No. 11-6480

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, *et al.*
Plaintiffs-Appellees,

v.

DONALD RUMSFELD, *et al.*
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF APPELLEE LEON E. PANETTA

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BRIEF OF APPELLEE LEON E. PANETTA[1]

STATEMENT OF JURISDICTION

For the claims against defendant Leon E. Panetta, who is sued in his official capacity as the Secretary of Defense, plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. JA 68-69. Plaintiffs filed a timely notice of appeal of the district court order dismissing their claims, JA 1538, 1539, and this Court has jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

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[1] Leon E. Panetta was sworn in as Secretary of Defense on July 1, 2011, and is automatically substituted as defendant for the former Secretary of Defense, Robert M. Gates. *See* Fed. R. App. P. 43(c)(2).

STATEMENT OF ISSUE

Whether plaintiff Jose Padilla – who was detained by the military until January 2006 but has not since being detained by the military – has standing to seek an order that his prior designation and detention as an enemy combatant was unlawful and that any future military detention based on that designation would be unlawful.

STATEMENT OF THE CASE

Plaintiff Jose Padilla is now incarcerated serving a criminal sentence for committing federal crimes. He sues the Secretary of Defense seeking an injunction to prevent the Department of Defense from detaining him as an "enemy combatant" upon his release from federal criminal custody. The district court found that Padilla lacked standing to pursue this claim, and this appeal followed.

STATEMENT OF FACTS

1. According to his complaint, Padilla was detained by the Defense Department as an "enemy combatant" from June 2002 until January 2006. JA 78.[2] In January 2006, he was "transferred . . . to a federal detention center in Miami, Florida on criminal charges" and a "jury returned a verdict of guilty." JA 69. He

[2] In habeas corpus proceedings, this Court upheld the legality of Padilla's military detention under stipulated facts. *See Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

is currently serving a 17-year sentence stemming from those convictions. Order at 30. Padilla has appealed the conviction and the government has appealed the length of the sentence; both appeals are pending. *See United States v. Jayyousi*, No. 08-10494 (11th Cir.). His criminal conviction and sentence are not at issue in this case.

Padilla filed claims against several former government officials seeking damages for alleged constitutional violations in connection with his detention and treatment. Although most of Padilla's claims are directed at these former officials in their personal capacities, one claim is directed against the Secretary of Defense in his official capacity: he seeks a declaration that it would be unconstitutional to again hold him as an enemy combatant and an injunction to prevent him from being so held in the future after his criminal sentence ends. JA 107. He also claims that he suffers "public stigmatization" due to his prior detention. JA 102.

2. The district court held that Padilla lacked standing to pursue these claims. JA 1534-36. The court concluded that Padilla "claims a fear of redetention as an enemy combatant but alleges insufficient facts to suggest that such an event is actual or imminent." JA 1535. The court also found that Padilla's claim of stigma was insufficient to "damage[] his standing and associations in the community" given that he was serving time for "conspiracy to

murder, kidnap and maim persons outside the United States and providing material support to terrorists." JA 1536.

SUMMARY OF ARGUMENT

Padilla's claim against the Secretary fails for lack of standing, as the district court concluded. In light of Padilla's criminal convictions and the sentence he is now serving, there is no "real and immediate threat" that he will again be detained as an enemy combatant, and thus no standing to seek declaratory or injunctive relief regarding such hypothetical detention. *See Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). As to Padilla's claim of stigma, there is no "concrete" cognizable injury that he is currently suffering due his prior designation. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

STANDARD OF REVIEW

The Court reviews the dismissal of Padilla's claims *de novo*. *Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011).

ARGUMENT

The District Court Properly Dismissed Padilla's Official Capacity Claim For Lack Of Standing.

The power of federal courts extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2. To satisfy this standing requirement, a plaintiff must demonstrate an "injury in fact" that is "fairly traceable" to the defendant's conduct

and a "likelihood" that the requested relief will redress the alleged injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998); *see Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). If the plaintiff lacks standing, the Court lacks subject matter jurisdiction. *See Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) ("Doctrines like standing, mootness, and ripeness are simply subsets of Article III's command that the courts resolve disputes, rather than emit random advice.").

1. As the district court concluded, Padilla lacks standing to pursue this claim because his allegation that he fears redetention as an enemy combatant is neither "concrete" nor "imminent." JA 1536. Padilla alleges a "substantial risk" that he will again be subjected to military custody as an enemy combatant. JA 106. But this fear of future injury is, as the district court recognized, too speculative.

To establish the "injury in fact" needed for equitable relief a plaintiff must show a "real and immediate threat" of "irreparable injury" due to the challenged conduct. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). As this Court has explained, alleged "past wrongs do not in themselves amount to [a] real and immediate threat of injury." *Simmons v. Poe*, 47 F.3d 1370, 1382 (4th Cir. 1995); *see O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Rather, standing to seek

equitable relief turns on "either a continuing wrong or a real or immediate threat that [the plaintiff] would likely be irreparably injured by the use of [the challenged conduct]." *Simmons*, 47 F.3d at 1382; *see O'Shea*, 414 U.S. at 502. No standing will be found if the claimed future injury is "speculative" or "conjectural," no matter how much the plaintiff may claim to subjectively fear such injury. *Lyons*, 461 U.S. at 111; *Bryant*, 924 F.2d at 529. Thus, as *Lyons* explained, "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8.

Under these principles, the district court concluded (JA 1535) that Padilla's claimed fear of redetention as an enemy combatant does not confer standing to seek a declaration regarding his past detention, nor an injunction against his speculation that he might be detained in the future. Padilla is serving a sentence of more than seventeen years on terrorism-related offenses. He alleges no effort or intention on the part of the government to return him to military custody. The only support for his claim that he fears redetention is a statement, allegedly made by a Deputy Solicitor General to Padilla's counsel over five years ago, that the government "could . . . militarily detain Mr. Padilla at any time based on his alleged past acts." JA 102. That statement, however, was allegedly made on November 23, 2005, *id.*, while Padilla remained in military custody. The

statement therefore provides no support for Padilla's claim that he would be returned to military custody *after* being transferred into the criminal justice system, and Padilla alleges no statement or act of any kind after Padilla's transfer to civilian custody for criminal prosecution which indicates a "real and immediate" threat to return Padilla to military detention.[3]

Thus, just as Padilla's earlier habeas case became moot when he was transferred to civilian custody to face criminal charges, there is no real and immediate threat of a return to military custody for standing purposes here. As Justice Kennedy explained, "the course of legal proceedings has made [Padilla's claims as to the legality of military detention] . . . hypothetical," *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J, concurring in the denial of certiorari), and it is well established that a court does not hear claims that are "conjectural or hypothetical." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180 (2000). In sum, Padilla's claim that he may be redetained as an enemy combatant is purely speculative and does not support standing.[4]

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[3] The claim is made even more speculative by the fact that, in conjunction with seeking permission to move Padilla into civilian custody, the government requested in Padilla's habeas case "that [the Court] withdraw [its] opinion of September 9, 2005" upholding the legality of military detention. *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005).

[4] The result here would be the same if plaintiffs' claim were analyzed under (continued...)

2. Padilla also cannot establish standing based on a claim that the prior designation and detention as an enemy combatant stigmatizes him, *see* Br. at 52, as the district court properly concluded. JA 1536. This claim fails for at least two reasons.

First, a claim based on stigma must be tied to a further cognizable injury, which is not present here. While stigma may provide a basis to challenge certain government actions as violative of due process rights, the stigma must accompany a challenge to some concrete governmental action, such as termination of employment or removal of a child from parental custody. *See Zepp v. Rehrmann*, 79 F.3d 381 (4th Cir. 1996); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990); *Boston v. Webb*, 783 F.2d 1163 (4th Cir. 1986). This is because, as the Supreme Court has explained, reputation alone is not a sufficient interest; thus, "a 'stigma' to one's reputation" has not in itself been deemed a cognizable injury under the Due Process Clause, "apart from some more tangible interests such as employment." *Paul v. Davis*, 424 U.S. 693, 701 (1976) ("The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out

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[4](...continued)
ripeness doctrine. Padilla's claim is "dependent on future uncertainties" and is thus not "fit for judicial decision." *Miller*, 462 F.3d at 319. Nor would there be any "hardship" to Padilla from "withholding court consideration." *Id.* at 319; *see Padilla*, 126 S. Ct. at 1650 (Kennedy, J., concurring) (Padilla's "concern that his status might be altered again" can "be addressed if the necessity arises").

reputation as a candidate for special protection over and above other interests that may be protected by state law"). And, in turn, as explained above, the asserted interest that is more tangible in this case– a perceived threat of future detention – is entirely speculative such that it provides no basis for Padilla's standing. Thus, given that alleged social stigma is not, in itself, a constitutionally sufficient interest in this context, Padilla lacks standing to challenge his prior designation on this basis. *See McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 57 (D.C. Cir. 2001) ("when injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that 'some tangible, concrete effect' remain, susceptible to judicial correction'"); *see also Spencer v. Kemna*, 523 U.S. 1, 16 n.8 (1998).

Second, Padilla has not pled an adequate stigmatizing injury.[5] The injury needed for standing must be "concrete," "objective," and "palpable," rather than merely "abstract" or "subjective." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Here, as the district court reasoned (Order at 31), in light of Padilla's conviction for supporting international terrorism and conspiring in the U.S. to

[5] Padilla argues that the district court applied the substantive due process standard rather than the test for standing. Br. at 54. We submit that Padilla fails either test but, in any event, his legal claim is that the designation constitutes an "ongoing deprivation of liberty . . . which remains in effect . . . in violation of Mr. Padilla's Fifth Amendment substantive due process rights," JA 106, so he must meet both standards to avoid dismissal.

murder, kidnap, and maim people overseas, it is difficult to see a distinct justiciable interest that this case would serve to protect his "good name, reputation, honor, or integrity." *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 645-46 (4th Cir. 2007); *see also Ridpath v. Board of Governors Marshall Univ.*, 447 F.3d 292, 307-12 (4th Cir. 2006). The only "legally relevant injury" in this context "is the incremental effect" of the allegedly stigmatizing act over other unchallenged actions. *McBryde*, 264 F.3d at 57. The incremental effect here would be small, especially given that, unlike his criminal conviction, under the laws of war "'[c]aptivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (quoting Winthrop, Military Law & Precedents 788). Thus, it was entirely appropriate for the district court to assess, in considering standing, whether further review of this action could markedly advance Padilla's reputational interests, and the district court's conclusion that any "incremental effect" on Padilla's reputation would be minimal at best was manifestly correct.[6]

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[6] Padilla also likely cannot show that the alleged stigma is "false" as a matter of fact with regards to his ties to al Qaida, as opposed to the overarching legal issues he seeks to raise. *See Ridpath*, 447 F.3d at 312 ("[t]here can be no deprivation of liberty unless the stigmatizing charges at issue are false"). Padilla's criminal conviction was based, among other things, on his attendance at an al-Qaida training camp in (continued...)

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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July 2011

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[6](...continued)
Afghanistan. *See United States v. Hassoun*, No. 04-60001 CR-COOKE, Detention Order (S.D. Fla. Jan. 19, 2006) (the "weight of evidence against the defendant is substantial" and included the fact that "[o]n July 24, 2000, Padilla filled out an Al Qaeda terrorist training camp"; a "witness . . . stated that the application was identical to the form he completed before attending an Al Qaeda terrorist training camp"; and "[intercepted p]hone conversations . . . indicate that Padilla was in Afghanistan attending a terrorist training camp"). Other arguments that Padilla might like to pursue in this action - for example, his argument that a U.S. citizen captured on U.S. soil cannot lawfully be detained under the AUMF or consistent with the Constitution - are legal arguments that have no bearing on his reputation and could not form the basis for a challenge to the prior designation based upon stigma. *See McBryde*, 264 F.3d at 57 (judge lacked standing to pursue certain claims because "we cannot see how [holding that judicial council acted beyond lawful authority] would rehabilitate his reputation").

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

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 2431 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with WordPerfect-X5 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2011, I electronically filed the foregoing "BRIEF OF APPELLEE LEON E. PANETTA" with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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