

## Where Lawfare Meets Lawsuit in the Case of *Padilla v. Yoo*

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A strict observance of the written laws is doubtless *one* of the high virtues of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.<sup>1</sup>

### I. INTRODUCTION

According to John Locke, a leader's first duty is to protect the country, not to follow the law.<sup>2</sup> On September 12, 2001, a day after the events of September 11, during a National Security Council meeting, then-President George W. Bush told John Ashcroft, "Don't ever let this happen again."<sup>3</sup> The message could not have been clearer: "The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal."<sup>4</sup>

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1. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 80 (2009) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) in *THE WRITINGS OF THOMAS JEFFERSON* 418 (Andrew A. Lipscomb ed., 1903)) (emphasis in original).

2. *Id.* at 80–81.

3. *Id.* at 74–75 (quoting JOHN ASHCROFT, *NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE* 130 (2006)).

4. *Id.* at 81.

Lawyers solve problems, however, by looking back rather than by looking forward.<sup>5</sup> Typically, when presented with a legal problem, an attorney must apply the current law to the facts at hand. Indeed, even at the early stages of legal analysis, the lawyer may have a particular theory that he or she hopes to prove using the existing law. Yet, however thought-out and creative a particular theory is, the lawyer, especially a government attorney writing opinions that affect the constitutional rights of citizens, is not permitted to misconstrue the law to fit the theory. John Yoo, an attorney in the Office of Legal Counsel (OLC) who was largely responsible for authoring the infamous “torture memos,” misconstrued, twisted, and bent existing law to fit an illegitimate legal theory—that the use of harsh interrogation techniques would not constitute torture.

After the terrorist attacks on September 11, 2001, the Executive Branch relied on the OLC for unprecedented legal advice on how to deal with issues of national security. Because the Executive Branch desired to operate within the confines of the law, it called upon government attorneys to find an optimal balance between protecting the country and protecting the country’s laws. According to Senator Bob Graham, “[W]e need excellent, aggressive lawyers who give sound, accurate legal advice . . . that [allows] the operators [to] do their jobs quickly and aggressively within the confines of law and regulation.”<sup>6</sup> Because the President’s power to act must be authorized by an act of Congress or the Constitution itself,<sup>7</sup> a team of lawyers, dubbed the “War Council,” drafted a series of memoranda with the goal of outlining the constitutional grounds for President Bush’s actions in the War on Terror.<sup>8</sup>

The decision to intimately involve lawyers in national-security strategy, however, is not without consequences, resulting in concerns about the use of lawfare. Lawfare is defined as “the use of the law as a weapon of war.”<sup>9</sup> Proponents of lawfare use it to obtain moral high ground over the enemy and to intimidate heads of state from acting out of fear of prosecution for war crimes.<sup>10</sup> Al-Qaeda training manuals, for

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5. *See id.* at 133.

6. *Id.* at 92.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (holding that the President’s power to issue an executive order must originate from an act of Congress or the Constitution).

8. *See* John Schwartz, *Judge Allows Civil Lawsuit Over Claims of Torture*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/14/us/politics/14yoo.html> (discussing how the War Council helped shape President Bush’s policy in the war on terrorism by authoring memoranda that authorized the harsh treatment of detainees).

9. Brooke Goldstein & Aaron Eitan Meyer, *Legal Jihad: How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT’L & COMP. L. 395, 395 (2009) (citing David B. Rivkin & Lee A. Casey, *Lawfare*, WALL ST. J. (Asia), Feb. 23, 2007, <http://www.onlinewsj.com/article/SB117220137149816987.html>).

10. *Id.*

instance, instruct readers that, if captured, they should file claims of torture or other abuse regardless of whether such abuse actually occurred.<sup>11</sup>

“Legal jihad” is another type of lawfare used to describe Islamist organizations that file lawsuits in American and foreign courts with the purpose of punishing those who engage in public discourse about radical Islam.<sup>12</sup> The lawsuits are often baseless—filed merely to intimidate defendants.<sup>13</sup> For instance, the Council on American Islamic Relations sued Cass Ballenger, a former U.S. Congressman, for reporting the group to the CIA and FBI for allegedly raising funds for Hezbollah.<sup>14</sup> Lawfare is not limited to American courts. For instance, because the United Kingdom’s libel laws are plaintiff-friendly, as opposed to America’s defendant-friendly libel laws, the House of Lords established a government panel to look into the possibility of amending its laws to make it tougher for radical Islamic groups who bring defamation suits in Britain to intimidate writers.<sup>15</sup>

With respect to the War on Terror, lawfare creates a fear that judicially created remedies authorizing damages “would invite enemies to use our own federal courts to obstruct the Armed Forces’ ability to act decisively and without hesitation.”<sup>16</sup> Because of the fear that our enemies would use our court system against our country’s government actors, Yoo defined torture so narrowly that the success of any prosecution or lawsuit alleging torture was unlikely. Authors of the OLC memoranda thus sought to find a way to circumnavigate the court system entirely. As Yoo wrote in his book, *War by Other Means: An Insider’s Account of the War on Terror*,<sup>17</sup> he “developed an extra-judicial, ex parte assessment of enemy combatant status followed by indefinite military detention, without notice of opportunity for a hearing of any sort. . . completely preclud[ing] judicial review of the designation.”<sup>18</sup>

The OLC memoranda and the use of lawfare formed the basis of Jose Padilla’s recent lawsuit. Padilla, an American citizen whom Presi-

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11. *Id.* at 395–96.

12. Brooke Goldstein & Aaron Eitan Meyer, *How Islamist Lawfare Tactics are Targeting Free Speech*, THE COUNTER TERRORIST, Feb.–Mar. 2009, at 14, 16, available at <http://www.thecounterterroristmag.com/pdf/Goldstein.Lawfare.lores.pdf>.

13. *Id.*

14. *Id.*

15. Alan Dershowitz & Elizabeth Samson, *The Chilling Effect of “Lawfare” Litigation*, GUARDIAN (U.K.), Feb. 9, 2010, <http://www.guardian.co.uk/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups>.

16. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007).

17. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2006).

18. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1014–15 (N.D. Cal. 2009) (citing Plaintiff’s First Amended Complaint ¶ 36).

dent Bush designated an enemy combatant<sup>19</sup> in 2002, sued John Yoo<sup>20</sup> for the alleged abuse he suffered as a result of the memos Yoo authored.<sup>21</sup> Notably, Padilla's capture was the impetus for two memoranda written by Yoo. The suit posed a question originally addressed by our Founding Fathers, which was how to balance fighting a war against terror—at home and abroad—with fighting a war using tactics of terror.<sup>22</sup> Determining the proper role of the Judiciary in such an inquiry presents another complicated legal question—is it proper to exclude the Judiciary from national-security issues due to the fear that enemy combatants will use the courts against the Executive Branch? While courts should defer to the coordinate branches of government with respect to the “core strategic matters of war making,”<sup>23</sup> the Supreme Court has clearly held that a “state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”<sup>24</sup>

This Note argues that, despite the concern that the use of lawfare threatens American national-security interests, *Padilla v. Yoo* was decided correctly, both in its legal reasoning and in the appropriateness of the Judiciary's intervention in a domestic question of constitutional rights. Part II examines Padilla's capture and detention, as well as the development of the torture memos. Part III discusses the constitutional violations alleged in *Padilla*. Part IV suggests that, despite the use of lawfare, the Judiciary properly adjudicated a domestic-affairs issue and acted within its authority in not deferring to the coordinate branches of government. Part V analyzes the trial court's reasoning in denying Yoo's qualified-immunity defense. Finally, Part VI summarizes the balance government lawyers seek to achieve and the integral role of the Judiciary in that process.

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19. An enemy combatant is “[a] combatant captured and detained while serving in a hostile force during open warfare.” BLACK'S LAW DICTIONARY (9th ed. 2009).

20. Elaine Cassel, *Jose Padilla's Suit Against John Yoo: An Interesting Idea, But Will It Get Far?*, FINDLAW, Jan. 14, 2008, <http://writ.corporate.findlaw.com/cassel/20080114.html>. Attorneys working with the Lowenstein International Human Rights Clinic at Yale Law School filed the civil action on behalf of Padilla against John Yoo. *Id.* Ironically, Yoo is a Yale Law School graduate. *Id.*

21. *Padilla*, 633 F. Supp. 2d at 1012.

22. *Id.*

23. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (“While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”).

24. *Id.* at 536.

## II. THE CONFLUENCE OF THE TORTURE MEMOS AND THE CAPTURE AND DETENTION OF JOSE PADILLA

After Padilla was imprisoned as an enemy combatant, government officials attempted to find constitutional validity for harsh interrogation methods. Padilla remained in solitary confinement for three years with no charges filed against him; however, in 2005, criminal charges were suddenly filed.<sup>25</sup> On August 16, 2007, a jury convicted Padilla and two codefendants of conspiracy to murder, kidnap, and maim people in a foreign country,<sup>26</sup> conspiracy to provide material support for terrorists, and providing material support for terrorists.<sup>27</sup> On January 22, 2008, Padilla was sentenced to seventeen years and four months<sup>28</sup> in the Federal Maximum Security Prison in Florence, Colorado.<sup>29</sup> This Part discusses the circumstances of Padilla's capture, the conditions of his confinement prior to his civil suit against Yoo, and the development of the torture memos, which as noted above were drafted in part based on Padilla.

### A. "This guy Padilla's a bad guy."<sup>30</sup>

Jose Padilla, later known as Abdullah al-Muhajr, was born in Brooklyn and raised with his four siblings in Chicago, where he began drinking and flashing gang symbols in his early teens.<sup>31</sup> When he was

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25. *Times Topics: Jose Padilla*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/p/jose\\_padilla/index.html?scp=1-spot&sq=jose%20padilla&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html?scp=1-spot&sq=jose%20padilla&st=cse) (last modified Mar. 6, 2009).

26. See Jeff St. Onge, *Appeals Court Renews Charge Against Padilla*, N.Y. SUN, Jan. 31, 2007, <http://www.nysun.com/national/appeals-court-renews-charge-against-padilla/47699/>. District Court Judge Marcia Cooke in Miami dismissed the charge of conspiracy to murder, kidnap, and maim because it charged Padilla twice for the same conduct. *Id.* The Court of Appeals for the Eleventh Circuit, however, reinstated the charge. *Id.*

27. *Id.*

28. Associated Press, *Jose Padilla Sentenced on Terrorism Charges*, MSNBC, Jan. 22, 2008, <http://www.msnbc.msn.com/id/22784470/>.

29. Kiely Lewandowski, *Padilla Sent to Colorado "Supermax" Prison to Serve Out Terrorism Conspiracy Sentence*, JURIST, Apr. 19, 2008, <http://jurist.law.pitt.edu/paperchase/2008/04/padilla-sent-to-colorado-supermax.php>. See also Peter A. Talevich, Note, *During and in Relation to: How the Ninth Circuit Rewrote a Statute in the Case of the Millennium Bomber*, 32 SEATTLE U. L. REV. 477, 481 n.29 (2009) (citing Marianne Vollers, *Inside Bomber Row*, TIME, Nov. 5, 2006, at 36-40, available at <http://www.time.com/time/magazine/article/0,9171,1555145,00.html>) ("The inmate list of ADX Florence, as it is known, is a veritable 'who's who' of terrorists involved in attacks against American interests."). In addition to Padilla, the prison also holds Unabomber Ted Kaczynski; Oklahoma City Federal Building accomplice Terry Nichols; the mastermind of the first attack on the World Trade Center, Ramzi Yousef; al-Qaeda shoe bomber Richard Reid; and September 11 conspirator Zacharias Moussau. *Id.*

30. Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, <http://www.nytimes.com/2004/04/25/us/terror-suspect-s-path-from-streets-tobrig.html?pagewanted=all> (quoting President Bush as saying "this guy Padilla's a bad guy"). This Part draws extensively from Sontag's article.

31. *Id.*

fourteen, Padilla and a friend were drinking on a street corner and decided to rob a couple of Mexican immigrants.<sup>32</sup> Padilla's friend stabbed one of the immigrants to death, and Padilla kicked him in the head "because he felt like it."<sup>33</sup> Padilla spent five years in a juvenile detention center.<sup>34</sup>

In 1991, when he was twenty, Padilla got into a traffic dispute when he cut off and flashed a revolver at another driver.<sup>35</sup> The other driver attempted to follow Padilla, and Padilla fired a single shot into the air.<sup>36</sup> Padilla was charged with three felony counts and sent to jail.<sup>37</sup> A few months into his sentence, Padilla was charged with battery on a law enforcement officer after he struck a prison guard.<sup>38</sup>

At some point during this incarceration, Padilla decided to change his life. He began fasting and working out, and he read the Bible cover to cover.<sup>39</sup>

Once released, Padilla worked at a Taco Bell and befriended the restaurant manager, Muhammed Javed, who was a cofounder of the Broward School of Islamic Studies.<sup>40</sup> After visiting a mosque with Javed, Padilla began studying Arabic and scripture.<sup>41</sup> Padilla decided that he wanted to immerse himself in the Arabic language and in Islam, so he moved to Egypt.<sup>42</sup> He worked days teaching English at a private school and nights as a gym trainer and martial arts instructor.<sup>43</sup> After returning from the Hajj,<sup>44</sup> Padilla took a job teaching English in Yemen.<sup>45</sup>

B. "[T]he hunt was on. . . ."<sup>46</sup>

During the spring of 2002, Abu Zubaydah, a senior al-Qaeda official under American custody at an undisclosed location overseas, told interrogators that al-Qaeda members had come to him with a proposal to

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. The Hajj is the religious pilgrimage to Mecca. *Times Topics: Hajj*, N.Y. TIMES, <http://topics.nytimes.com/topics/reference/timestopics/subjects/i/islam/hajj/index.html?scp=1-spot&sq=hajj&st=cse> (last visited April 6, 2011).

45. Sontag, *supra* note 30.

46. *Id.*

acquire and detonate a radiological device, a so-called dirty bomb.<sup>47</sup> Zubaydah identified Padilla as part of the dirty bomb plot.<sup>48</sup> On May 8, 2002, Padilla checked in at the Zurich airport for a flight to Chicago.<sup>49</sup> Unbeknown to Padilla, Swiss and American intelligence agents also boarded the plane.<sup>50</sup> Once Padilla landed at O'Hare, FBI agents arrested him based on a material witness warrant.<sup>51</sup> American intelligence officials told reporters that the dirty bomb plot was in the early stages and a time for the detonation had not been set.<sup>52</sup> Intelligence officials noted that, because of Padilla's American citizenship, al-Qaeda leadership thought he would have an easier time accessing the United States to carry out the dirty bomb plot.<sup>53</sup>

After his arrest, officials sent Padilla to the Metropolitan Corrections Center in downtown Manhattan.<sup>54</sup> On June 9, 2002, while a motion was pending to vacate the material witness warrant, then-President George W. Bush, consistent with the advice from Yoo in the "Determination of Enemy Belligerency and Military Detention" memo, issued an order that declared Padilla an enemy combatant and directed Secretary of Defense Donald Rumsfeld to take Padilla into protective military custody.<sup>55</sup> At the time, so long as Padilla was held under military authority, he could be detained indefinitely.<sup>56</sup> According to the President, Padilla was associated with al-Qaeda, was engaged in conduct that constituted hostile and war-like acts, and represented a "continuing, present and grave danger to the national security of the United States"; thus, Padilla's detention would "prevent him from aiding al-Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens."<sup>57</sup>

Although Padilla's arrest was viewed as an antiterrorism victory, skeptics questioned the lack of formal criminal charges brought against

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47. James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, <http://www.nytimes.com/2002/06/11/national/11ARRE.html>.

48. See Sontag, *supra* note 30. Zubaydah did not refer to Padilla by name; instead, he described him physically and referred to him as a Latin-American. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. See Risen & Shenon, *supra* note 47.

53. See *id.*

54. Sontag, *supra* note 30.

55. See Memorandum from President George W. Bush to Sec'y of Defense Donald Rumsfeld (June 9, 2002) [hereinafter Memorandum from President George W. Bush], *reprinted in* Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

56. See Sontag, *supra* note 30.

57. Memorandum from President George W. Bush, *supra* note 55.

him.<sup>58</sup> Democrats and the American Civil Liberties Union (ACLU) questioned whether Padilla's arrest was part of a pattern in which the Bush Administration orchestrated its announcements to advance the administration's interests.<sup>59</sup> According to an ACLU spokesperson, while the administration's position was that it would not disclose information about terrorist plots it disrupted, the administration did, in fact, emerge with a new announcement each time it faced criticism.<sup>60</sup>

### C. Legally Justifying Torture

Meanwhile, a little-known department of the government, tasked with setting the outer limits of the President's authority in a time of war, analyzed the legal strategies the Executive Branch could take with respect to Padilla. Before the torture memos became public, neither the authority bestowed to the OLC nor the shield the OLC provided to those who relied on its opinions was widely known. The OLC's power was so great that it was "practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turns out to be wrong."<sup>61</sup> Thus, one consequence of the OLC's power to interpret the law was the power to give government officials a potential shield for actions taken at the edges of vague criminal laws.<sup>62</sup> This section describes the structure of the OLC and details the three memos that pertained to Padilla.

#### 1. The Office of Legal Counsel

The OLC is located within the Department of Justice and "functions as a kind of general counsel" to the Executive Branch.<sup>63</sup> OLC opinions

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58. Adam Liptak, *Traces of Terror: The Courts; Questions on U.S. Action in Bomb Case*, N.Y. TIMES, June 11, 2002, <http://www.nytimes.com/2002/06/11/us/traces-of-terror-the-courts-questions-on-us-action-in-bomb-case.html>.

59. Neil A. Lewis, *Traces of Terror: The Disclosure; Questions of Timing Arise With New Information*, N.Y. TIMES, June 12, 2002, <http://www.nytimes.com/2002/06/12/us/traces-of-terror-the-disclosures-questions-of-timing-arise-with-new-information.html>.

60. *Id.* (quoting Laura W. Murphy, Director of the Washington office of the ACLU).

61. GOLDSMITH, *supra* note 1, at 96.

62. *Id.* at 96–97.

63. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577 (2007). Conversely, the Office of the White House Counsel is located within the White House and has a much smaller mandate. Tung Yin, *Great Minds Think Alike: The "Torture Memo," Office of Legal Counsel, And Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 477 (2009). Typically, instead of providing legal response to specific inquiries, the White House Counsel monitors potential conflicts of interest within the White House, helps to vet judicial and cabinet nominees, and advises on potential legislation. See Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 209–11 (2002). Lastly, the White House Counsel provides an informal channel between the Presi-



are published as Opinions of the Attorney General.<sup>64</sup> The OLC's interpretations of law are typically considered binding within the Executive Branch, unless overridden by the Attorney General or the President.<sup>65</sup>

At the time of the terrorist attacks on September 11, 2001, Assistant Attorney General Jay S. Bybee headed the OLC.<sup>66</sup> Yoo, a Deputy Attorney General, was in charge of foreign affairs and national security for the OLC.<sup>67</sup> Although Bybee led the OLC, Yoo authored the three memoranda that would form the subject matter of Padilla's civil claim: two that specifically referenced Padilla, and a third, and most controversial, that narrowly interpreted a torture statute.<sup>68</sup>

## 2. The Three Memos Pertaining to Padilla

Yoo's first memo, "Determination of Enemy Belligerency and Military Detention,"<sup>69</sup> concluded that Padilla qualified as an enemy combatant under the laws of armed conflict. The memo relied heavily on *Ex parte Quirin*,<sup>70</sup> a World War II-era case in which German saboteurs infiltrated New York and Chicago. In *Quirin*, the Supreme Court reasoned, "[T]hose who during [a] time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants . . . ." <sup>71</sup> Thus, the Court explained, "[L]awful combatants are subject to capture and detention as prisoners of war by opposing military forces," and "[u]nlawful combatants are likewise subject to capture and detention."<sup>72</sup>

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dent and the Attorney General. See Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 80-81 (1993).

64. See 28 C.F.R. § 0.25 (2009).

65. Johnsen, *supra* note 63, at 1577.

66. Yin, *supra* note 63, at 477. During 2002, President Bush appointed Bybee for a judgeship on the Ninth Circuit. Harry Weinstein, *Conservative Confirmed as 9th Circuit Judge*, L.A. TIMES, Mar. 14, 2003, <http://articles.latimes.com/2003/mar/14/local/me-bybee14>. Former University of Chicago law professor Jack Goldsmith replaced Bybee atop the OLC. Yin, *supra* note 63, at 478.

67. Yin, *supra* note 63, at 477.

68. Yoo authored numerous memos while working for the OLC. For a thorough index of OLC memoranda during the war on terror, see *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU, Mar. 3, 2009, [http://www.aclu.org/pdfs/safefree/olcmemos\\_2009\\_0305.pdf](http://www.aclu.org/pdfs/safefree/olcmemos_2009_0305.pdf).

69. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, MEMORANDUM TO THE ATTORNEY GENERAL: DETERMINATION OF ENEMY BELLIGERENCY AND MILITARY DETENTION (2002), available at <http://www.justice.gov/opa/documents/memomilitarydetention06082002.pdf> [hereinafter ENEMY BELLIGERENCY MEMO].

70. *Ex Parte Quirin*, 317 U.S. 1 (1942).

71. ENEMY BELLIGERENCY MEMO, *supra* note 69, at 3 (quoting *Ex parte Quirin*, 317 U.S. at 35).

72. *Id.* at 2 (quoting *Ex Parte Quirin*, 317 U.S. at 31).

Yoo compared Padilla's capture to the situation in *Quirin*, arguing that *Quirin* allows the President, under the Commander-in-Chief power in Article II of the U.S. Constitution, to direct the armed forces to seize enemy combatants in an armed conflict and detain them until the end of any armed conflict.<sup>73</sup> Here, Padilla met with a senior al-Qaeda operative while living abroad and discussed a plan to detonate a radiological explosive device within the United States.<sup>74</sup> Further, like in *Quirin*, Padilla entered the United States as part of a plan to conduct acts of sabotage that could have resulted in a massive loss of life.<sup>75</sup>

The second memo naming Padilla, "Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens,"<sup>76</sup> argued that the transfer of Padilla from the custody of the Department of Justice to the control of the Department of Defense violated the federal Non-Detention Act.<sup>77</sup> This statute states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress."<sup>78</sup> According to Yoo, this law did not apply to Padilla because military detention of enemy combatants serves a different goal than detention of civilians.<sup>79</sup> While the purpose of law-enforcement detention is punitive, the exclusive purpose of military detention is to prevent the captured individual from serving the enemy.<sup>80</sup> Thus, the Non-Detention Act did not, and could not, intrude upon the core presidential function of capturing and detaining members of the enemy.<sup>81</sup>

Yoo additionally stated that the President's authority to detain an enemy combatant is not limited by a showing of American citizenship.<sup>82</sup> For instance, in *In re Territo*, the Ninth Circuit Court of Appeals held that "it is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."<sup>83</sup>

Finally, Yoo's most controversial memo, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A" (Torture Statute

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73. *Id.* at 1–2.

74. *Id.* at 3.

75. *Id.*

76. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, MEMORANDUM FOR DANIEL J. BRYANT, RE: APPLICABILITY OF 18 U.S.C. § 4001(a) TO MILITARY DETENTION OF UNITED STATES CITIZENS (2002), available at <http://www.justice.gov/opa/documents/memodetentionuscitizens06272002.pdf> [hereinafter MILITARY DETENTION MEMO].

77. Non-Detention Act, 18 U.S.C. § 4001 (1971).

78. *Id.* at § 4001(a) (emphasis added).

79. MILITARY DETENTION MEMO, *supra* note 76, at 2–3.

80. *Id.* at 3.

81. *Id.* at 2.

82. *Id.* at 4.

83. *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946).

Memo),<sup>84</sup> provided additional support for Padilla's civil suit. According to 18 U.S.C. § 2340A, it is a crime for any U.S. national to commit or attempt to commit torture.<sup>85</sup> Torture is defined as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."<sup>86</sup> Ultimately, Yoo concluded while "certain acts may be cruel, inhuman, or degrading," the acts may fall outside § 2340A.<sup>87</sup>

Yoo began the Torture Statute Memo by analyzing the plain language of each element of § 2340. First, Yoo concluded that "specifically intended" constituted a subjective element—the prosecution must prove that the defendant acted with "specific intent" to torture.<sup>88</sup> Thus, to act with specific intent, "the infliction of such pain must be the defendant's precise objective."<sup>89</sup> Conversely, if the defendant possessed knowledge that severe pain would result from his actions, but *causing* such harm was not his objective, then the defendant merely possessed general intent and did not possess the requisite mental state to violate the statute.<sup>90</sup> Additionally, if the defendant acted "with a good faith belief that his conduct would not produce the result that the law prohibits," the specific intent element would be negated.<sup>91</sup> Yoo did not define good faith; however, relying on *Cheek v. United States*,<sup>92</sup> he stated that "[a] good faith belief need not be a reasonable one."<sup>93</sup> While the Supreme Court did, indeed, hold that an unreasonable good faith belief negated specific intent, *Cheek* involved the complex tax code and the Court's belief that a taxpayer should be given the benefit of the doubt.<sup>94</sup> Arguably, because the torture statute is not nearly as complex as the tax code, the threshold for good faith should be different.<sup>95</sup>

Second, Yoo defined "severe pain or suffering" by considering basic rules of grammar and statutory construction. Yoo opined that "inflic-

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84. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, MEMORANDUM FOR ALBERTO R. GONZALES, RE: STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. §§ 2340-2340A (2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter TORTURE STATUTE MEMO]. This memorandum was signed by Bybee but generally understood to be written by Yoo. Yin, *supra* note 63, at 478–79.

85. 18 U.S.C. § 2340A (2001).

86. 18 U.S.C. § 2340(1) (2004).

87. TORTURE STATUTE MEMO, *supra* note 84, at 1.

88. *Id.* at 3.

89. *Id.*

90. *Id.* at 3–4.

91. *Id.* at 4.

92. *Cheek v. United States*, 498 U.S. 192 (1991).

93. TORTURE STATUTE MEMO, *supra* note 84, at 5 (citing *Cheek*, 498 U.S. at 202).

94. Yin, *supra* note 63, at 480.

95. *Id.*

tion of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture.”<sup>96</sup> Rather, to amount to torture, the pain or suffering “must be severe.”<sup>97</sup> Grammatically, Yoo was correct—“severe” modifies “pain and suffering.” But Yoo interpreted this grammatical shortcoming to set forth a standard of conduct that would allow all but the most egregious forms of torture. Because § 2340 did not define the term “severe pain,” Yoo relied on the common rule of statutory construction, which gives ambiguous terms the same definition found in other statutes.<sup>98</sup> The phrase “severe pain” appears in a statute defining an emergency medical condition for the purpose of providing health benefits.<sup>99</sup> This statute defines an emergency condition as one that placed the health of the individual “(i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.”<sup>100</sup>

Although the medical statute addressed a substantially different subject than the substance of § 2340, Yoo argued that it was “nonetheless helpful for understanding what constitutes severe physical pain.”<sup>101</sup> Despite the tenuous connection between the medical statute and the torture statute, Yoo used the medical statute to define the outer limits of torture tactics that American military and intelligence officials could use during interrogations of detainees. He concluded that the damage to the detainee “must rise to the level of death, organ failure, or the permanent impairment of a significant body function.”<sup>102</sup>

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96. *Id.* at 5.

97. TORTURE STATUTE MEMO, *supra* note 84, at 5.

98. *See* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) (“[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”).

99. *See, e.g.*, 8 U.S.C. § 1369(d) (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000).

100. 42 U.S.C. § 1395w-22(d)(3)(B) (describing that an emergency condition “manifest[s] itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part”).

101. TORTURE STATUTE MEMO, *supra* note 84, at 6.

102. *Id.* Yoo demonstrated even more profound levels of creativity when he determined what would be considered the “administration . . . of mind-altering substances or other procedures calculated to disrupt profoundly the sense of personality.” 18 U.S.C. § 2340(2)(B) (2004). For procedures using drugs to rise to the level of “disrupt[ing] profoundly the senses or personality,” “they must produce an ‘extreme effect.’” TORTURE STATUTE MEMO, *supra* note 84, at 6. For example, drug-induced dementia, which would cause significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual, is considered a profound disruption. *Id.* at 1. Similarly, the onset of a “brief psychotic disorder” would satisfy the standard. *Id.* at 11. The onset of an obsessive-compulsive disorder would rise to the “profound disruption” standard if there were “aggressive or horrific impulses.” *Id.* Lastly, Yoo noted that pushing someone to the “brink of suicide” would be a sufficient disruption of the personality to

Finally, Yoo considered the applicability of § 2340A in relation to the President's constitutional powers. According to Yoo, § 2340A does not apply to the President's detention and interrogation of enemy combatants.<sup>103</sup> Yoo's reasoning was synonymous with the fear of lawfare: if executive officials were subject to prosecution for conducting interrogations while carrying out the President's Commander-in-Chief power, "it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties."<sup>104</sup> Thus, in order to respect the President's inherent constitutional authority to manage a military campaign against al-Qaeda and its allies, § 2340A must be construed as inapplicable to interrogations undertaken pursuant to the Commander-in-Chief authority.<sup>105</sup>

### III. LAWFARE AND LAWSUITS: *PADILLA V. YOO*

On June 9, 2002, Department of Defense officials took Padilla into custody without charging him and transported him to the Consolidated Naval Brig in Charleston, South Carolina.<sup>106</sup> In an empty wing of the military brig, the officials placed Padilla in a tiny cell where

Padilla alleges that he was "subjected to a systematic program of unlawful interrogation methods and conditions of confinement, which proximately and foreseeably caused [him] to suffer extreme isolation, sensory deprivation, severe physical pain, sleep deprivation, and profound disruption of his senses, all well beyond the physical and mental discomfort that normally accompanies incarceration."<sup>107</sup>

According to Padilla, Yoo personally provided numerous legal memoranda that purported to provide government agents a legal basis to implement an extreme and unprecedented interrogation and detention program—even though such tactics were unprecedented in U.S. history and clearly contrary to the U.S. Constitution and the law of war. Based on the series of memoranda authored by Yoo, Padilla alleged that Yoo proximately and foreseeably injured him by violating numerous clearly established constitutional and statutory rights: (1) denial of access to

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constitute a "profound disruption." *Id.* Although Yoo listed four examples of what would likely be considered a "profound disruption," he did not give examples of what would not reach that standard of treatment thus signaling that actions falling outside his enumerated examples would fall beyond the statute. *See id.*

103. TORTURE STATUTE MEMO, *supra* note 84, at 35.

104. *Id.*

105. *Id.* at 34.

106. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1013 (N.D. Cal. 2009).

107. *Id.* (quoting Plaintiff's First Amended Complaint ¶ 45).

counsel, (2) denial of access to court, (3) unconstitutional conditions of confinement, (4) unconstitutional interrogations, (5) denial of freedom of religion, (6) denial of the right of information, (7) denial of the right to association, (8) unconstitutional military detention, (9) denial of the right to be free from unreasonable seizures, and (10) denial of due process.<sup>108</sup>

Padilla's complaint also contained an exhaustive list of twenty-five specific types of interrogation tactics and policies, including the following: (1) extreme and prolonged isolation; (2) deprivation of light and exposure to prolonged periods of artificial light, sometimes in excess of twenty-four hours; (3) extreme and deliberate variations in the temperature of his cell; (4) sleep adjustment; (5) threats to subject him to physical abuse that would result in severe physical pain and suffering, or death, including threats to cut him with a knife and pour alcohol into the wounds; (6) threats to kill him immediately; (7) threats to transfer him to a location outside of the United States, to a foreign country or Guantanamo, where he was told he would be subjected to far-worse treatment; (8) administering to him or making believe that he was being administered psychotropic drugs against his will; (9) shackling and manacling for hours at a time; (10) forcing him into markedly uncomfortable and painful (or "stress") positions; (11) requiring him to wear earphones and black-out goggles during movement to, from, and within the brig; (12) introducing into his cell noxious fumes that caused pain to the eyes and nose; (13) lying to him about his location and the identity of his interrogators; (14) loud noises at all hours of the night, caused by government agents banging on the walls and bars of his cell or opening and shutting the doors to nearby empty cells; (15) withholding a mattress, pillow, sheet or blanket, leaving him with nothing to sleep or rest on except a cold steel slab; (16) forced grooming; (17) sudden and unexplained suspension of showers; (18) sudden and unexplained removal of religious items; (19) constant surveillance, including during the use of toilet facilities and showers; (20) blackening out of the interior and exterior windows of his cell; (21) deprivation of access to any form of information about the outside world, including radio, television, and newspapers from the time of his imprisonment in the military brig until summer 2004, at which time he was allowed very limited access to such materials; (22) denial of sufficient exercise and recreation and, when permitted intermittently, only in a concrete cage and often at night; (23) denial of any mechanism to tell time in order to ascertain the time for prayer in keeping with the Muslim practice; (24) denial of access to the Koran for most of

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108. *Id.* at 1016–17.

his detention; and (25) complete deprivation or inadequate medical care for serious and potentially life-threatening ailments.<sup>109</sup>

Yoo filed a motion to dismiss the complaint, relying heavily on the qualified-immunity defense; however, the court denied his motion in regard to all of Padilla's claims.<sup>110</sup>

#### IV. DESPITE THE USE OF LAWFARE, THE JUDICIARY PROPERLY INTERVENED TO RESOLVE PADILLA'S CLAIMS

When drafting his memoranda on the treatment of Padilla, Yoo articulated a strong vision of executive power. The vision was designed, in part, to navigate around the Judiciary, which would be susceptible to lawfare tactics. Thus, it came as no surprise that Yoo's defense to Padilla's claims relied on a similar philosophy: the Judiciary should not be involved in a dispute over the President's constitutional authority during an armed conflict.

A United States District Court in California, however, thought otherwise and properly rejected Yoo's attempt to circumnavigate the Judiciary. In order to support "a government of laws, and not of men,"<sup>111</sup> the Judiciary cannot be sidelined when it comes to matters of national security. Thus, despite Padilla's use of lawfare, the Judiciary was the proper forum to adjudicate *Padilla* for three reasons. First, our nation is founded upon a principle of three independent branches of government, where each branch checks the actions of the other two. Second, although the threat of lawfare comes primarily from foreign sources, Padilla is an American citizen, detained on American soil, whose fate was determined by American lawyers. Finally, the Judiciary has the power to recognize causes of action for constitutional violations despite the absence of a statute that authorizes such a cause of action.

##### *A. Separation of Powers and the Proper Role of the Judiciary*

"The separation of governmental powers into the Legislature, Executive, and Judiciary is fundamental to our democratic government, and under the Constitution, no one department may interfere with or encroach upon either of the other branches."<sup>112</sup> Lawfare tactics turn the Judiciary into a potential weapon against the other branches of government and government employees. For instance, the threat of criminal prosecution or tort liability has the potential to chill the efforts of individual gov-

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109. *Id.* at 1013–14.

110. *Id.* at 1039–40 (granting Padilla leave to amend his claim for a violation of his Fifth Amendment right against compelled self-incrimination).

111. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

112. 16 C.J.S. *Constitutional Law* § 215 (2009).

ernment actors. In the case of Padilla, by defining torture so narrowly, Yoo sought to remove the Judiciary from the separation-of-powers equation. Government agents were free to operate under the golden shield created by Yoo's memos, which minimized the chance that the Judiciary would hear a claim involving torture. The structural provisions of the Constitution, however, prevent the accumulation of power in the hands of a single person or group regardless of the motivation to consolidate power.<sup>113</sup> Thus, if any branch of government acts beyond the bounds of the authority granted to it from the Constitution, the Judiciary, and the Judiciary alone, may consider such action unconstitutional and void.<sup>114</sup>

Despite potential misuse of the court system through lawfare tactics, the Judiciary is the proper branch to hear torture claims because of its unique functional position. While theoretically each branch is independent, in practice, the directive of each branch inherently changes the power balance between the other branches. For instance, the Judiciary's breadth of power is limited by the jurisdiction granted to it by Article III of the Constitution; therefore, it is the most reactive of the three branches.<sup>115</sup> The Executive and Legislative Branches, on the other hand, are proactive branches of government.<sup>116</sup> Because the Judiciary must wait for an issue to be presented in court, it functions as both a stopgap and a neutral arbiter that must deal with the issue before it. Without judicial involvement, the power to make and interpret law would be left to the Legislative and the Executive Branches—and the motive to avoid lawfare would be too tempting. Removing the Judiciary mirrors Yoo's strat-

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113. *State v. Washington*, 266 N.W.2d 597, 606 (Wis. 1978) (“The doctrine of separation of powers must be viewed as a general principle to be applied to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch.”).

114. *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408, 420 (9th Cir. 1980) (“Executive or legislative actions which contravene the principle of separation of powers are unconstitutional.”), *aff'd*, 462 U.S. 919 (1983).

115. DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 15 (3d ed. 2004). Essentially, the Judiciary differs from the Legislative and Executive Branches in four distinct ways. *Id.* First, the Legislative and Executive Branches do not wait for others to bring problems to their attention; therefore, they are considered the proactive branches of government. *Id.* Courts, however, are passive and reactive because they depend on others to bring matters to their attention. *Id.* Second, the Legislative and Executive Branches normally do not take an action that they do not have to take. *Id.* By avoiding politically charged issues, the other branches of government deliberately let the Judiciary handle important questions. *Id.* Third, the Legislative and Executive Branches are very responsive to elections, public opinion, and partisan pressure. *Id.* Conversely, the federal Judiciary is largely insulated from the broader political system due to lifetime appointments. *Id.* Fourth, the Legislative and Executive Branches elicit a wide array of information from diverse points of view. *Id.* On the other hand, the Judiciary receives information presented through the adversary process, which narrows and isolates the evidence. *Id.*

116. *Id.*



egy—interpret torture in a way that makes it unlikely that a civil suit or prosecution would arise. Yoo’s strategy, however, was not grounded in precedent.

The Judiciary’s traditional role in deciding the law<sup>117</sup> was evident, for example, when it ruled that the President acted outside the scope of his constitutional authority<sup>118</sup> and when it held that the Legislative and Executive Branches, despite being in agreement, could not reallocate their respective authorities.<sup>119</sup> In the first example, the President of the United States directed the Secretary of Commerce to take possession of and operate most of the nation’s steel mills.<sup>120</sup> The Court held that the President’s order amounted to lawmaking, a legislative function, which the Constitution had expressly confided to Congress and not the President.<sup>121</sup> The President’s power to act must stem either from an act of Congress or from the Constitution itself.<sup>122</sup> In the second example, Congress enacted the Line Item Veto Act, which gave the President the power to “cancel in whole” three types of provisions that had been signed into law.<sup>123</sup> Although the Legislative and Executive Branches approved this reallocation of power, the Court held that the Line Item Veto Act was unconstitutional because it ignored the Presentment Clause<sup>124</sup> of the Constitution.<sup>125</sup> The Court reasoned that, despite the agreement of the branches, a textual provision of the Constitution could not be ignored.<sup>126</sup> Thus, action outside the constitutional structure is unconstitutional.

By narrowly defining the law of torture so that any lawsuit would become exceedingly unlikely to succeed in the courts, in effect, Yoo attempted to circumvent the Judiciary. The Judiciary, however, cannot be considered removable merely because lawfare threatens its misuse. After all, the Judiciary vindicates the injured and the accused. Moreover, the Founding Fathers modeled our government so that one or two branches could not control the government. Collusion between independent branches of government “may justly be pronounced the very definition of

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117. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

118. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

119. *See Clinton v. City of New York*, 524 U.S. 417, 436–438 (1998).

120. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582.

121. *See id.*

122. *Id.* at 585.

123. *Clinton*, 524 U.S. at 436.

124. U.S. CONST. art. I, § 7, cl. 2.

125. *Clinton*, 524 U.S. at 440 (noting that the first President of the United States, George Washington, wrote that the Presentment Clause requires that the President “approve all the parts of a Bill, or reject it in toto”).

126. *Id.*

tyranny.”<sup>127</sup> Thus, regardless of whether the branches are in agreement or in conflict, the principle is that all three branches must be involved in questions of national security, specifically when it comes to torture.

### B. Padilla Presented Purely Domestic Questions of Law

*Padilla* presented a question of domestic concern—whether, and to what extent, a government lawyer should be held liable for his interpretation of law that he knows will be relied and acted upon by others. Unlike a lawsuit filed by an alien, *Padilla*’s suit is one filed by an American citizen against an American lawyer who operated in a role to direct the treatment of an American citizen on American soil. Concern that the Judiciary will become susceptible to lawfare tactics does not erase *Padilla*’s potentially valid allegations and the potential constitutional protections to which he is entitled as an American citizen.

*Padilla* is dissimilar to *Arar v. Ashcroft*, in which the court refused to provide a civil remedy in the foreign policy context.<sup>128</sup> In *Arar*, Maher Arar filed an action against senior officials in the American government and alleged abuse through harsh interrogation techniques.<sup>129</sup> Unlike *Padilla*, Arar was not a citizen of the United States and was only temporarily on American soil. In 2002, Arar, a dual citizen of Canada and Syria, was seized after he landed at Kennedy Airport in New York and, two weeks later, through the practice of extraordinary rendition, was flown to Syria, where he claimed he was held for ten months in a tiny cell and beaten repeatedly with a metal cable.<sup>130</sup>

In 2006, Arar filed a civil suit against Ashcroft, Director of the FBI Robert Mueller, senior immigration officials, and others in the Eastern District of New York.<sup>131</sup> Arar sought a *Bivens*<sup>132</sup> remedy for the alleged violation of his right to substantive due process. The Court of Appeals for the Second Circuit noted that this lawsuit presented questions touching on the role of the Executive Branch in combating terrorist forces with international allies.<sup>133</sup> The court then distinguished matters that go beyond the borders of the United States—which necessarily affect the

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127. *Id.* at 450 (quoting THE FEDERALIST No. 47, at 301 (Clinton Rossiter ed., 1961)).

128. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252, 279 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir. 2008), *vacated & superseded on reh’g en banc*, 585 F.3d 559 (2d Cir. 2009).

129. *Id.* at 252.

130. *Id.* at 254–55.

131. *Id.* at 257.

132. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). A *Bivens* claim is an implied cause of action for damages against a federal official for violating the plaintiff’s constitutional rights. *Arar*, 414 F. Supp. 2d at 267. It is the analog to 42 U.S.C. § 1983, which permits civil actions against state actors under color of law for violating a constitutional right. *Id.* at 265.

133. *See Arar*, 585 F.3d at 575 (noting that Arar’s complaint facially targeted the policy of extraordinary rendition).

country's relationship with foreign countries—from matters that exist solely within the boundaries of the United States.<sup>134</sup> Because the success in combating international terrorism requires coordination between the law-enforcement and foreign-policy officials of foreign governments,<sup>135</sup> the court held that three special factors counseled hesitation in awarding civil damages under Arar's *Bivens* claim.<sup>136</sup> None of these factors is present in *Padilla*.

First, unlike Arar, an alien, Padilla is an American citizen and American citizens retain the right to challenge their detainment under the writ of habeas corpus.<sup>137</sup> In *Arar*, the court reasoned that Article I, Section 8 of the Constitution placed the regulation of aliens squarely within the authority of the Legislative Branch.<sup>138</sup> Because Congress had yet to take any affirmative position on federal court review of extraordinary renditions, Congress had not explicitly created a private cause of action to plaintiffs in Arar's position.<sup>139</sup> Padilla, on the other hand, is an American citizen, and so the regulation of aliens is not applicable to his lawsuit. In *Hamdi v. Rumsfeld*, the Supreme Court held that absent suspension of the writ, the writ of habeas corpus remains available to every individual detained within the United States.<sup>140</sup> Therefore, a United States citizen who is classified as an enemy combatant has due process rights to receive notice of the factual basis of his classification and a fair opportunity to rebut the government's factual assertions before a neutral decision-maker.<sup>141</sup> Thus, because Padilla is an American citizen, he retains the right to challenge his detainment and the right to bring a civil claim for injuries that arise as a result of the detainment.

Second, unlike in *Arar*, where Arar was captured in the United States and sent to Syria through extraordinary rendition, Padilla remained on American soil under the control of American personnel during his entire detention. Extraordinary rendition involves the exchange of diplomatic, security, and intelligence information between the intelligence agencies of foreign countries.<sup>142</sup> The potential for public exposure of such classified information through lawfare tactics entails the risk that other countries would become less willing to cooperate with the U.S. in sharing intelligence resources to counter terrorism. But in *Padilla*, the

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134. *Arar*, 414 F. Supp. 2d at 281.

135. *Id.*

136. *Arar*, 585 F.3d at 563.

137. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004).

138. *Arar*, 414 F. Supp. 2d at 281.

139. *Id.*

140. *Hamdi*, 542 U.S. at 525.

141. *Id.* at 533.

142. *Arar*, 585 F.3d at 576.

exchange of information between the United States and foreign countries was limited to the investigation and surveillance of Padilla. Once Padilla was apprehended, the United States' need to exchange information with foreign countries ceased. Additionally, Padilla did not allege that foreign-intelligence agents took part in any phase of his detention, further diminishing potential foreign-policy tension between the United States and foreign countries. In sum, the potential risk of exposing the involvement of foreign countries in a case of domestic lawfare was low, so the likelihood that foreign countries would cease cooperating with the United States was also low.

The final and most important distinction between *Arar* and *Padilla* is "the fundamental difference between courts evaluating the legitimacy of actions taken by federal officials in the domestic arena and evaluating the same conduct when taken in the international realm."<sup>143</sup> For instance, a qualified-immunity claim in international terrorism cases, like *Arar*, would offer inadequate protection because jurisprudence in the international realm is one where most domestic judges lack any special competence.<sup>144</sup> On the other hand, in domestic terrorism cases like *Padilla*, judges have constitutional authority to evaluate government officials' decision-making in the domestic context.<sup>145</sup> Additionally, judges also have experience derived from living in the same environment as domestic officials.<sup>146</sup> Courts, therefore, are properly set up to successfully adjudicate a terrorism lawsuit when the facts of the case involve substantially domestic concerns, such as those presented in *Padilla*.

In sum, the issue presented in *Padilla* poses significant implications pertaining to both the rights of American citizens and the actions of government lawyers who write legal memoranda. The issue presented in *Padilla*, furthermore, has a low probability of affecting the nation's relationship with foreign allies. Finally, unlike international terrorism cases, American judges in American courts are uniquely situated to successfully adjudicate criminal and civil claims that arise out of domestic terrorism. Thus, despite the potential misuse of the court system through lawfare tactics, the Judiciary properly accepted review of Padilla's lawsuit.

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143. *Arar*, 414 F. Supp. 2d at 282.

144. *Id.* In cases involving international terrorism, like *Arar*, almost all judges have neither the international experience nor the background to adequately and competently balance the rights of an individual against the needs of officials acting to "defend the sovereign interests of the United States, especially in circumstances involving countries that do not accept our nation's values or may be assisting those out to destroy us." *Id.*

145. *Id.*

146. *Id.*

*C. Pursuant to Bivens, a Court May Have Reason to Extend  
a Remedy Despite the Absence of a Statute*

Had the Judiciary succumbed to the fear of lawfare, it would have denied Padilla access to the courts and any potential remedy for valid claims. A *Bivens* remedy, however, enables a court to cure a constitutional violation despite the absence of a statute conferring such a right.<sup>147</sup> In determining whether a *Bivens* remedy exists, a court applies a two-pronged test. First, the court determines whether an existing process would adequately protect the plaintiff's interest.<sup>148</sup> Second, the court determines whether "any special factors counseling hesitation [exist] before authorizing a new kind of federal litigation."<sup>149</sup>

In *Padilla*, the court's *Bivens* analysis underscores two conclusions. First, without the Judiciary, it would be impossible for Padilla to seek a remedy for his alleged injuries. Second, despite the importance of thwarting terrorism, nothing in *Padilla* supports the conclusion that courts should defer adjudication of Padilla's claim.

With regard to the first prong of the *Bivens* analysis, Padilla had no other means of redress for the alleged injuries that he sustained during his detention.<sup>150</sup> Three reasons support this conclusion. First, the Military Commissions Act of 2006, which authorizes trial by military commissions for violations of laws of war, only applies to alien, or noncitizen, unlawful enemy combatants.<sup>151</sup> Because Padilla is an American citizen, the Military Commissions Act of 2006 could not apply to him. Second, the other branches of government had not acted to provide an alternative remedy for the type of constitutional violations alleged in this case.<sup>152</sup> Thus, Padilla had no other judicial remedies to allege. And third, a habeas petition would not have provided an adequate, alternative remedy because the habeas petition would have had to be filed against the military commander in charge of the brig where Padilla was confined, not against Yoo.<sup>153</sup>

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147. *Id.* at 267.

148. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1020 (N.D. Cal. 2009) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 537–38 (2007)).

149. *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

150. *Id.*

151. *Id.* (citing 10 U.S.C. § 948r(c) (2006)).

152. *Id.* at 1020–21. In deciding that there were no other alternatives for Padilla to pursue, the court relied on various newspaper articles criticizing the Obama Administration for not investigating cases of alleged torture. *Id.* For example, "President Obama has shown little interest in prosecuting officials of the previous administration, and it is not clear whether there will be a government-sponsored investigation of Bush administration policies." John Schwartz, *Judge Weighs Dismissing Case Involving Torture Memorandums*, N.Y. TIMES, Mar. 6, 2009, <http://www.nytimes.com/2009/03/07/us/07yoo.html>.

153. *Padilla*, 633 F. Supp. 2d at 1021.

Under the second prong of the *Bivens* analysis, “special factors counseling hesitation ‘relate not to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided.’”<sup>154</sup> “[C]ourts should avoid creating a new, nonstatutory remedy when doing so would be ‘plainly inconsistent’ with authority constitutionally reserved for the political branches.”<sup>155</sup> No special factors counseled hesitation in *Padilla* for four reasons.

First, although Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to make enemy combatant designations, Congress had not spoken, specifically or definitively, regarding the constitutional standard for the treatment of enemy combatants.<sup>156</sup> Relying on *Hamdi v. Rumsfeld*,<sup>157</sup> the court in *Padilla* noted that all three branches of the government have a role to play when individual liberties are at stake and, further, there was no indication that the Judiciary was precluded from review of Executive decisions made pursuant to the AUMF.<sup>158</sup> Because Congress did not explicitly exclude the Judiciary, courts are not precluded from reviewing the treatment of plaintiffs like *Padilla*.

Second, “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>159</sup> Furthermore, “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of review and resolving claims like those presented” in *Padilla*.<sup>160</sup> Granted, courts should be cautious when intruding upon the judgment and discretion of military authorities by targeting the government attorneys who advise military leaders.<sup>161</sup> And the Judiciary should defer to the Legislative and Executive Branches of government with respect to the core strategic matters of war-making.<sup>162</sup> *Padilla*’s allegations, however, “concern the possible constitutional trespass on a detained individual citizen’s liberties. . . .”<sup>163</sup> The war power, therefore, “is a power to wage war successfully . . . [b]ut even the war power does not remove constitutional limita-

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154. *Id.* at 1022 (quoting *Sanches-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985)).

155. *Id.* (quoting *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 103 (D.D.C. 2007)).

156. *Id.* at 1026.

157. 542 U.S. 531 (2004).

158. *Padilla*, 633 F. Supp. 2d at 1026 (“The joint resolution does not create a remedial scheme, similar to the separate regime of military justice, or the elaborate remedial schemes set out, for instance, by the Social Security Act or the Civil Service Reform Act.”).

159. *Id.* at 1027–28 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

160. *Id.* (quoting *Hamdi*, 542 U.S. at 536).

161. *Id.* at 1027.

162. *Id.* at 1028.

163. *Id.*

tions safeguarding essential liberties.”<sup>164</sup> Thus, the Commander in Chief’s power is limited to creating war strategy, whereas it is within the Judiciary’s power to safeguard constitutional liberties.

Third, *Padilla* does not threaten the revelation of government secrets. During the course of the *Padilla* case, all of the documents drafted by Yoo, which were mentioned in the complaint, eventually became public record through Freedom of Information Act (FOIA) requests; thus, there was little chance of revealing government secrets.<sup>165</sup> In addition, Yoo’s argument amounted to an assertion of the state-secrets privilege. Should a privilege surface on behalf of the government, the Judiciary could and would address those concerns in due time in order to manage the case.<sup>166</sup> And finally, while litigation may cause expenditure of valuable time and resources, litigation may be necessary to ensure that officials comply with the law.<sup>167</sup>

Lastly, as discussed in section B, *Padilla*’s claim involved American officials’ treatment of an American citizen within the country’s boundaries. The treatment of an American citizen on American soil does not raise the same specter of policy issues as does a case involving foreign relations.<sup>168</sup>

In sum, *Padilla*’s claims were rightly adjudicated by the Judiciary. “[A] government of laws, and not of men”<sup>169</sup> demands that the Judiciary play a role in interpreting policy decisions that affect citizens of this country. Additionally, the nation’s relationship with foreign governments is not likely to be negatively affected in matters involving an American government attorney and American citizens who are detained on American soil. Moreover, without the involvement of the Judiciary, plaintiffs with potentially valid claims would be left without any remedy.

#### V. IN CASES LIKE *PADILLA*, IT IS APPROPRIATE TO DENY QUALIFIED IMMUNITY FOR HIGH-RANKING GOVERNMENT OFFICIALS

With the role of the Judiciary properly established, the threat of lawfare dissipates in light of the Judiciary’s adjudication of similar claims against government attorneys. For instance, *Padilla* is not the only case dealing with liability for high-ranking lawyers within the Bush Administration to come out of the Ninth Circuit in recent years. In September 2009, a three-judge panel of the Court of Appeals for the Ninth Cir-

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164. *Id.* (quoting *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1030.

169. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

cuit affirmed a district court ruling that denied former Attorney General John Ashcroft's motion to dismiss allegations that he misused the federal material witness statute<sup>170</sup> to unlawfully investigate and preemptively detain Abdullah al-Kidd for suspected terrorist activities. While the court in *Padilla* did not rely on *al-Kidd*,<sup>171</sup> both cases evidence the Judiciary's role in balancing constitutional rights against the ability to effectively advise the President and implement polices during the War on Terror. Additionally, there is established precedent in denying qualified immunity to government attorneys who author unsound legal opinions.

#### A. Al-Kidd v. Ashcroft

On March 14, 2003, the Idaho U.S. Attorney's Office submitted an application to a magistrate judge seeking al-Kidd's arrest as a material witness in the trial of Sami Omar Al-Hussayan.<sup>172</sup> Two days later, pursuant to the material witness warrant, United States agents arrested al-Kidd, a United States citizen, at Dulles International Airport.<sup>173</sup> Over the next sixteen days, he was confined in high-security cells—lit twenty-four hours a day—in Virginia, Oklahoma, and Idaho.<sup>174</sup> Because he was never called as a witness in the Al-Hussayan trial or in any other criminal proceeding,<sup>175</sup> al-Kidd alleged that he was arrested and confined because Ashcroft promulgated policies to unlawfully use the federal material witness statute to investigate or preemptively detain terrorist suspects.<sup>176</sup> In response, Ashcroft claimed absolute immunity and, in the alternative, qualified immunity.<sup>177</sup>

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170. 18 U.S.C. § 3142(e)(1) (2006) (“If, after a hearing . . . the judicial officers finds that no condition or combination of conditions will reasonably assure the appearance of the person as required . . . such judicial officer shall order the detention of the person before trial.”).

171. *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).

172. *Id.* at 952. On February 13, 2003, a federal grand jury in Idaho indicted Al-Hussayan for visa fraud and making false statements to U.S. officials. *Id.*

173. *See id.* at 951.

174. *Id.*

175. *Id.* at 954.

176. *Id.* at 952. Al-Kidd made three claims against Ashcroft. First, he alleged that Ashcroft was responsible for a policy or practice under which the FBI sought material witness orders without sufficient evidence that the witness's testimony was material to another proceeding, or that it was impracticable to secure the witness's testimony. *Id.* at 957. Second, al-Kidd alleged that Ashcroft designed and implemented a policy under which the FBI and DOJ would arrest individuals who may have met the facial statutory requirements of § 3144, but with the ulterior and unconstitutional purpose of investigating or preemptively detaining them, in violation of the Fourth Amendment. *Id.* Lastly, al-Kidd alleged that Ashcroft designed and implemented polices, or was aware of policies and practices that he failed to correct, under which material witnesses were subjected to unreasonably punitive conditions of confinement, in violation of the Fifth Amendment. *Id.*

177. *Id.* Prosecutors are entitled to absolute immunity when they engage in activities “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). They are entitled to qualified immunity only when they perform investigatory functions,



Qualified immunity seeks to achieve unique harmony between “two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>178</sup> To determine whether a government official is entitled to qualified immunity, courts apply a two-prong approach. Courts ask whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer’s conduct violated a constitutional right, and if so, whether the right was clearly established in light of the specific context of the case.<sup>179</sup> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.<sup>180</sup> Direct, personal participation is not necessary to establish liability for a constitutional violation.<sup>181</sup>

Regarding the first prong, al-Kidd’s Fourth Amendment rights were violated because he alleged specific facts showing that Ashcroft used the material witness statute pretextually in order to investigate or preemptively detain suspects without probable cause.<sup>182</sup> Regarding the second prong, while no case had squarely confronted the issue of whether misuse of the material witness statute to investigate suspects violated the Constitution,<sup>183</sup> “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>184</sup> This is so because “while there may be no published cases holding similar policies [un]constitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue.”<sup>185</sup>

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administrative functions, or are essentially functioning as police officers or detectives. *Buckely v. Fitzsimmons*, 509 U.S. 259, 273 (1993). The United States Attorney General is not entitled to absolute immunity in the performance of his “national security functions.” *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985).

178. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1030 (N.D. Cal. 2009) (quoting *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009)).

179. *Al-Kidd*, 580 F.3d at 964–65 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

180. *Id.* at 964 (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

181. *Id.* at 965 (“Supervisors can be held liable for the actions of their subordinates for (1) setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates, or (4) for conduct that shows a ‘reckless or callous indifference to the rights of others.’” (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991))).

182. *See id.* at 969.

183. *Id.* at 970.

184. *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

185. *Id.* (quoting *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005)).

In *al-Kidd*'s case, no federal appellate court had held that the federal material witness statute satisfied the requirements of the Fourth Amendment, but the definition of probable cause was clearly established.<sup>186</sup> Existing case law emphasized that an investigatory programmatic purpose would invalidate a scheme of searches and seizures without probable cause. Ashcroft thus should have been on sufficient notice that the material witness detentions, involving a far more severe seizure than a mere traffic stop, would be similarly subject to an inquiry into programmatic purpose.<sup>187</sup> Therefore, *al-Kidd*'s right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established at the time of his arrest and Ashcroft was, accordingly, not entitled to qualified immunity.<sup>188</sup>

*B. The Qualified-Immunity Analysis in Padilla v. Yoo  
in Light of Previous Cases*

While the War on Terror raised unprecedented legal questions, the crux of the issue presented in *Padilla* was much narrower—whether, and to what extent, a government lawyer should be held liable for his interpretation of law that he knows will be relied and acted upon by others. Because American courts historically have answered qualified-immunity issues, concerns of lawfare should not be a detriment to those courts answering the same qualified-immunity issue presented in *Padilla*. In determining the qualified-immunity question in *Padilla*, the trial court did not consider the national-security context in which the case arose.<sup>189</sup> Rather, the court focused on analyzing case law, including the jurisprudence from other circuits and district courts.<sup>190</sup>

Like the suits in *al-Kidd* and other cases, *Padilla*'s suit targeted an individual who did not directly violate *Padilla*'s constitutional rights by physically torturing him. Rather, *Padilla* alleged specific facts in his complaint to satisfy the first prong of the qualified-immunity analysis—that *Yoo* set in motion a series of events that resulted in the deprivation of *Padilla*'s constitutional rights.<sup>191</sup> Although *Yoo* was not the sole decision-maker or solely responsible for implementing detainee policy, he

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186. *Id.* at 970–71.

187. *Id.* at 971.

188. *Id.* at 973.

189. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1032 (N.D. Cal. 2009) (“[T]he fact that no case has found a constitutional violation under the exact facts alleged does not imply that the law is not clearly established.”).

190. *Id.*

191. *But cf.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (holding that the “bare assertions” alleged in the complaint amounted to nothing more than a “formulaic recitation of the elements” of a constitutional discrimination claim).

was highly influential in creating that policy because he researched and interpreted national and international law as applied to Padilla. Like any other government official, government lawyers like Yoo are responsible for the foreseeable consequences of their conduct.<sup>192</sup> For example, in *Lippoldt v. Cole*,<sup>193</sup> the court found an assistant city attorney liable where she researched the law and drafted a letter denying a protest group's application for a parade permit based on the content of the group's speech.<sup>194</sup> Although senior city officials revised the letter, and others approved and eventually signed the denial of the permit, the court rejected the theory that intervening factors cut off causation and instead found that the drafting of a legal opinion justifying unconstitutional conduct was "a substantial factor" in the decision to deny the parade permits and violated the plaintiffs' First Amendment rights.<sup>195</sup>

Despite the lack of a direct, physical connection to torturing Padilla, Yoo violated Padilla's constitutional rights in three ways. First, Yoo personally reviewed information pertaining to Padilla and determined that Padilla was legally an enemy combatant.<sup>196</sup> In addition, Attorney General John Ashcroft relied on Yoo's opinion in recommending to the President that Padilla be taken into military custody.<sup>197</sup> Finally, Yoo interpreted the torture statute "to legally justify pressure techniques proposed by the CIA, including waterboarding, mock burial, and open-handed slapping of suspects."<sup>198</sup> Thus, because Padilla alleged specifically how Yoo proximately and foreseeably violated Padilla's rights, and did not make "bare assertions" that merely recited elements of constitutional violations, Padilla's complaint survived the first prong of the qualified-immunity analysis.

With respect to the second prong of the qualified-immunity analysis—whether Padilla's rights were clearly established—the court held that designation as an enemy combatant "does not automatically eviscerate all of the constitutional protections afforded to a citizen of the United States."<sup>199</sup> The court held that the basic facts alleged in the complaint

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192. *Padilla*, 633 F. Supp. 2d at 1033.

193. *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006). Defendants did not raise a qualified-immunity defense on appeal; however, the principle that supports liability is applicable to *Padilla*.

194. *See id.* at 1210, 1220.

195. *Id.* at 1220.

196. *Padilla*, 633 F. Supp. 2d at 1014 (citing Plaintiff's First Amended Complaint ¶ 38).

197. *Id.* at 1033 (citing Plaintiff's First Amended Complaint ¶ 39).

198. *Id.* (citing Plaintiff's First Amended Complaint ¶ 28).

199. *Id.* *See also, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. . . ."); *Phillips v. Hust*, 477 F.3d 1070, 1079–80 (9th Cir. 2007) (holding that the fact that no case has found a constitutional violation under the exact facts alleged does not imply that the law is not clearly estab-

clearly showed a violation of the rights afforded to citizens held in prison.<sup>200</sup>

Yoo argued that courts have never applied the level of constitutional rights sought in this action to this unique type of detainee.<sup>201</sup> In a qualified-immunity analysis, however, the plaintiff need not establish that the defendant's behavior had been previously declared unconstitutional.<sup>202</sup> Instead, "if binding authority indicates that the disputed right existed, even if no case had specifically so declared, the [d]efendant[] would be on notice of the right."<sup>203</sup> For example, in *Hope v. Pelzer*, prison guards hitched a prisoner to a post for an extended period of time in a position that was painful, and under circumstances that were degrading and dangerous.<sup>204</sup> According to the court, the fact that reasonable officers knew that handcuffing a prisoner to a fence could constitute cruel and unusual punishment should have provided defendants with some notice that handcuffing a prisoner to a hitching post violated the plaintiff's constitutional rights.<sup>205</sup> Courts often refer to this line of reasoning as the "common sense" approach.<sup>206</sup>

While no court had previously afforded an enemy combatant the kind of constitutional protections that Padilla sought, Padilla's rights were clearly established.<sup>207</sup> Merely designating Padilla as an enemy combatant does not remove his constitutional rights. Instead, the crucial facts were that Padilla is an American citizen, sent from a civilian jail to a military brig, detained without charge, deprived of contact with anyone, unable to practice his religion, and subjected to extreme interrogations.<sup>208</sup> Moreover, under the "common sense" approach, Yoo, as an experienced government attorney, is imputed to have understood the fun-

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lished); *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001) (holding that a right can be clearly established on the basis of common sense in the absence of precedent directly on point).

200. *Padilla*, 633 F. Supp. 2d at 1036 ("The complaint alleges that military agents entered a civilian jail, seized a citizen from the civilian justice system, transported him to a military brig, detained him there indefinitely without criminal charge or conviction, deprived him of contact with anyone, including attorneys or family, removed the basic ability to practice his religion, and subjected him to a program of extreme interrogations, sensory deprivation and punishment over a period of three years and eight months.").

201. *Id.*

202. *Id.* at 1037.

203. *Id.* (quoting *Hydrick v. Hunter*, 500 F.3d 978, 989 (9th Cir. 2007)).

204. *Hope*, 536 U.S. at 734–35 (noting that the prisoner was handcuffed to a hitching post in the sun with no shirt for seven hours and was given one or two water breaks but not bathroom breaks).

205. *Id.* at 745–46.

206. *See Padilla*, 633 F. Supp. 2d at 1036.

207. *Id.* at 1037.

208. *Id.* at 1036.

damental civil rights afforded to every citizen under the U.S. Constitution.<sup>209</sup>

Even though the legal framework relating to the designation of a citizen as an enemy combatant was developed around the same time as the conduct alleged in the complaint took place, federal officials were cognizant of the fundamental civil rights afforded to detainees under the Constitution.<sup>210</sup> Padilla properly alleged a violation of his constitutional rights, which were clearly established at the time of the conduct. A reasonable federal officer should have believed the conduct was unlawful.<sup>211</sup> Thus, despite the risk of lawfare in this lawsuit, the court correctly rejected Yoo's qualified-immunity defense.

## VI. CONCLUSION

The War on Terror raised unparalleled and extraordinary legal questions, such as how to interpret the scope of national and international law as applied to American citizens accused of supporting foreign terrorists. In writing the memoranda that defined torture policy, national-security lawyers, like Yoo, confronted two options. In the first option, government attorneys could attempt to interpret the law to fit the War on Terror, an untraditional war, into the framework of a traditional war, where countries are openly hostile to each other and their soldiers wear uniforms. Alternatively, the government attorneys had the option to attempt to prevent their interpretations of the law from ever ending up in the court system.

Yoo chose the latter option. By interpreting the torture law narrowly, Yoo attempted to exclude the Judiciary from being involved in decision-making relating to enemy combatants, even if those enemy combatants are American citizens. Such an exclusion degrades the integrity of our government's structure.

Yoo, however, continues to support his policy of circumnavigating the judiciary.<sup>212</sup> After the killing of Osama bin Laden, Yoo stated that the

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209. *See id.* at 1037.

210. *Id.* *See also, e.g.,* *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (holding that denial of medical attention may result in the infliction of unnecessary suffering which is “inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself”); *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (holding that “persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish”).

211. *Padilla*, 633 F. Supp. 2d at 1038.

212. John Yoo, *From Guantanamo to Abbottabad*, WALL ST. J., May 4, 2011, [http://online.wsj.com/article/SB10001424052748703834804576301032595527372.html?mod=WSJ\\_Opinion\\_LEAD](http://online.wsj.com/article/SB10001424052748703834804576301032595527372.html?mod=WSJ_Opinion_LEAD) Top.

killing “vindicated the Bush administration.”<sup>213</sup> Although he did not specifically refer to his memos, Yoo hinted that his strategy for conducting interrogations on terrorism suspects, such as 9/11 mastermind Khalid Sheikh Mohammed at Guantanamo Bay instead of prosecuting him in Article III civilian courts, was responsible for the information that eventually led to the location of bin Laden.<sup>214</sup>

Lawfare is, indeed, a risk in our current litigious world. Often during the War on Terror, government agents hesitated to act without approval by government lawyers.<sup>215</sup> Lawfare, however, will continue to be a risk if attorneys misconstrue current law in a means-ends analysis. The Judiciary correctly decided the case of *Padilla v. Yoo* despite the potential use of lawfare by the plaintiff. The Judiciary is a necessary and integral part of a democratic government, including on matters that involve national security. The Judiciary’s importance is more pronounced in matters solely involving domestic matters. If the Judiciary were circumvented, plaintiffs similarly situated to Padilla would be without legal recourse. Further, in cases like *Padilla*, where a plaintiff establishes that his rights were violated and the defendant government official knew of those rights, the qualified-immunity defense should not be available.

Within the separation-of-powers framework, the Judiciary’s primary role is to interpret the law set in place by the Legislative and Executive Branches. While lawfare can be a tactic used by our enemies, it can also be the tool through which the Judiciary reviews potentially overreaching Legislative and Executive implementations. During this review, the Judiciary’s importance, especially in assessing constitutional protections of American citizens, is at its zenith, and it would be unconscionable if government officials were permitted to circumvent protections provided by the court system.

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213. *Id.*

214. *Id.* In April 2011, Attorney General Eric Holder announced that he would prosecute Khalid Sheikh Mohammed and four other 9/11 terror suspects in military trials. Alan Silverleib, *Accused 9/11 Terror Suspects to Face Military Trials*, CNN, Apr. 5, 2011, <http://edition.cnn.com/2011/US/04/04/guantanamo.tribunals/index.html#>.

215. See GOLDSMITH, *supra* note 1, at 95. The CIA would forego a covert operation if it thought that its personnel would be subject to retroactive discipline for acting outside the scope of a vague legal memo. *Id.*