

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

ESTELA LEBRON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 2:07-cv-410-RMG
	)	
v.	)	
	)	
DONALD H. RUMSFELD, et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM OF LAW IN SUPPORT OF WILLIAM J. HAYNES II'S MOTION TO  
DISMISS BASED UPON ABSOLUTE STATUTORY IMMUNITY**

Defendant William J. Haynes II files this Memorandum in support of his Motion to Dismiss based upon absolute immunity conferred by 10 U.S.C. § 1054.

The fundamental threshold question presented by this case is whether a damages action is the appropriate means of enforcing limits on the military detention and interrogation of enemy combatants. For reasons explained in Defendants' briefs in support of their collective Motion to Dismiss, well-established Supreme Court precedent compels the conclusion that no damages claims lie under such circumstances and, in any event, Defendants are entitled to qualified immunity. This Memorandum explains that Mr. Haynes should be dismissed on the additional (and independent) ground that he is absolutely immune from suit for acts or omissions arising from the allegations in the Third Amended Complaint.

Mr. Haynes was sued in his individual capacity for actions allegedly taken years earlier in his role as the General Counsel of the Department of Defense. But Congress has broadly immunized Department of Defense attorneys from civil claims for damages caused by acts in connection with providing legal services while acting within the scope of the person's duties as

an attorney or member of a legal staff within the Department of Defense. *See* 10 U.S.C. § 1054 (2006). To the extent that Plaintiffs allege facts sufficient to satisfy *Iqbal*'s requirement to plead the personal participation of Mr. Haynes in any alleged constitutional violation, which they do not, *see* Defs.' Mot. Dismiss (Dkt. No. 94), at 27-38, all claims against Mr. Haynes must nevertheless be dismissed for this additional reason.

### PROCEDURAL AND FACTUAL BACKGROUND

1. In 2001, the President appointed William J. Haynes II to serve as General Counsel of the Department of Defense. The General Counsel is the chief legal officer of the Department of Defense. *See* 10 U.S.C. § 140(b) (2006). After being confirmed by the Senate, Mr. Haynes assumed this position in May 2001 and held it continuously until March 2008.

2. Less than four months after Mr. Haynes took office, nineteen terrorists associated with al Qaeda hijacked four airplanes and crashed three of them into public buildings they had targeted, including the Pentagon where Mr. Haynes's office was then located. *Padilla ex. rel. Newman v. Bush*, 233 F. Supp. 2d 564, 570 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d. Cir. 2003). The terrorists destroyed the World Trade Center towers and seriously damaged the Pentagon, killing almost 3,000 people in that day's coordinated attacks. *Id.* On September 14, 2001, by reason of those attacks, the President declared a state of national emergency. *Id.* Four days later Congress passed a joint 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 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"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

3. On May 8, 2002, Padilla arrived at the Chicago airport from Zurich carrying \$10,526 and a contact list written in Arabic that included information about suspected al-Qaeda associates. *See* Ex. A (Appellee's Br., *United States v. Jayyousi*, No. 08-10494 (11th Cir. June 30, 2009)), at 24. When questioned by FBI agents, Padilla was evasive and ultimately refused to answer further questions about the suspicious circumstances under which he entered the United States. *Id.* FBI agents then arrested Padilla in Chicago O'Hare International Airport pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. Third Am. Compl. ("3A Compl.") ¶ 35. Padilla was transferred to New York and appointed counsel.

4. On June 9, 2002, the President directed the Secretary of Defense to detain Padilla as an enemy combatant. *See* 3A Compl. Ex. 3 (6/9/02 Presidential Order). The President found that Padilla "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war," "engaged in conduct that constituted hostile and war-like acts," "represents a continuing, present and grave danger to the national security of the United States," and that detention of 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." *Id.* ¶¶ 2, 3, 5. At the President's direction, Department of Defense officials took control of Padilla and transferred him to the Naval Consolidated Brig, Charleston, South Carolina.

5. Two days later, on June 11, 2002, Padilla's attorney, Donna Newman, filed a habeas petition challenging the designation and detention of Padilla as an enemy combatant. *See* 233 F. Supp. 2d at 571-72. The United States filed in the Southern District of New York a redacted version of the President's written findings along with a public and sealed declaration of

a Defense Department official (Michael H. Mobbs)<sup>1</sup> detailing certain underlying facts. On December 4, 2002, the Southern District of New York held that the President is authorized under the Constitution and by Congress to detain enemy combatants in Padilla's circumstances and that the Court would evaluate the factual basis for Padilla's detention under the deferential "some evidence" standard proposed by the government. *See id.* at 569. Although the court refused to hold that Padilla was constitutionally entitled to counsel, it ordered as a matter of judicial discretion that he be permitted access to counsel to aid in the review of his habeas petition. *See id.* at 599–605.

6. On December 18, 2003, a divided panel of the Second Circuit reversed. Conceding that the government's evidence supplied "ample cause to suspect Padilla of involvement in a terrorist plot," 352 F.3d 695, 699 n.2, the majority held that the President nevertheless lacked authority to detain U.S. citizens captured within the United States regardless of the factual circumstances. *See id.* at 724. According to the majority, the President lacked inherent constitutional authority to detain U.S. citizens, and Congress did not authorize such detentions in the AUMF.

7. The government filed a petition for writ of certiorari in the U.S. Supreme Court seeking to reverse the Second Circuit's jurisdictional and merits rulings on Padilla's habeas petition. The Supreme Court granted certiorari on February 20, 2004. *See Rumsfeld v. Padilla*, 540 U.S. 1173 (2004). On June 28, 2004, without reaching the merits, the Supreme Court vacated the Second Circuit's decision, holding that Padilla's attorneys had filed in the wrong court. *See Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004). On the same day, the Supreme Court

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<sup>1</sup> On December 14, 2010, Plaintiffs dismissed numerous defendants from this action including Mr. Mobbs and John Ashcroft, Mack D. Keen, Dr. Craig Noble, Sandy Seymour, Stephanie Wright, and John Does 1-48.

issued the landmark decision *Hamdi v. Rumsfeld*, holding, contrary to the Second Circuit's divided panel in *Padilla*, that the AUMF authorizes detention of U.S. citizens who take up arms against the United States. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). In so ruling, the Supreme Court rejected application of the key authority relied upon by the Second Circuit and made clear that the President is empowered to detain militarily U.S. citizens who take up arms against the United States. *See id.* at 523.

8. Four days later, on July 2, 2004, Padilla re-filed his habeas petition in the United States District Court for the District of South Carolina. *See* Case No. 04-2221 (Dkt. No. 1) (D.S.C.). On August 30, 2004, the United States filed the declaration of a Defense Department official setting forth facts justifying Padilla's continued military detention, including that Padilla took up arms against the United States in Afghanistan in addition to plotting terrorist attacks within the United States in connection with al Qaeda. *See* Ex. B (8/27/04 Decl. of Jeffrey N. Rapp, No. 04-2221 (D.S.C.)). During a September 14, 2004 status conference, this Court offered to convene a hearing on the factual basis of Padilla's detention pursuant to the Supreme Court's direction in *Hamdi*. *See* Ex. C (9/14/04 Hr'g Tr., No. 04-2221 (D.S.C.)), at 20-22. After having the opportunity to review the government's evidence, Padilla's counsel declined this Court's invitation to mount a factual challenge, choosing instead to mount a broad attack on the President's legal authority to detain U.S. citizens captured within the United States. *See id.* at 20-24, 59-65. This Court clearly and repeatedly cautioned Padilla's counsel about the consequences of Padilla's tactical decision, including that he could not subsequently complain about further delay in obtaining such a hearing. *See id.* Confirming his client understood and accepted these consequences, Padilla's counsel subsequently wrote on September 16, 2004 that

Padilla “agrees that the ‘authority’ issue be addressed first as proposed by counsel.” Ex. D (9/16/04 Letter from Andrew G. Patel to Judge Robert Carr, No. 04-2221 (D.S.C.)).

9. On February 28, 2005, this Court held that Padilla’s military detention was unlawful. *See Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005). The Court read *Hamdi* as limited to captures on foreign battlefields and distinguished Padilla’s case as involving capture within the United States. *Id.* at 685-86. On September 9, 2005, a unanimous panel of the Fourth Circuit reversed. *See Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). The Fourth Circuit held that the AUMF authorized the President to detain U.S. citizens who commit acts that fall within the scope of the AUMF, wherever found or captured, and that the place of capture is irrelevant to the analysis. *See id.* at 393. Agreeing with the Southern District of New York, Judge Wesley’s dissent in the Second Circuit, and the *Hamdi* plurality, the unanimous Fourth Circuit held, in a decision that binds this Court, that the President is authorized by the AUMF to detain U.S. citizens under the circumstances established by the evidence submitted by the government, to which Padilla stipulated for the purposes of the appeal. *See id.* at 397.

10. On November 22, 2005, a grand jury indicted Padilla in Miami for providing material support to terrorism. *See Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006). The United States sought permission to transfer Padilla to Miami for trial, which Padilla did not oppose. The Supreme Court granted permission, and Padilla was transferred to the custody of the Department of Justice. *Id.*<sup>2</sup>

11. On November 29, 2005, in light of Padilla’s removal from the District of South Carolina and indictment on criminal charges in the Southern District of Florida, this Court

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<sup>2</sup> On August 16, 2007, a jury in Miami convicted Padilla of all charges for which he was tried. *See Ex. A*, at 2–3. United States District Judge Marcia Cooke sentenced Padilla to more than 17

administratively closed Padilla's habeas case without objection from Padilla or his counsel. The Supreme Court subsequently denied Padilla's petition for writ of certiorari in connection with his habeas case. 547 U.S. 1062 (2006). Padilla did not subsequently move to reopen his habeas case. *See* Docket, 04-2221 (D.S.C.).

12. On February 9, 2007 and May 7, 2007, Plaintiffs filed the initial Complaint and First Amended Complaint in this action, neither of which named Mr. Haynes. On May 30, 2008, Plaintiffs filed the Second Amended Complaint, which added three defendants, including Mr. Haynes. On July 23, 2008, Plaintiffs filed the Third Amended Complaint, which is the operative complaint. The Third Amended Complaint named Mr. Haynes and 11 other present and former government officials in their individual capacities for damages arising from Padilla's designation and detention as an enemy combatant. On December 14, 2010, Plaintiffs voluntarily dismissed six named Defendants and John Does 1-48.

13. Mr. Haynes is alleged to have been the "General Counsel to the Department of Defense," and is alleged to have been a member of a group of lawyers described as a "War Council" in a book authored by Jack Goldsmith. 3A Compl. ¶¶ 15, 47. These allegations involve consultations among government lawyers in which Mr. Haynes participated as Department of Defense General Counsel. Rather than relating to Padilla specifically, Plaintiffs' allegations are directed towards critiquing Mr. Haynes's activities as General Counsel more generally. For example, Haynes is alleged to have:

- directed the drafting of or received various legal memoranda on a variety of topics of general applicability prepared by the Office of Legal Counsel, which Plaintiffs assert were "crafted to provide a veneer of legality." 3A Compl. ¶¶ 49-50;

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years confinement. *Id.* Padilla appealed his conviction, *id.*, and the United States appealed his sentence, *id.* at 26.

- provided the Secretary of Defense with a memorandum recommending certain interrogation techniques requested for use by the command at Guantanamo Bay be approved and others not be approved. 3A Compl. ¶¶ 65-68. Plaintiffs assert that this memorandum was not subjected to what the Plaintiffs characterize as “the normal process of consultation with other military components.”<sup>3</sup> *Id.*;
- visited Guantanamo Bay and the South Carolina detention facility along with other “high-ranking government lawyers” who received a “briefing in connection with Padilla’s detention.” 3A Compl. ¶¶ 62-63;
- participated in a Working Group on Detainee Interrogations in the Global War on Terrorism convened at the direction of the Secretary of Defense and that Mr. Haynes allegedly instructed the Working Group to consider legal memoranda provided by the Department of Justice’s Office of Legal Counsel to be binding on the executive branch and that Mr. Haynes allegedly “concealed the final conclusions of the Working Group” from some participants who allegedly disagreed with some of its conclusions. 3A Compl. ¶¶ 73-77.

14. In addition, Plaintiffs lodge undifferentiated and implausible conclusory allegations made on information and belief against a group that Plaintiffs label the “Senior Policy Defendants,” a group that purportedly includes Mr. Haynes. Plaintiffs allege that this group “conspired to bring about a regime of extreme and unlawful detention and interrogation of suspected enemy combatants, to cloak those practices with the appearance of legality and to immunize from prosecution those who broke the law by implementing them, and then authorized or permitted the application of those unlawful policies even to U.S. citizens held on U.S. soil.” 3A Compl. ¶ 5. Mr. Haynes is alleged, upon information and belief, to have known about or participated with other governmental lawyers (including others who have not been sued) in advising decision-makers about a process whereby enemy combatants could be assessed and

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<sup>3</sup> This memorandum, which is attached to the Third Amended Complaint, applies only to interrogations of non-citizens conducted at Guantanamo Bay and was in response to a request for additional interrogation techniques raised by the command. *See* 3A Compl. Ex. 13. It is not directly applicable to Padilla, who does not allege ever having been detained at Guantanamo.

detained. 3A Compl. ¶ 36. Plaintiffs' counsel assert that this process was unlawful because it was "extra-judicial" and "ex parte." *Id.*<sup>4</sup>

15. Similarly, Plaintiffs set forth several allegations specific to Mr. Haynes but involving detainees other than Padilla. For example, Plaintiffs allege that Mr. Haynes:

- instructed those responsible for interrogating John Walker Lindh in 2001 to "take the gloves off." 3A Compl. ¶ 58;
- instructed the Norfolk Brig to deny access to detainee Hamdi and withhold his legal correspondence. 3A Compl. ¶ 109.

16. At oral argument, Plaintiffs' counsel failed to identify any allegation in the Third Amended Complaint involving personal participation of Mr. Haynes in the alleged unconstitutional treatment of Padilla. In fact, they conceded that their theory is "a species of supervisor liability" in which the Senior Policy Defendants were responsible because in their respective roles as government officials they generally were "involved in setting interrogation policies and conditions of confinement for other detainees" or "knew what was going on at the brig, and they permitted it to continue." Ex. E (1/29/09 Hr'g Tr.), at 104-05.

### ARGUMENT

Mr. Haynes enjoys statutory immunity for acts and omissions in connection with legal services provided as General Counsel of the Department of Defense, a position he held throughout Padilla's military detention. In addition to the grounds for dismissal collectively asserted by all Defendants, the claims against Mr. Haynes must be dismissed because those

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<sup>4</sup> Plaintiffs' undifferentiated allegations of mistreatment in connection with Padilla's military detention, even if taken as true for the purposes of this Motion, do not remove conduct from the scope of employment. *See Rasul v. Myers*, 563 F.3d 527, 528-29 & n.1 (D.C. Cir.) (per curiam), *cert denied*, 130 S. Ct. 1013 (2009) (holding that allegations of abuse by military interrogators are within the scope of the interrogator's employment).

claims rest on allegations that arise in connection with Mr. Haynes's performance of duties as General Counsel.

1. In 1976, Congress broadly immunized military medical personnel ("any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel") from damages actions based on acts or omissions in the performance of medical, dental, or related health care functions. *See* Pub. L. No. 94-464, 90 Stat. 1985 (1976). This immunity was based upon an earlier-enacted provision covering employees of the Public Health Service. *See* 42 U.S.C. § 233(a) (2006). In the mid-1980s, Congress sought to "provide protection for Department of Defense lawyers similar to that provided for [military] doctors"<sup>5</sup> who are insulated "fully from any personal liability" arising out of the performance of their official duties.<sup>6</sup> In 1987, Congress extended such protection to military lawyers by making a tort claim against the United States the "exclusive" remedy for any "damages . . . caused by the negligent or wrongful act or omission" of attorneys and legal staff within the Department of Defense "in connection with providing legal services while acting within the scope of the person's duties or employment." 10 U.S.C. § 1054(a).<sup>7</sup> Section 1054 broadly immunizes Department of Defense attorneys and legal staff from "*any other civil action or proceeding by reason of the same subject matter.*" *Id.* (emphasis added). This plain language immunizes Mr. Haynes not only from common law tort claims but also the constitutional and statutory claims at issue here. Indeed, the Supreme Court recently held as much in construing indistinguishable language in Section 1054's

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<sup>5</sup> S. Rep. No. 99-331, at 543 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6413, 6602.

<sup>6</sup> S. Rep. No. 94-1264, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 4443, 4444; *see* 10 U.S.C. § 1089 (immunizing military doctors).

<sup>7</sup> The statutory immunity conferred by Congress is not limited to actions undertaken by lawyers; nor is it limited to the provision of legal services. Rather, statutory immunity is extended to all

statutory forerunner, 42 U.S.C. § 233(a). *See Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (42 U.S.C. § 233 immunizes PHS officials from *Bivens* claims).

2. The face of the Third Amended Complaint makes clear that Plaintiffs' claims are predicated on actions Mr. Haynes allegedly undertook in his capacity as General Counsel of the Department of Defense. *See* 3A Compl. ¶ 15. Indeed, during the entirety of Padilla's military detention, Mr. Haynes served exclusively as the chief legal officer of the Department of Defense. Mr. Haynes assumed the duties of General Counsel in May 2001—one year before Padilla was detained in Chicago—and served in that position for nearly seven years until he left government service in March 2008—more than two years after Padilla was transferred, without objection, to the Department of Justice for trial.

a. The statutory authority for the General Counsel of the Department of Defense makes the General Counsel “the chief legal officer of the Department,” and charges him or her with performing “such functions as the Secretary of Defense may prescribe.” 10 U.S.C. § 140(b) (2006). Department of Defense directives detail the broad scope of the General Counsel's duties as the chief legal officer. For example, the General Counsel is tasked with: (1) providing advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within, or involving, the Department of Defense; (2) providing legal advice to Office of the Secretary of Defense (OSD) organizations and, as appropriate, other DoD Components; (3) coordinating significant legal issues before the Department of Justice, including litigation involving the Department of Defense and other matters in which the Department of Defense has an interest; (4) establishing DoD policy on general legal issues, determining the DoD position on specific legal problems, and resolving disagreements within the Department of Defense on such

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members of Department of Defense legal staffs, and is available for any negligent or wrongful act or omission *in connection with* the provision of legal services. 10 U.S.C. 1054.

matters; and (5) providing for guidance in, and coordination of, significant legal issues in international law. *See* Ex. F (Department of Defense Directive 5145.01).

b. Plaintiffs' claims are based upon the implausible theory that Mr. Haynes and other government officials aided in the creation of a "regime" of detention and interrogation cloaked with "the appearance of legality" based upon the legal advice of Mr. Haynes and other government lawyers. *See* 3A Compl. ¶¶ 5, 15. Plaintiffs note, for example, that Mr. Haynes gave legal advice to Secretary Rumsfeld concerning interrogation techniques applicable to Guantanamo. *See id.* ¶ 65. Plaintiffs allege that Mr. Haynes later convened a working group that included military lawyers to reevaluate the issues, *see id.* ¶ 73, and that the working group subsequently produced a report recommending re-approval of interrogation techniques previously approved for detainees held outside the United States, *see id.* ¶ 78. Plaintiffs further allege the working group was instructed that the legal opinions issued by the Department of Justice Office of Legal Counsel (OLC) should be viewed as binding on the Department of Defense.<sup>8</sup> *See id.* ¶ 74. To the extent such allegations relate to actions by Mr. Haynes, such actions would have been undertaken in connection with providing legal advice and services as General Counsel of the Department of Defense. The activities Mr. Haynes is alleged to have participated in—drafting legal memoranda, giving advice to the Secretary or DOD components, coordinating legal issues including those relating to detainees with DOJ and DOD—fall well within the General Counsel's statutory and regulatory responsibilities to provide legal services as chief legal officer of the Department of Defense. As such, Plaintiffs' claims against Mr. Haynes are barred by Section 1054, and Mr. Haynes must be dismissed.

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<sup>8</sup> Such an instruction would have been accurate. *See, e.g., Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010) (observing that "OLC opinions are generally binding on the Executive branch"), *cert denied*, 131 S. Ct. 74 (2010).

**CONCLUSION**

For the foregoing reasons, the Court should dismiss Mr. Haynes from this case.

Respectfully Submitted,

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