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Dismissing *Padilla v. Yoo*: A Glass Half Empty?

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The Ninth Circuit correctly dismissed Jose Padilla's lawsuit against John Yoo, the former Department of Justice official who provided key analysis of legal questions arising from the war on terrorism. But being the traditionally liberal and oft-reversed Ninth Circuit, the court could not leave well enough alone and issued an opinion that casts doubt on the lawfulness of terrorist detention policies and opens the door to future lawsuits against officials responsible for developing and implementing national security policies. Though it reached the right result, the court's reasoning sets a dangerous precedent that may hinder future responses to attempted acts of terrorism. The Constitution assigns responsibility for national security to the political branches, and the courts should be far warier than the Ninth Circuit in second-guessing their decisions.

Background. Jose Padilla is currently serving a lengthy sentence as a result of his conviction for various terrorism-related offenses. Prior to being detained by the federal government, he was, as the Fourth Circuit Court of Appeals recently found, "a member of Al Qaeda, who has been an active participant in that organization's terrorist mission since the late 1990s."[1] From 2002 to 2006, Padilla was detained as an enemy combatant and held in the Naval Consolidated Brig in Charleston, South Carolina. During that time, he was the subject of legal proceedings to obtain his release that twice rose to the Supreme Court. In 2006, he was transferred to civilian custody in Florida, where he was subsequently tried and convicted.

With two lawsuits undertaken by civil liberties activists and law school clinics, Padilla has again engaged the federal courts in contesting his detention as an enemy combatant. The first, against former Secretary of Defense Donald Rumsfeld and various members of the military chain of command, was dismissed by the Fourth Circuit in January. The second was against John Yoo for the legal advice he provided as an attorney in the Office of Legal Counsel (OLC).

Padilla alleged that Yoo, though his legal memoranda, shaped the government's response to the 9/11 attacks and authorized Padilla's unlawful detention and treatment as an enemy combatant—in more specific terms, essentially the same arguments that Padilla raised in his prior habeas petitions. Padilla's complaint sought a declaration that Yoo had violated his rights under the Constitution and the Religious Freedom Restoration Act (by impeding his practice of Islam while detained) and monetary damages from Yoo personally. The district court denied Yoo's motion to dismiss, holding that the law authorized a damages suit against national security officials, that Padilla had adequately alleged Yoo's personal responsibility for the alleged violations of Padilla's rights, and that Padilla's rights had been clearly established at the time of his detention. This was the decision on appeal to the Ninth Circuit.

"Special Factors Counseling Hesitation." Padilla's lawsuit against Yoo is but one of several seeking monetary damages from national security officials for carrying out their duty to protect the

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nation. Each relies on the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents*. *Bivens* held that an ordinary criminal law search and seizure that violates the Fourth Amendment can give rise to a lawsuit for monetary damages against the offending federal officials, even in the absence of a statute authorizing such relief.[2] Since *Bivens*, plaintiffs have sought to hold federal officials liable for violations of a myriad of rights, but the Court has applied the doctrine in a different context only once, in a 1980 decision that authorized liability for violation of a federal prisoner's Eighth Amendment right to be free of cruel and unusual punishment.[3]

Recognizing that *Bivens*-type liability raises severe separation-of-powers concerns—because it intrudes on Congress's power to define the law and, potentially, the executive's discretion in carrying it out—the Court has limited its applicability in several respects. First, in general, *Bivens* is wholly inapplicable in areas where Congress has created alternative remedies. Similarly, *Bivens* will not apply where there are "special factors counseling hesitation," such as delegation of a particular function to one of the other branches or the needs of military discipline.[4] Second, because "each Government official … is only liable for his or her own misconduct," "a plaintiff must plead that each Government official defendant, through the official's own individual actions, has violated the Constitution," and must do so with "sufficient factual matter … to state a claim to relief that is plausible on its face." Under this standard, it is insufficient to plead facts that are "merely consistent with a defendant's liability."[5] Third, even if the plaintiff's rights have been violated, an official will only be held liable where "the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[6] Where the right is not so established, the official may claim "qualified immunity."

Based on these principles, the Court has declined to apply *Bivens*-type liability to those responsible for the nation's security. In *Chappell v. Wallace*, the Court rejected liability where soldiers claimed that their superiors had discriminated against them based on their race. The Constitution, explained the Court, assigned responsibility for military discipline to Congress, and "Congress has exercised its plenary constitutional authority over the military." Moreover, "The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." Thus, "special factors" counseled strongly against a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers.[7] In *United States v. Stanley*, the Court relied on the logic of *Chappell* to bar all lawsuits incident to military service, on the grounds that the Constitution confers authority over the Army, Navy, and militia upon the political branches and that judicial intermeddling in that field risks ruinous consequences.[8] Most recently, the Court rejected a claim alleging that former Attorney General John Ashcroft had abused material witness warrants in violation of the Fourth Amendment, on qualified immunity grounds. Federal officials, the Court explained, need "breathing room to make reasonable but mistaken judgments about open legal questions."[9]

In short, while the Court has not overturned *Bivens*, it has effectively confined it to that case's circumstances, on the basis that the courts are ill-suited to make the types of policy determinations that its approach requires.

The Fourth Circuit properly "approach[ed] Padilla's invitation to imply a *Bivens* action" against national security and military officials "with skepticism." Padilla, the court observed, "seeks quite candidly

1. Lebron v. Rumsfeld, 670 F.3d 540, 544 (4th Cir. 2012).
2. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
3. Carlson v. Green, 446 U.S. 14 (1980).
4. *See, e.g.*, United States v. Stanley, 483 U.S. 669 (1987).
5. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
6. Pearson v. Callahan, 555 U.S. 223 (2009).
7. Chappell v. Wallace, 462 U.S. 296 (1983).
8. *Stanley*, 483 U.S. at 679.
9. Ashcroft v. Al-Kidd, __ U.S. __, 131 S. Ct. 2074 (2011).

to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values"—a question well beyond any court's competence. Merely litigating Padilla's claim, the court explained, "risks interference with military and intelligence operations on a wide scale." And imposing liability would leave future officials "shadowed ... by the thought that [they] would face prolonged civil litigation and potential personal liability" for discharging their duties on behalf of the nation. The judicial branch, it concluded, "should not proceed down this highly problematic road in the absence of affirmative action by Congress."[10]

Throwing Open the Door. If only the Ninth Circuit shared the Fourth Circuit's justified skepticism as to the appropriateness of judicial intermeddling in the most sensitive matters of national security policymaking and practice. Rather than address the *Bivens* question head on, or at least the question of whether a government attorney may be held liable for his legal advice, the court turned instead to the far narrower question of qualified immunity. Padilla's rights as a detainee, it held, were not clearly established during the period from 2001 to 2003, when Yoo was at OLC. Nor was it clearly established that his treatment amounted to cruel and unusual punishment in violation of the Fourth Amendment. On that basis, and without fully absolving Yoo of constitutional violation, the court held that Yoo could not be held liable.

The court, however, strongly implies that its decision is limited to its precise terms. Decisions after 2003, it suggests, may have established the contours of detainees' rights. And it states, in a footnote, that "[r]ecent decisions ... offer support" for the proposition that Padilla's alleged treatment rose to the level of torture. In this way, the court opens the door to future lawsuits against federal attorneys and officials responsible for formulating national security policy. Moreover, by failing to decide the constitutional issues definitively, it seemingly tars Yoo's conduct but effectively precludes him from challenging its reasoning. And it added insult to this injury by gratuitously, and erroneously, impugning his competence and professional standards.

While there may never be another case precisely like Padilla's, the Ninth Circuit's decision nonetheless leaves the law in an uneasy state. It speaks to the constitutional minimums governing the treatment of individuals detained as enemy combatants, putting officials and potentially military personnel at risk of personal liability, without actually deciding the issue in a manner that likely forecloses further appeals. It strongly implies, without so much as holding, that a government attorney may be held personally liable for others' decisions based on his legal advice. And its too-reluctant reasoning leaves one with the firm impression that Padilla's rights were violated, by the wanton acts of Yoo and other officials, but that the court was unfortunately bound to rule as it did.

Bound, it was, and the court surely knew that any decision in favor of Padilla would invite rebuke by the Supreme Court. This may explain why the court did, at least, reach the proper result and dismiss Padilla's lawsuit. But it neither explains nor justifies the court's cynical approach.

Implications for the Country. The chief risk of applying *Bivens* in the national security context is that it will distort the decisions of those charged with our defense, fearful of personal liability for decisions made and carried out in good faith, leaving us more vulnerable to attack. Although the Constitution does not bar such liability, it definitively assigns responsibility for balancing the competing policy interests at stake to the political branches, not the courts—as the Supreme Court has repeatedly recognized. The Fourth Circuit's decision refusing to apply *Bivens* is a faithful application of these precedents. The Ninth Circuit's decision—though holding John Yoo not liable for any depredations suffered by Jose Padilla—is nearer an abdication of judicial duty.

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10. *Lebron*, 670 F.3d at 555.