

No. 11-1277

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IN THE  
*Supreme Court of the United States*

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ESTELA LEBRON and JOSE PADILLA,

*Petitioners,*

—v.—

DONALD H. RUMSFELD, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**REPLY TO BRIEF IN OPPOSITION**

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## ARGUMENT

1. The core of respondents' brief is the contention that the decision below "reflects a straightforward application of this Court's decisions" in *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983). Br. in Opp. 10. It does not, and the broad misreading of those cases by the court of appeals warrants this Court's review.

Contrary to respondents' suggestion, *Stanley* and *Chappell* do *not* stand for the proposition that federal courts should forbear from adjudicating cases involving military matters generally. Both cases involved claims by servicemembers seeking damages for injuries sustained incident to their service. In rejecting those claims, this Court stressed the importance of maintaining "the unique disciplinary structure of the Military Establishment." *Stanley*, 483 U.S. at 679 (citing *Chappell*, 462 U.S. at 304). That concern is not present here. By stretching the decisions in *Stanley* and *Chappell* far beyond their stated rationales, the court of appeals effectively eliminated a *Bivens* remedy for *any* American citizen gravely injured by the unlawful conduct of military officials. Neither *Stanley* nor *Chappell* supports that result, let alone compels it.<sup>1</sup>

In *Chappell*, for instance, this Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U.S. at 305 (emphasis

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<sup>1</sup> Nor did the government argue for such a rule in either case. See generally Brief for the Petitioners, *United States v. Stanley*, 483 U.S. 669 (1987) (No. 86-393); Brief for the Petitioners, *Chappell v. Wallace*, 462 U.S. 296 (1983) (No. 82-167).

added). The Court’s holding derived from *Feres v. United States*, 340 U.S. 135 (1950), which prohibited servicemembers from suing the government under the Federal Tort Claims Act for injuries sustained incident to military service. *Chappell*, 462 U.S. at 298–300. *Feres* recognized that members of the military had a “unique,” “peculiar,” and “special” relationship to the government, and that civilian courts should “hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers.” *Chappell*, 462 U.S. at 299–300.

*Chappell* merely extended that logic to the *Bivens* context, and *Stanley* further refined it by holding that servicemembers may not sue other members of the military—superior or not—for “injuries that ‘arise out of or are in the course of activity incident to service.’” *Stanley*, 483 U.S. at 684 (quoting *Feres*, 340 U.S. at 146); *see also id.* at 683–84 (affirming that special factors “require abstention . . . as extensive as the exception to the [Federal Tort Claims Act] established by *Feres*”).

Petitioners are not servicemembers and are not subject to the “unique disciplinary structure” that *Stanley* and *Chappell* protect. Where, as here, military officials have violated the rights of civilians, the courts have not hesitated to recognize *Bivens* claims. *See, e.g.*, Pet. 19.

Moreover, unlike petitioners, servicemembers have been provided with a “comprehensive internal system of justice to regulate military life,” one that “not only permits aggrieved military personnel to raise constitutional challenges in administrative

proceedings [but that] authorizes recovery of significant consequential damages.” *Schweiker v. Chilicky*, 487 U.S. 412, 436 (1988) (citing *Chappell*, 462 U.S. at 302–03).

Respondents ignore these distinctions, insisting that *Stanley* and *Chappell* foreclose all damages suits seeking “judicial review of national security and military matters” or of “military policies and operations.” Br. in Opp. 13, 15. Their sweeping rhetoric seeks, and the court of appeals’ opinion creates, the type of national-security exemption that this Court has consistently rejected. *See* Pet. 20–23. Allowing such a far-reaching exemption to stand would corrode the judicial obligation to safeguard individual liberties. Review is warranted to correct the Fourth Circuit’s error.

1. Respondents contend that a *Bivens* remedy should be unavailable here because “Congress has legislated repeatedly and recently regarding the matters implicated in this suit without creating a damages action.” Br. in Opp. 13 (emphasis omitted). But respondents have it exactly backwards. That Congress has not “creat[ed] a damages action” is not a “factor counseling hesitation” but rather a truism: in *every* special factors inquiry, it will *always* be the case that Congress has not legislated a cause of action. Moreover, as petitioners explained in the petition for certiorari, Congress has in fact quite recently spoken to these issues in a manner that makes plain that a *Bivens* remedy remains available to petitioners.

In the Military Commissions Act of 2006 (“MCA”), Congress expressly foreclosed civil actions for *non-citizens* designated by the executive as

“enemy combatants,” while leaving intact such actions by citizens. See Pub. L. No. 109-366, § 7(a)(2), 120 Stat. 2600, 2635–36 (2006). Respondents cannot plausibly contend that Congress was unaware of *Bivens* when it enacted the MCA. Indeed, in a report to the United Nations Committee Against Torture in April 2006, the U.S. Department of State affirmed that “U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights,” and it expressly included among those “avenues” “[s]uing federal officials directly for damages under provisions of the U.S. Constitution for ‘constitutional torts,’ see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).” United States Written Response to Questions Asked by the Committee Against Torture, April 28, 2006, available at <http://www.state.gov/drl/rls/68554.htm>. Less than six months later, Congress enacted the MCA.

Thus, the salient fact is not that Congress neglected to *create* a cause of action for U.S. citizen “enemy combatants” subjected to cruel and inhumane treatment, but that it expressly addressed the issue and chose to bar such actions only for non-citizens.

2. Respondents’ assertion that this case is a poor vehicle to address the question presented is predicated on material misrepresentations of petitioners’ complaint, the proceedings below, and the governing case law. See Br. in Opp. 17–20.

*First*, respondents argue that petitioners’ allegations fail the pleading standards enunciated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The district

court thought otherwise, and for good reason. C.A. App. 1453–54 (“Attached to the third amended complaint is a massive trove of documents. I’ve read them all. I’ve read every one of them. I’ve read them twice actually. And I’m sure that was, among other things, as to address the challenges of *Iqbal* and *Twombly*, and it was successful in that.”).

Petitioners clearly allege that each respondent personally participated in Mr. Padilla’s brutal mistreatment, either directly or by ordering others to do so. C.A. App. 84, 90–91, 98. And petitioners plead concrete facts supporting that allegation and rendering it plausible. Unlike *Iqbal*, in which one of 762 detainees alleged a sprawling conspiracy by the Attorney General to invidiously discriminate against him, this case involves one of only *two* Americans detained by the military on U.S. soil as suspected “enemy combatants,” and the only one to be seized in the United States. The government viewed Mr. Padilla as a class of one, *see, e.g.*, C.A. App. 111–13, and his detention and interrogation were superintended by respondents, at the highest levels of government.

Petitioners’ factual allegations establish that: (1) respondents directed virtually every aspect of the detention and interrogation of certain detainees, up to and including the approval of the use of specific interrogation techniques on specific detainees, C.A. App. 84–89, 98; (2) those same officials even more closely managed the detention and interrogation of Mr. Padilla, given his status as the only American “enemy combatant” seized and detained on U.S. soil, *see* C.A. App. 98, 111–13, 650 (3AC Ex. 27), 652–53 (3AC Ex. 28); and (3) the interrogation techniques

that respondents authorized for use against certain detainees were similar, and in many cases identical, to those used on Mr. Padilla, *compare* C.A. App. 90–91, *with* C.A. App. 419, 430–32 (3AC Ex. 13), *and* C.A. App. 574–77 (3AC Ex. 17).

These allegations and supporting facts, as well as numerous others based on now-public government documents attached to petitioners’ complaint, easily satisfy *Iqbal’s* pleading standards. *See also* Reply Brief of Plaintiffs–Appellants at 20–29, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (No. 11-6480), ECF No. 91 (extensive discussion of petitioners’ factual allegations).

*Second*, respondents suggest that Mr. Padilla’s habeas corpus proceedings (which sought his release from military custody) preclude his *Bivens* claims (which seek compensation for abuse while in custody). Br. in Opp. 19 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994)).

Respondents’ claim fails on its own terms. Even were *Heck* applicable outside the criminal context, it would not apply here, because there is no underlying court judgment to protect. *Heck* was intended to foreclose collateral attacks on still-valid court judgments and, thereby, to prevent inconsistent results. Mr. Padilla was detained on the basis of a unilateral executive decision, which no court has affirmed. Allowing petitioners’ *Bivens* claims to proceed would not, therefore, risk a collateral attack on a valid judgment. Moreover, at this stage of the proceedings, Mr. Padilla is only challenging the conditions of his confinement, not the basis for his prior detention in military custody.

Respondents' misplaced reliance on *Heck* also obscures a critical and material point. Respondents held Mr. Padilla in incommunicado detention for nearly two years, without any access to counsel, courts, or family. C.A. App. 91, 93. By preventing Mr. Padilla from communicating to his counsel the details of his horrific abuse, respondents effectively denied Mr. Padilla the very remedy that, they now claim, was his only one.

*Finally*, respondents assert that this Court's review would be "fruitless" because even if petitioners have a cause of action, respondents would be entitled to qualified immunity. Put otherwise, respondents contend that in 2002 and 2003, reasonable government officials could not have known that subjecting Mr. Padilla to severe beatings and chaining him in stress positions; depriving him of sleep, heat, and light; and threatening him with worse torture and death might violate the Constitution.

But this Court's decisions had made abundantly clear that interrogation techniques and conditions of confinement far less severe than those to which Mr. Padilla was subjected are "too close to the rack and the screw" and thus categorically prohibited. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952); *see also Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.8, 154 (1944) (36 hours of interrogation "inquisition[al]" and "inherently coercive"); *Darwin v. Connecticut*, 391 U.S. 346 (1968) (48 hours of incommunicado questioning); *Clewis v. Texas*, 386 U.S. 707 (1967) (arrest without probable cause and interrogation for nine days with little sleep); *Blackburn v. Alabama*, 361 U.S. 199,

206 (1960) (“this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition”); *Beecher v. Alabama*, 389 U.S. 35, 36–38 (1967) (threat of death with a gun “inescapabl[y]” unconstitutional); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (holding that moving a prisoner “by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously” was unconstitutionally coercive).

Those decisions were not rendered null by the executive’s unilateral creation of a novel “enemy combatant” designation for a U.S. citizen seized out of civilian criminal custody by military officials. *See, 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.”).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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