No. 11-6480

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, for herself and as Mother and Next Friend of Jose Padilla; JOSE PADILLA,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, Former Secretary of Defense; CATHERINE T. HANFT, Former Commander Consolidated Brig; MELANIE A. MARR, Former Commander Consolidated Brig; LOWELL E JACOBY, Vice Admiral, Former Director Defense Intelligence Agency; PAUL WOLFOWITZ, Former Deputy Secretary of Defense; WILLIAM HAYNES, Former General Counsel Department of Defense; ROBERT M. GATES, Secretary of Defense in his official and individual capacities,

Defendants-Appellees.

Appeal from the United States District Court for the District of South Carolina in Case No. 2:07-cv-00410, Judge Richard M. Gergel

BRIEF FOR DEFENDANT-APPELLEE DONALD H. RUMSFELD

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Defendant-Appellee states that it is not a publicly held corporation or other publicly held entity, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock. No publicly held corporation has a direct financial interest in the outcome of the litigation.

Dated: July 11, 2011

By: /s/ Andrew M. Grossman
Andrew M. Grossman

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1. Whether the rights claimed by Appellants apply to detained enemy combatants.

2. Whether the Court has Article III jurisdiction over Appellants' claims.

STATEMENT OF THE CASE

This is a "*Bivens*" claim. Appellants seek one dollar in damages and declaratory relief personally against each individual Appellee, as well as declaratory and injunctive relief against the Secretary of Defense, in his official capacity, for injuries allegedly resulting from Jose Padilla's designation and detention as an enemy combatant. JA 1514-1515.

Appellants' claims were dismissed below because "special factors" counsel against extending the *Bivens* remedy into the national security and war-fighting areas, and because Appellees are entitled to qualified immunity. JA 1525, 1534. This appeal ensued.

STATEMENT OF FACTS

The President personally designated Padilla an enemy combatant and ordered his military detention because of his "'close[] associat[ion]

with al Qaeda, an international terrorist organization with which the United States is at war.'" *See Padilla v. Hanft*, 423 F.3d 386, 388-89 (4th Cir. 2005) ("*Padilla V*") (quoting June 9, 2002 presidential determination), *cert. denied*, 547 U.S. 1062 (2006). Padilla's designation and detention were challenged in two separate habeas proceedings. JA 1525 n.4.[1] In *Padilla V*, this Court held that Padilla's "military detention as an enemy combatant by the President is unquestionably authorized by the [Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF")] as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan." 423 F.3d at 392.

Appellants filed this action invoking *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). JA 1506. The District Court, considering motions to dismiss for failure to state a claim, immunity, and lack of jurisdiction, dismissed all of Appellants' claims in a February 17, 2011, decision. JA 1506-1540.

[1] As the District Court noted, despite Appellants' denial of due process claims, Padilla's enemy combatant designation and detention have been twice litigated to the Supreme Court. JA 1508-1514, 1525 n.4.

SUMMARY OF ARGUMENT

The law of armed conflict forbids a policy of "no quarter." Consequently, the U.S. Armed Forces can defeat an enemy force only if captives can be detained during hostilities. Interposition of the rights of civilian criminal defendants would make this process impossible. *See Padilla V,* 423 F.3d at 394-95. Recognizing a *Bivens* remedy in favor of detained (even in error) enemy combatants would similarly impose an impossible burden on the civilian and military personnel charged with defending the Nation against armed attack. Such an action has no basis in law or logic, and the District Court's dismissal should be affirmed.

Although the court below correctly concluded that "special factors" counsel against a *Bivens* remedy here, and that Appellees were entitled to qualified immunity on all claims, it did not rule on the vital questions of whether the constitutional and statutory rights Appellants assert actually exist and whether federal courts even have jurisdiction to consider their claims.

Because the President's ability to designate and detain enemy combatants is critical in all armed conflicts, this Court should affirm on

the bases that Padilla's constitutional or statutory rights were not violated by his enemy combatant designation and detention and that the federal courts lack jurisdiction over such claims.

ARGUMENT

I. Appellants' Rights Were Not Violated By Padilla's Enemy Combatant Designation And Detention

The District Court recognized Appellees' qualified immunity because the rights claimed were not "clearly established" at the time of their alleged injuries. JA 1529, 1530-1531, 1532-1533. This was within the court's discretion, *see Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009), and was correct as a matter of fact and law. However, there are compelling reasons why Appellees' qualified immunity also should be recognized based upon Appellants' failure to allege facts showing any constitutional violation with respect to Padilla's enemy combatant designation and detention. The Court may affirm on that basis. *Suter v. United States*, 441 F.3d 306, 310 (4th Cir. 2006).

A. *Saucier* Versus *Pearson*

Qualified immunity presents two questions: (1) whether the facts alleged show "a violation of a constitutional right" and (2) whether any such right "was 'clearly established' at the time of [the] defendant's

alleged misconduct." *Pearson*, 129 S. Ct. at 815-816. *Saucier v. Katz*, 533 U.S. 194 (2001), required consideration of these questions in that order, so as to preserve "the process for the law's elaboration from case to case." *Id.* at 201. *Pearson* relaxed this requirement, but noted that "the *Saucier* protocol . . . is often beneficial" because it "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 129 S. Ct. at 818-819. This is that case.

Appellants' claims depend upon the insupportable propositions that Padilla was entitled to rights equivalent to those of a criminal suspect and that Appellees Rumsfeld, Haynes, Wolfowitz, and Jacoby "developed the unprecedented 'enemy combatant' status to remove individuals from judicial review and other constitutional protections, including protections against brutal interrogation methods." Br. at 5.[2]

[2] Appellants' assertion that "ten of the eleven claims for relief do not turn on the propriety of Padilla's enemy combatant designation," Br. at 43, is incorrect. The alleged restrictions on Padilla's access to counsel, courts, and the outside world, as well as on his religious practices, in addition to his military detention and interrogation, were a direct result of, and justified by, his enemy combatant designation.

This assertion is foreclosed by the binding precedents of this Court, *Padilla V*, and of the Supreme Court, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Enemy combatant status was and is well-established in law, and Padilla received all of the process that was due.

B. Padilla Was Properly Designated And Detained

1. Enemy Combatant Status

The Government – much less Appellees – did not invent the "enemy combatant" classification to justify the unlawful detention of Padilla or anyone else. The Supreme Court used the term in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), and the status it describes is far older – as is the right to detain such persons without criminal trial or the equivalent. *See* H.W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* 431, 434 (1861) ("[T]he captor has the absolute right to keep his prisoners in confinement till the termination of the war.").

Similarly, assertions by amici Retired Military Officers that constitutional due process requirements support Appellants' claims are without foundation and without citation to any authority. *See* Brief *Amici Curiae* of Retired Military Officers in Support of Plaintiffs-Appellants and Urging Reversal, at 20-21.

The *Hamdi* plurality adopted a traditional definition of "enemy combatant," noting that "[a] citizen no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United Sates.'" *Hamdi*, 542 U.S. at 519.[3] This Court followed that definition in *Padilla V,* 423 F.3d at 392.

2. Enemy Combatant Rights

Enemy combatants are subject to capture and detention without criminal process during the entire course of the relevant hostilities. As the Court already has ruled with regard to Padilla, "the availability of criminal process cannot be determinative of the power to detain, if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place – the prevention of return to the field of battle." *Padilla V*, 423 F.3d at 394-95.

[3] The term is not as changeable as Appellants claim. Br. at 45 n.15. The critical common thread running through its usage is an association with enemy forces involving the receipt and execution of orders or "other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it," *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010), as was the case with Padilla. *Padilla V*, 423 F.3d at 392.

However, the alleged rights Appellants seek to vindicate here are precisely those appertaining to criminal defendants. Virtually without exception, their cited cases arose in the criminal justice context, addressing the rights of criminal suspects (*Rochin v. California*, 342 U.S. 165 (1952); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Gerstein v. Pugh*, 420 U.S. 103 (1975)), pre-trial detainees (*Bell v. Wolfish*, 441 U.S. 520 (1979); *Slade v. Hampton Rds. Regional Jail*, 407 F.3d 242 (4th Cir. 2005)), or convicted inmates (*Procunier v. Martinez*, 416 U.S. 396 (1974); *Lewis v. Casey*, 518 U.S. 343 (1996)).

Padilla fell into none of these categories, nor did he fall within a "new type of detainee classification" to which existing law from the criminal-justice context simply applies. Br. at 42. *Hydrick v. Hunter* is inapposite. *Hydrick* involved a form of "civil commitment" for sexually violent predators ("SVPs") based upon "diagnos[is] [of a] mental disorder that makes the person a danger to the health and safety of others." 500 F.3d 978, 983 (9th Cir. 2007) (*quoting* Cal. Welf. & Inst. Code § 6600(a)), *vacated and remanded*, *Hunter v. Hydrick*, 129 S. Ct. 2431 (2009) (in light of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)). In that context, the court concluded that there was "clearly established law" for

purposes of its qualified immunity analysis: that applicable to the "prison context" and to "civilly detained persons," even if that law did not deal precisely with SVPs. *Id.* at 989. The court agreed, however, "that context is critical in constitutional claims." *Id.* at 989 n.8. Equally inapposite are the single military court decision and UCMJ provision cited by Appellees, Br. at 33-34 (citing *United States v. Fricke*, 53 M.J. 149 (C.A.A.F. 2000) and 10 U.S.C. § 813), both of which concern pretrial confinement.

Padilla was held neither as a criminal suspect nor a civilly detained person. He was detained as an enemy combatant in wartime, and his rights were appropriately defined by law applicable to that status. Enemy combatants are subject to detention (*i.e.,* the seizure of their persons), *see Hamdi,* 542 U.S. at 518, and the military is the lawful, appropriate, and traditional detaining authority, *see Ex Parte Quirin,* 317 U.S. 1, 31 (1942) ("By universal agreement and practice . . . [u]nlawful combatants are . . . subject to capture and detention [and] trial and punishment by military tribunals . . . .").

The same is true of the other "rights" Appellants claim were violated, particularly with regard to restrictions on Padilla's access to

information and ability to contact Lebron and other civilians, as well as the various constraints upon his person and activities while detained. Such restraints are the normal consequence of classification as an enemy combatant. The right to "restrict the detainee's communication with confederates" is inherent in the President's authority to detain. *Padilla V*, 423 F.3d at 395.[4]

Similarly, Padilla's involuntary interrogation was fully consistent with his detention as an enemy combatant.[5] As this Court recognized in rejecting Padilla's assertions that his military detention was "neither necessary nor appropriate": "[I]n many instances criminal prosecution

[4] Wartime detainees' outside contacts are always strictly controlled to prevent the receipt or provision of information from or to co-belligerents. This is true even for POWs, who have many more rights and privileges than do unlawful enemy combatants like Padilla. *See* Geneva Convention III of 12 August 1949 Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 21, 34, 37, 39, 41, 82, 87-89 ("GPW"). POW contact with family and friends also can be controlled (art. 71), including through the censorship of correspondence or its prohibition altogether in appropriate circumstances (art. 76).

[5] As stated in the Brief of Individual Appellees, at 51-56, Padilla's various claims with regard to abusive conditions of confinement fail to meet the pleading standards mandated by *Twombly* and *Iqbal*, and are belied by the material attached to his Complaint.

would impede the Executive in its efforts to gather intelligence from the detainee." *Padilla V,* 423 F.3d at 395.[6]

Padilla's access to counsel and the courts also was properly limited. It is well settled that such rights are to be defined based upon the nature of confinement and relevant process. *See, e.g., Hause v. Vaught*, 993 F.2d 1079, 1084 (4th Cir. 1993) (limits on pre-trial detainee); *Hydrick,* 500 F.3d at 1000 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). As an enemy combatant, Padilla was entitled to habeas proceedings and a "fair opportunity to rebut the Government's factual assertions." *Hamdi*, 542 U.S. at 533. Padilla was fully accorded the first process, JA 1525 n.4, and he refused the second. JA 1230-34, 1247, 1268-75. Padilla received all the process that was due.

No detainee case decided since *Hamdi* and *Padilla V*, brings this conclusion into doubt. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), struck down the President's Military Commission Order No. 1 as

[6] Contrary to Appellants' suggestion, Br. at 30 n.8, interrogations are a lawful and critical aspect of enemy combatant detention. The controlling opinion in *Hamdi* merely stated that "indefinite detention for the *purpose* of interrogation is not authorized." 542 U.S. at 520 (emphasis added). It did not suggest that the interrogation of an enemy combatant, otherwise properly detained during hostilities, was in any way inappropriate.

inconsistent with the applicable requirements of the Uniform Code of Military Justice ("UCMJ"). However, no member of the Court questioned either that the United States was at war with al Qaeda or that Hamdan, a close associate of Osama bin Laden, was properly subject to military detention. Similarly, *Boumediene v. Bush*, 553 U.S. 723 (2008), affirmed that "[t]he law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Id.* at 797. At no point did the Court suggest that the rights of detained enemy combatants were, as Appellants would have it, coextensive with those available in the criminal justice system.

This is not to say that enemy combatants in Padilla's position have no rights – only that those rights do not exist in the form Appellants assert. *Boumediene* proved this point, making clear that the metes and bounds of whatever constitutional rights detained enemy combatants may have were not established at the time of Padilla's detainment: "Because our Nation's past military conflicts have been of

limited duration, it has been possible to leave the outer boundaries of war powers undefined." *Id.* at 797-798.[7]

II. There Is No Article III Jurisdiction Over Appellants' Claims

A. Appellants Lack Standing To Challenge Padilla's Enemy Combatant Designation And Detention

The Court has an "obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010). Although the District Court held Appellee Rumsfeld's motion to dismiss for lack of jurisdiction to be moot, this Court should affirm dismissal of all claims arising out of Padilla's designation and detention because Appellants lacked Article III standing to pursue them. Padilla's enemy combatant designation was a discretionary presidential action which is not properly reviewable in a damage action against subordinate officials. In addition, the express textual assignment to Congress of the power to regulate the armed forces renders Appellants' conditions of confinement

[7] Significantly, in ruling that Guantanamo detainees were entitled to habeas, the Court specifically left open the details of that process: "[w]e make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings." *Id.* at 796.

claims outside of the federal courts' jurisdiction as political questions and, in any case, precludes creation of a *Bivens* remedy.

1. Padilla's Designation And Detention Are Not An Injury Fairly Traceable To Any Action Of Appellees

President Bush designated Padilla an enemy combatant and ordered his military detention. JA 122. As a matter of law, the President was the only official who *could* have made this designation. The AUMF authorizes action by no other person, and Appellants allege no presidential delegation of this authority. As subordinate officials, Appellees had no power to authorize, approve, or contest the President's determination. Any participation by Appellees in formulating relevant U.S. policies, or in recommending Padilla's designation, was wholly advisory.

Advisory actions are not subject to judicial review where – as here – the President is the ultimate decisionmaker. *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Until the President acts in such cases, there is no action "that will directly affect the parties" which may then be subject to judicial review. *Id.* at 797. *See also Dalton v. Specter*, 511 U.S. 462, 469-71 (1994) (recommendations by subordinate officials were not subject to judicial review because only the President

could take action affecting interests subject to judicial vindication); *Rendell v. Rumsfeld*, 484 F.3d 236, 242 (3d Cir. 2007) (recommendations are "merely preliminary in nature" and can cause no injury to plaintiffs); *Rell v. Rumsfeld*, 423 F.3d 164, 165 (2d Cir. 2005) (same); *Blagojevich v. Rumsfeld*, 385 F. Supp. 2d 768, 772 (C.D. Ill. 2005), *vacated on other grounds,* 2006 WL 3147365 (7th Cir. 2006) ("[T]he recommendations of the Secretary and the Commission are tentative recommendations that do not affect anyone's legal rights. The Governor, therefore, has not alleged an injury-in-fact and does not have standing.").

Appellants have failed to plead an injury-in-fact attributable to any action of Appellee Rumsfeld (or any other Appellee) and therefore lack standing to assert any claim arising out of Padilla's enemy combatant designation and detention. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 328 (4th Cir. 2010). Only the President could, and did, take action affecting Appellants' legal interests, and this conclusion is not changed by any impact the Appellees' recommendations may have had on the President. *See Flue-Cured Tobacco Cooperative*

Stabilization Corp. v. EPA, 313 F.3d 852, 860 (4th Cir. 2002) ("Regardless of how the challenged reports by the Commission and Secretary affected the President's range of choices, the final decision which produced the actions directly affecting the parties remained the President's.").

This requirement is more than a matter of administrative exhaustion. "To revise or review an administrative decision, which has only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948). This is the language of Article III jurisdiction, not administrative law. Without the President's action in such cases, there is no legally cognizable injury-in-fact.

As a result, Appellants have not and cannot allege an injury attributable to Padilla's designation as an enemy combatant that is "fairly traceable" to any action of Appellee Rumsfeld or of any other Appellee. Appellants therefore lack standing. *See The Friends For Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002)

("fairly traceable" requirement ensures that the alleged injury did not result from the independent actions of someone not before the court).[8]

2. Judgment Against Appellees Cannot Redress Appellants' Alleged Injuries

Similarly, no declaration that Appellees acted unlawfully, nor any damage award against them, could redress Appellants' alleged injuries because they were caused, if at all, by the President. Where a plaintiff's injury depends upon "the independent action of some third party not before the court," it becomes entirely "speculative whether the desired exercise of the court's remedial powers" would redress that injury. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976).

Moreover, where the President is the ultimate decisionmaker, "there are no other officials – subordinate or otherwise – to whom the Court could issue an order that would redress" an alleged constitutional

[8] Only where a subordinate's own actions have independent legal significance are they subject to review. *See Franklin*, 505 U.S. at 803 (constitutional apportionment challenge could proceed against Commerce Secretary based upon responsibilities vested by law in her alone); *Bennett v. Spear*, 520 U.S. 154, 169, 178 (1997) (Fish and Wildlife Service "biological opinion" created fairly traceable injury where it "has a powerful coercive effect on the action agency" and actually alters "the legal regime to which the action agency is subject").

violation solely within the President's control. *See Newdow v. Bush*, 355 F. Supp. 2d 265, 281-82 (D.D.C. 2005) (injunctive relief denied because the President, and no subordinates, had "ultimate decision-making power in selecting speakers for the Inauguration, including clergy").[9]

B. The System Of Military Discipline Precludes A Common Law Remedy For Deprivations Incident To Confinement

Appellants ask the Court to intrude on Congress' plenary power to "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, and meddle where "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Chappel v. Wallace,* 462 U.S. 296 (1983) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10). But "[i]t is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline." *Id.* Appellants claims present political

[9] This is true even where the result is to "foreclose judicial review." *Dalton*, 511 U.S. at 475; *see Chicago & Southern Air Lines, Inc.*, 333 U.S. at 113. Detainees may, of course, still seek release through habeas proceedings. *Boumediene*, 553 U.S. at 795.

questions, and the remedy Appellants urge lies at or beyond the outer limits of justiciability. *See Hanson v. Wyatt*, 552 F.3d 1148, 1167 n.3 (Gorsuch, J., concurring) (listing cases "defining the scope of justiciability in military affairs"); *Bancoult v. McNamara*, 445 F.3d 427, 432, 436 (D.C. Cir. 2006) (military policy and its implementation presented a nonjusticiable political question). The Court's jurisdiction is doubtful. *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1452 (U.S. 2007) (a political question presents "no justiciable 'controversy'"); *Lin v. U.S.*, 561 F.3d 502, 505-06 (D.C. Cir. 2009) (no subject matter jurisdiction).[10]

Congress has in fact exercised its plenary power in this area. Contrary to Appellants' bare assertion that Padilla possessed "no alternative means of redress" of his claims, Br. at 20, the UCMJ provides a "alternative, existing process for protecting the interest[s],"

[10] The availability of alternative remedies is, of course, also directly relevant to the Court's *Bivens* inquiry. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Though not reaching the issue directly, due to its reliance on "special factors," the District Court did suggest that Padilla had taken advantage of an alternative remedy, habeas corpus, and had had other opportunities to raise his claims in the courts, JA 1525 n.4. The parties contested the availability of alternative remedies below, *e.g.*, Individual Defendants' Motion To Dismiss, at 24 n.17; Plaintiffs' Response, at 16 n.9, and Appellants vigorously and repeatedly assert the unavailability of such remedies before this Court, *e.g.*, Br. at 20 ("It is beyond dispute that Padilla has no alternative means of redress").

Wilkie v. Robbins, 551 U.S. 537, 550 (2007), that Appellants allege were abrogated incident to Padilla's confinement. The comprehensive military justice system that it establishes, *see U.S. v. Joshua*, 607 F.3d 379, 383 (4th Cir. 2010), provides an effective deterrent to the deprivation of rights incident to detainment.

Such deprivations of rights are subject to military discipline. *See* UCMJ art. 93 (cruelty and maltreatment), art. 97 (unlawful detention), art. 128 (assault), and art. 134 (providing for the punishment of "all conduct of a nature to bring discredit upon the armed forces"); *Dep't of the Navy Corrections Manual* § 3402 (rules of conduct for staff), § 3405 (physical abuse/maltreatment). Detainees, like all military prisoners, are entitled to complain of violations of their rights by prison staff or other prisoners. Rules for Courts-Martial 301. Servicemen, meanwhile, may not conceal and fail to report misconduct; misprision of a serious offense is punishable by confinement up to three years, as well as service-related punishment — *e.g.*, loss of rank and a dishonorable discharge. *Manual for Courts-Martial* § IV-132 (2008 ed.); Maximum Punishment Chart, Article 134 "Misprision of Serious Offense", Appendix 12-6, *Manual for Courts-Martial* (2008 ed.). Complaints,

whether by detainees or service members, may be made by any means or format to law enforcement, investigative personnel, or appropriate persons in the chain of command, and must be forwarded to the immediate commander of the person involved. Rules for Courts-Martial 301 and discussion.[11] Upon receipt, the immediate commander must make or cause to be made a preliminary inquiry into the charges or suspected offenses. Rules for Courts-Martial 303. UCMJ offenses, including violations of regulations and orders, are subject to action within the chain of command or court-martial, and are punishable by reprimand, reassignment, loss of rank, hard labor, imprisonment, and discharge. *See Manual for Courts-Martial* § V 4-7; Rules for Courts-Martial 1003. Evidence presented by the Appellants demonstrates that military discipline was in fact appropriately applied to punish violations of detainee policy. JA 631-33 (Report of Vice Admiral A.T. Church on Treatment of Enemy Combatants, Ex. 22 to Plaintiffs' Third Amended Complaint) (listing infractions and their dispositions).

[11] Indeed, Padilla had ample opportunity to make complaints to Brig officials both in person and through the Brig's "chit" system. JA at 597-98 (Decl. of Stephanie Wright, Ex. 18 to Plaintiffs' Third Amended Complaint).

Because Congress has enacted this comprehensive disciplinary system, a *Bivens* remedy would inappropriately infringe on Congress's prerogatives and lack any purpose. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (describing deterrent purpose of *Bivens*).

In light of Congress's comprehensive approach, specific policy choices, and precise constitutional authority, the Court must defer to the system of military regulation and discipline established by Congress and decline Appellants' invitation to draft its own manual for the treatment of detainees held by the armed forces and for the discipline of those holding them. Having provided an "effective substitute" to *Bivens,* Congress has "resolved the question" of its application. *Bush v. Lucas*, 462 U.S. 367, 378 (1983). The UCMJ occupies the field of military discipline. The effect is to displace any vestige of federal common law.[12] *See American Elec. Power Co., Inc. v. Connecticut*, No. 10-174, at *10 (S.Ct. June 20, 2011).

Accordingly, the District Court's dismissal of Appellants' claims also should be affirmed because they lack Article III standing to press them.

CONCLUSION

For the reasons stated above, and for those stated in the Brief for Defendants-Appellees Hanft, Haynes, Jacoby, Marr, and Wolfowitz, the District Court's decision should be affirmed.

Oral argument is requested.

Dated: July 11, 2011

Respectfully Submitted,

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[12] *Bivens* is, of course, a species of federal common law. *See Holly v. Scott*, 434 F.3d 287, 289-90 (4th Cir. 2006); *Wilkie*, 551 U.S. at 550.

CERTIFICATE OF COMPLIANCE WITH RULES 28.1(e) & 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because this brief contains 4,422 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in the 14-point size of the Century font.

Dated: July 11, 2011

By: /s/ Andrew M. Grossman
Andrew M. Grossman

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2011, I electronically filed the foregoing Brief with the Court by using the CM/ECF system and by overnight delivery. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: /s/ Andrew M. Grossman
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