IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JOSE PADILLA, et al.,	)	Case No. 2:07-410-HFF-RSC
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
DONALD H. RUMSFELD, et al.,	)	
	)	
Defendants.	)	

INDIVIDUAL FEDERAL DEFENDANTS' RESPONSE
TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

In their Notice of Supplemental Authority, Plaintiffs alerted the Court to the recent order of the United States District Court for the Northern District of California in the matter of *Padilla, et al. v. Yoo*, No. 08-00035, 2009 WL 1651273 (N.D. Cal. June 12, 2009). Plaintiffs noted that the Northern District of California rejected "several of the same arguments for dismissal" raised by the individual federal defendants in this case, including: 1) special factors counseling hesitation bar the *Bivens* remedy sought; 2) Plaintiffs have not adequately pleaded the defendants' personal involvement in the constitutional torts alleged; and 3) the defendants are entitled to qualified immunity because the constitutional violations alleged by Plaintiffs were not clearly established. However, contrary to Plaintiffs' implication, this single district court order does not warrant a rejection of the ample, well-supported by controlling authority arguments for the dismissal of Plaintiffs claims that have been made by the individual federal defendants in this matter. This is so for several reasons.

The *Yoo* court erred in its analysis of the special factors issue. That analysis suffers from the same faults the individual federal defendants identified in Plaintiffs' special factors arguments in this

case. *See* Individual Federal Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint ("MTD") at 13-25; Individual Federal Defendants' Reply to Plaintiffs' Opposition to Motion to Dismiss ("Reply") at 1-10. The *Yoo* court, like Plaintiffs in this matter, construed the special factors doctrine as being applicable only in the narrow factual circumstances of the particular Supreme Court cases in which the doctrine has been considered. *See*, *e.g.*, *Padilla, et al. v. Yoo*, 2009 WL 1651273, at *14 ("The circumstances presented to this Court do not concern federal personnel decisions, military discipline or justice, the denial of social security benefits, or the detention and interrogation of aliens abroad . . . These are the circumstances that have been found to counsel hesitation by the federal courts."). However, this construction of the special factors doctrine is incorrect because, as the individual federal defendants have shown in the briefing of their motion to dismiss, the Supreme Court has recognized that a wide range of factors may make it inappropriate for a federal court to create a *Bivens* remedy in a particular context. It is the principles underlying these decisions, and not their narrow holdings, that compels dismissal here. The *Yoo* court also erred in its failure to consider the collective weight of the special factors identified in *Yoo*. As shown in the individual federal defendants' briefs in this matter, this approach is wrong because even if a given factor is insufficient in itself to preclude a *Bivens* remedy, special factors are also considered in the aggregate. *See* Reply at 3.

The *Yoo* court also erred in its threshold determination that Padilla had no alternative remedy to a *Bivens* claim because habeas proceedings were not an "adequate" alternative remedy. As an initial matter, the individual federal defendants in this matter never argued that habeas, standing alone, was an adequate alternative remedy sufficient to preclude Plaintiffs' *Bivens* action. Rather, they merely noted that the fact that Padilla had, and extensively pursued, habeas relief was one

among many considerations which warranted caution in extending any individual capacity implied remedy here. In fact, as the individual federal defendants have shown in the briefing of their motion to dismiss, it is irrelevant whether a remedy available to Padilla can be considered to have been "adequate." *See* Reply at 1-2. It is the very existence of some remedy – whether it is considered to be adequate or inadequate – that may bar a *Bivens* claim. Moreover, the *Yoo* court found habeas to be an inadequate remedy because Padilla's habeas petition would not have been filed against the defendant in *Yoo*, a former Deputy Attorney General, but against the military commander in charge of the naval brig where Padilla was held. *See Padilla, et al. v. Yoo*, 2009 WL 1651273, at *11. That rationale, which in and of itself has never been endorsed by any court, cannot possibly apply in this case because the defendants include current and former military commanders of the brig where Padilla was held.

The *Yoo* court's analysis of the degree of personal participation necessary to overcome a claim of qualified immunity is completely inapplicable to the defendants in this case because this case involves different claims (or in some instances, a complete absence of allegations) of culpable personal conduct. As the Supreme Court recognized in *Ashcroft v. Iqbal*, No. 07-1015, 2009 WL 1361536 (S. Ct. May 18, 2009), *Bivens* liability is personal and based upon each defendant's *own* constitutional violations. The allegations offered by Plaintiffs against the individual federal defendants in this case do not survive the scrutiny mandated by the Supreme Court in *Iqbal*. Nor do Plaintiffs' allegations survive the scrutiny mandated by *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which requires more than the conclusory allegations of personal involvement and allegations consistent with lawful behavior offered by Plaintiffs in this case. Moreover, the *Yoo* court's finding of sufficient personal participation for the defendant in *Yoo* was premised on its

adoption of an unlimited "set in motion" theory of liability, pursuant to which a defendant's personal liability can be established by virtually any conduct that can be linked, however loosely or far removed, to an eventual violation committed by others. The governing caselaw, including the Supreme Court's recent decision in *Iqbal*, shows that the personal exposure of federal officials is not nearly so unbounded.

Finally, the *Yoo* court's qualified immunity analysis is fundamentally flawed for another reason. As a district court in the Ninth Circuit, the *Yoo* court did not have to (and in fact did not) recognize the precedential effect of the Fourth Circuit's decision in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006). However, *Padilla v. Hanft* is controlling precedent in this Circuit and, as the individual federal defendants showed in their briefs, the Fourth Circuit's decision in *Padilla v. Hanft* is dispositive for qualified immunity purposes here even if, as Plaintiffs and the *Yoo* court appear to assert, the Fourth Circuit was wrong. Contrary to the *Yoo* court's analysis, it is irrelevant to Plaintiffs' claims whether the facts regarding Padilla's designation and detention as an enemy combatant were litigated in *Padilla v. Hanft*. *See Padilla, et al. v. Yoo*, 2009 WL 1651273, at *11. Regardless of the process Padilla chose to challenge his enemy combatant designation, the government was entitled to detain him pending the outcome of that process. As the individual federal defendants in this matter have shown, it is of no fault of any of the defendants that the factual basis for Padilla's designation as an enemy combatant was never litigated. Moreover, even if there were deficiencies in the actual facts supporting Padilla's enemy combatant designation, Plaintiffs have alleged nothing that supports holding the named defendants personally responsible for any such deficiencies. At best, all Plaintiffs allege is that the defendants, like the Fourth Circuit, took as true the facts that were presented to them concerning Padilla's alleged

involvement in terrorist activity and, like the Fourth Circuit, determined that Padilla met the criteria for designation and detention as an enemy combatant based upon those facts. On that claim the Fourth Circuit's decision is preclusive.

CONCLUSION

The decision of the United States District Court for the Northern District of California is not binding on this court, contains numerous and critical errors, ignored controlling Supreme Court and other precedent, and for these reasons should not be followed here.

Dated: June 24, 2009

Respectfully submitted,

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