney General, the President and/or other agencies should go unchecked. Congress has enacted 28 U.S.C. § 530B (also known as the "McDade Amendment"). Under Section 530B, Department of Justice attorneys, as well as other government attorneys, "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B.[2] State bar rules speak to an attorney's ethical duties when advising a client.

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[2] As set forth in the implementing regulation, however, § 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 C.F.R. 77.1(b). *See also Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 19-20 (1st Cir. 2000) ("Congress directed the Attorney General to fill out the details of enforcement by regulation * * *. These regulations dispel the notion that section 530B grants states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law."). Thus, there may be circumstances in which application of a state rule or a (continued...)

See, e.g., ABA MODEL RULES OF PROFESSIONAL CONDUCT, 2.1, 3.1. To the extent someone believes that a Department of Justice attorney has violated the applicable bar rules, under the McDade Amendment, they can file a complaint with the relevant state bar.

In fact, complaints have been filed with the District of Columbia and Pennsylvania bars against defendant Yoo. Under the McDade Amendment, Yoo potentially could be subject to discipline if he violated any of the applicable rules and/or standards.

In addition to potential discipline by a state bar, Department of Justice attorneys are also subject to investigation by the Office of Professional Responsibility ("OPR"), *see* 28 C.F.R. 0.39 and the Office of the Inspector General, 5 U.S.C. App. §8E. Section 1001 of the USA Patriot Act directs the Department of Justice Inspector General to review information and receive complaints alleging abuses of civil rights and civil liberties by Department of Justice employees. *See* Pub. L. 107-56, § 1001, 115 Stat. 391 (2001). OPR and the Office of the Inspector General have broad investigatory powers and can recommend discipline and even criminal prosecution, where appropriate.

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[2](...continued)
state adjudication of a bar complaint might not be authorized under the Supremacy Clause and the McDade Amendment.

Indeed, Yoo's conduct has been subject to investigation by OPR. OPR's report and recommendations have not been publicly released as of this date. *See Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees* (August 24, 2009) ("[OPR] has now submitted to me its report regarding the Office of Legal Counsel memoranda related to so-called enhanced interrogation techniques. I hope to be able to make as much of that report available as possible after it undergoes a declassification review and other steps.") (http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html).

If Congress were to believe that additional avenues of recourse are necessary in cases where Department of Justice attorneys provide legal advice to the Attorney General, the White House and/or relevant agencies regarding matters relating to war powers and national security, it can enact appropriate legislation. Given the sensitivities of such claims, and the risk of deterring full and frank advice regarding matters of national security, however, this is a clear case where "special factors" strongly counsel against a judicially-created *Bivens* action.

b. Finally, at least in regard to the *Bivens* claims challenging the lawfulness of his military detention, there was also an "'alternative, existing process for protecting' the plaintiff's interests," that by itself raises the "inference that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and

freestanding remedy in damages.'" *Western Radio Services Co.*, 578 F.3d at 1120 (quoting at *Wilkie*, 551 U.S. at 550).

In *Western Radio*, the plaintiff, Western Radio, brought a *Bivens* money-damage claims against Forest Service officials claiming that their "inactions violated the First Amendment (by treating Western unfavorably in retaliation for its prior litigation against the Forest Service), [and] the Fifth Amendment (by treating Western less favorably than the other lessees without a rational basis)." *Id*. at 1118. This Court held that a *Bivens* action should not be recognized because Congress provided the Administrative Procedure Act, 5 U.S.C. 702 ("APA"), to challenge the lawfulness of government actions and inaction. *Id.* at 1122-25. Even though the APA provided no damage remedy and afforded no redress against the individual officers, this Court held that the existence of this alternative mechanism for challenging the Government's actions or inactions, "'amounted to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Id*. at 1125 (quoting at *Wilkie*, 551 U.S. at 550). *See also Miller v. U.S. Dep't of Agr. Farm Serv. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("a right to judicial review under the APA is[] alone sufficient to preclude * * * a *Bivens* action").

Here, likewise, there was an alternative congressionally authorized mechanism for challenging the Government's actions. By bringing an action under the habeas

statute, 28 U.S.C. § 2241, Padilla could challenge the lawfulness of his detention. Indeed, two days after he was taken into military detention, Padilla filed a petition for a writ of habeas corpus challenging his designation and military detention, as well as his being held in isolation. That habeas case ultimately went to the Supreme Court, which held that Padilla's habeas petition was improperly filed in the Southern District of New York rather than in the District of South Carolina. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Padilla then filed a new habeas corpus petition in South Carolina. That district court held that President Bush lacked constitutional authority to detain Padilla as an enemy combatant. In September 2005, the Fourth Circuit reversed that decision and upheld Padilla's designation and detention as an enemy combatant based upon a factual record that had been stipulated to by the parties for the purposes of resolving the legal issue of President Bush's enemy combatant designation authority. *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005). On remand, the matter was dismissed as moot after Padilla was indicted on federal criminal charges and removed from military custody.

Thus, Padilla had a congressionally-enacted statutory remedy for challenging the lawfulness of his detention. As in *Western Radio*, the fact that the habeas statute provides no damage remedy or redress against Yoo personally, is not a ground for supplementing that remedy with a judicially-created money-damage claim. Just as

the APA was a basis for rejecting the *Bivens* action in *Western Radio*, the habeas statute provides "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages,'" 578 F.3d at 1125 (quoting at *Wilkie*, 551 U.S. at 550), in regard to Padilla's claim of unlawful military detention.

* * *

In sum, if Congress were to believe that additional avenues of recourse are necessary in cases such as this, it could enact appropriate legislation. Given the sensitivities of such claims, and the risk of deterring full and frank advice regarding the military's detention and treatment of those determined to be enemies during an armed conflict, however, this is a clear case where "special factors" strongly counsel against the recognition of a *Bivens* action. Accordingly, the district court erred in refusing to dismiss the *Bivens* claims here and its decision should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court in regard to the *Bivens* claims.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 5,780 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with WordPerfect-X4 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2009, I electronically filed the foregoing "BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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