THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JOSE PADILLA, et al.,	)	
	)	
Plaintiffs,	)	Case No. 2:07-410- RMG
	)	
v.	)	
	)	
DONALD H. RUMSFELD, et al.,	)	
	)	
Defendants.	)	November 24, 2010

PLAINTIFFS' OPPOSITION TO DEFENDANT RUMSFELD'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

This case involves a United States citizen subjected to years of military detention and brutal interrogation by U.S. officials on U.S. soil. In the more than three years since plaintiffs filed their complaint, Rumsfeld and the other defendants have vigorously attacked the lawsuit, led by the Assistant Attorney General in charge of the DOJ Civil Division and the Director of its Torts Branch, which oversees DOJ's nationwide defense of *Bivens* claims. They never made the radical argument now presented by Defendant Rumsfeld's newly-appointed private counsel: that because President Bush designated Padilla as an enemy combatant, this Court lacks jurisdiction to review Rumsfeld's role in bringing about that designation and the abuses that followed it. Rumsfeld is entitled to raise the new subject matter jurisdictional argument, even now, at the eleventh hour, but the fact that the experienced *Bivens* attorneys handling this case did not make the argument during the last three years underscores how attenuated it is.

The DOJ's decision not to question the Court's subject matter jurisdiction over claims that a U.S. citizen was brutally interrogated at a U.S. naval brig is unsurprising. On Rumsfeld's view, a presidential order to murder a detainee would immunize the officers who carried out the order from any legal consequence. No court has ever held that subordinate federal officers are categorically immune from liability for grave misconduct so long as they act pursuant to a presidential order – much less that courts lack jurisdiction to hear such claims. To the contrary, the Supreme Court has exercised jurisdiction over habeas suits against those detaining enemy combatants pursuant to presidential order, upheld an injunction against the Secretary of Commerce for seizing steel mills pursuant to a presidential order, and even held the commander of American warship liable in damages for an illegal seizure commanded by presidential order. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006);

Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

Moreover, even on its own radical terms, Rumsfeld's argument could not possibly reach the lion's share of the claims in this case, which speak to Padilla's allegations that he was brutally interrogated in a regime approved and ordered by Rumsfeld – but never ordered by President Bush. Rumsfeld invites this Court to conclude that the harms alleged here – being forced into excruciating stress positions, deprived of sleep and even a blanket, denied access to all natural stimulation and human contact, and interrogated incommunicado and under threat of death to oneself and harm to one's family – are "natural incidents" of one's designation as an enemy combatant. That invitation offends long-held constitutional norms and law-of-war principles and deviates sharply from this Nation's history and traditions. Such treatment is not the "natural incident" of detention, and this Court should reject Rumsfeld's eleventh hour attempt to shoehorn what is at best an argument about causation – whether he or the President is more to blame for the abuses plaintiffs suffered – into a new rule of Article III standing.[1]

[1] In the introduction to his motion, Rumsfeld discourses at length on policy arguments irrelevant to the standing issue that his motion purports to present. He suggests, for instance, that if Padilla is permitted to seek compensation for the brutal treatment to which he was subjected, then all "present and future" presidential advisors will be chilled from advising the President in the absence of a "pre-existing judicial determination" that the activity in question is lawful. While the argument has no bearing on the standing issue, plaintiffs note briefly that it is quite wrong, for several reasons. First, the years-long arbitrary detention and cruel treatment of a U.S. citizen on U.S. soil was unique and extraordinary; it is surpassingly unlikely that a finding of liability in these circumstances would deter *any* present or future officer from any activities incident to his or her official duties. Second, as explained in plaintiffs' opposition to the last motion to dismiss, there is already abundant "pre-existing judicial" precedent making clear that the treatment to which Padilla was subjected was prohibited by law. Finally, "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (denying immunity to Attorney General exercising his national security function).

SUMMARY OF FACTS AND PROCEDURAL HISTORY

Jose Padilla is an American citizen. C ¶ 12.[2] On June 9, 2002, he was arrested at O'Hare Airport in Chicago, flown to New York and detained there as a material witness in a civilian jail. *Id*. ¶ 35. His court-appointed attorney moved to vacate the material witness warrant, but two days before the motion was to be heard, Padilla was declared an "enemy combatant," seized by military agents from his civilian jail cell, and brought by night to a military prison in Charleston, South Carolina – the Consolidated Naval Brig ("Brig"). Padilla was not and had never been an enemy combatant. No judge – including the district court judge overseeing his detention in the New York civilian jail as a material witness – had the opportunity to review the evidence or otherwise rule on the designation purportedly justifying Padilla's military seizure and detention. *Id*. ¶ 36-43.

Rumsfeld played a central role in Padilla's unlawful designation and detention. He developed an "extra-judicial, ex parte assessment of enemy combatant status followed by indefinite military detention, without notice or opportunity for a hearing of any sort." C36. He effectively assured the approval of that policy by conspiring with John Yoo to manufacture legal memoranda that set the stage for that unprecedented exertion of unilateral executive power, namely, by justifying the application of military law to domestic operations and crafting a memorandum specific to Padilla himself. C ¶¶ 49, 50a, 50f, 50g. He recommended application of this protocol to Padilla, C ¶¶ 38, 42, and "ordered the U.S. Armed Forces to take control of Padilla as an 'enemy combatant' and hold him at the Naval Consolidated Brig." C ¶ 43.

[2] The facts on Padilla's seizure, detention, and brutal treatment are described in more detail in the Third Amended Complaint ("C") and reviewed in Plaintiffs' Opposition to Motion to Dismiss by Defendants in their Individual Capacities ("Opp.").

No criminal charge was brought against Padilla, a U.S. citizen seized by the military in a civilian setting – a secure jail cell – in the U.S. Military agents held him in solitary confinement in the Brig for more than three and a half years. For ten months, he was kept completely incommunicado, unable to speak with his family, lawyers, or the courts. After being allowed a single brief message to his mother letting her know that he was alive, he was plunged again into an entirely incommunicado detention, lasting another eleven months. For twenty-one months, he had no access *at all* to courts or counsel, and that one brief message to his mother was the only communication he had with anyone in the outside world. *Id*. ¶¶ 82, 91.

Aside from Padilla himself, the only people who knew the details of his mistreatment were Rumsfeld and those who, with him, orchestrated and implemented the interrogations and detention. During his time in the Brig, Padilla slept on a steel slab, deprived of mattress, blanket, sheet, and pillow. His sleep was "adjusted" by extreme temperature variations, noxious odors, and deliberate interruptions of loud noises and glaring light. His windows were blackened and he was subject to glaring artificial light, so that he never knew whether it was day or night. *Id.* ¶ 81. His Koran was confiscated, and he was denied access to newspapers or any news from outside the Brig. *Id*. In the midst of this treatment, Padilla was subjected to multiple, extended periods of interrogation. He was left shackled in stress positions for hours. Interrogators threatened him with rendition and told him that they would execute him immediately. He also was forcibly injected with drugs and told that the injections contained a "truth serum." *Id*. He was given grossly inadequate medical care or denied care altogether. *Id*. ¶ 101.

Rumsfeld purposely designed, approved, and ordered the use of these extreme methods of detention and interrogation. C ¶ 46. He was personally involved in deciding on the range of interrogation techniques that would be used against detainees in general, and on the conditions of

detention and interrogation to which individual detainees were subject. *Id*. ¶ 56. On December 2, 2002, he authorized the interrogation techniques described in a November 27, 2002 memo from Defendant Haynes. These techniques included waterboarding, threats of death, exposure to extreme cold, sensory deprivation, 20-hour interrogations, four hours of stress positions, and environmental manipulation. *Id*. ¶¶ 66, 70. He authorized these techniques despite having received a memorandum from the FBI stating that the techniques were unconstitutional and might violate federal criminal law against torture. *Id*. ¶ 67. When Rumsfeld encountered firm internal opposition, he convened a Working Group and reauthorized all the techniques through the group, in part by conspiring to manufacture a flawed legal analysis by John Yoo. *Id*. ¶¶ 77-78.

Though Padilla was imprisoned and interrogated incommunicado, so that he could not communicate with his lawyers, his counsel petitioned for a writ of habeas corpus on his behalf in the Southern District of New York. The district court ruled that Padilla had a right to counsel and a right to challenge the factual basis for his detention. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) [*Padilla I*]. The Second Circuit affirmed Padilla's rights, holding that Padilla – a U.S. citizen seized in a civilian setting in the U.S. – could not be imprisoned without charge. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) [*Padilla II*].

It was not until the Supreme Court granted certiorari to hear the case that Rumsfeld and his co-defendants allowed Padilla limited access to his attorneys – nearly two years after he was seized. C ¶ 82; Opp. at 3-4. The attorney-client meetings were recorded, and government agents were present at each meeting. C ¶¶ 84-88; Opp. at 6. Interrogators used threats to prevent Padilla from revealing the conditions of his detention, and told him that his lawyers were untrustworthy. C ¶ 86. Padilla remained in solitary confinement in the Brig for another two

years without charge. During this time, he was allowed his first direct communications with his family: three twenty-minute phone calls and one visit from his mother. C ¶ 92.

By a 5-4 margin, the Supreme Court dismissed Padilla's suit on jurisdictional grounds, holding that he had to file in the district where he was then held, not where military agents had first seized him from a civilian jail. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) [*Padilla III*]. On the same day, the Court decided *Hamdi v. Rumsfeld*, 543 U.S. 507 (2004). It held that the Authorization for Use of Military Force (AUMF), 115 Stat. 224, permitted the arrest without criminal charge of a U.S. citizen caught on a foreign battlefield. *Hamdi* ruled, though, that even a citizen captured on a foreign battlefield had the right to challenge his detention in proceedings that provided due process. Furthermore, it held that the government could detain only individuals who were actually "enemy combatants," and only then for the purpose of preventing them from returning to the battlefield – detention for interrogation purposes was "certainly" not allowed. *Id.* at 521.

Padilla's attorneys filed a new habeas corpus petition before this Court. For the first time, the Executive then alleged that Padilla had been on a battlefield in Afghanistan. Opp. 7-8. This Court granted Padilla's motion for summary judgment, holding that a U.S. citizen seized in a civilian setting in the U.S. could not be imprisoned without criminal charge. *Padilla v. Hanft*, 389 F. Supp. 678, 690-91 (D.S.C. 2005) [*Padilla IV*]. The Fourth Circuit reversed, holding that factual circumstances could exist under which detention without charge was permissible, and remanding for this Court to consider the factual basis for the designation. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) [*Padilla V*]. Padilla petitioned the Supreme Court to review the Fourth Circuit's decision. Facing the likelihood of Supreme Court review, the government revealed criminal charges against Padilla – charges that made no mention of any act upon which the

government had purported to base its military detention of Padilla for the past 38 months. The government then asked the Fourth Circuit for permission to transfer Padilla out of military custody, back into a civilian jail.

The Fourth Circuit denied the government's motion, with Judge Luttig noting the "appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court." *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005) [*Padilla VI*]. As the Circuit pointedly noted :

> The government's] actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake – an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time . . . can, in the end, yield to expediency with little or no cost to its conduct of the war against terror – an impression we would have thought the government likewise could ill afford to leave extant. And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts. . . .

Id. at 587.

After the Supreme Court summarily approved Padilla's transfer out of a military prison into a civilian jail, *Hanft v. Padilla*, 546 U.S. 1084 (2006), he stood trial and was convicted for acts significantly less serious than the acts for which the government detained him. *See Padilla VI*, 432 F.3d at 584. His appeal of that conviction is pending.

Plaintiffs brought this suit for damages against each defendant except Defendant Gates, who plaintiffs sue in his official capacity only, for injunctive relief only.[3] *See* C ¶ 139; Opp. at 57 n.51. The individual defendants, including Rumsfeld, filed a motion to dismiss on August 25,

[3] Plaintiffs here withdraw their claims for declaratory and injunctive relief against the individual defendants, retaining only the injunctive claim against Defendant Gates in his official capacity.

2008. On January 29, 2009, Magistrate Judge Carr heard oral arguments on that motion. That motion is pending.

On August 18, 2010, this case was reassigned to the Honorable Richard M. Gergel. On October 8, 2010, Rumsfeld filed notice of new counsel, who filed this motion the same day; shortly thereafter, his Department of Justice counsel withdrew.

ARGUMENT

Standing requires three things. "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Id*. Finally, "it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'" *Id*. at 561.

This case meets all three requirements. First, the plaintiffs have pleaded concrete and actual injuries: physical, emotional and dignitary harm stemming from Padilla's illegal extra-judicial designation, incommunicado detention and brutal interrogation. *See, e.g.*, C ¶¶ 79, 81-82, 84-86, 92-105, 115. Second, those injuries are fairly traceable to Rumsfeld's personal role in devising, implementing, and overseeing Padilla's abuse. C ¶¶ 123-27 (alleging that Rumsfeld proximately and foreseeably caused injury to him). As explained more fully below, these injuries resulted from Rumsfeld (among others), not "from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976). Finally, damages provide an appropriate remedy for the injuries that Rumsfeld caused. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)

("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

I. Plaintiffs' injuries from brutal treatment and conditions are traceable to Rumsfeld.

Rumsfeld's central argument is that when a defendant has violated a plaintiff's constitutional rights, the plaintiff does not have standing to seek damages for that violation if the President approved the constitutional violation. That assertion has no support. *See infra* Part. II. But even if the assertion had support, it would have no effect on the claims of brutal treatment at the heart of this case. Rumsfeld points to nothing in the complaint (or beyond it) remotely suggesting that the President personally approved the vicious interrogation methods to which Padilla was subjected as a result of Rumsfeld's actions.

Unable to tie his novel theory to the pleaded facts, Rumsfeld retreats to loose rhetoric. The brutal treatments were "natural incidents" of the President's designating Padilla an "enemy combatant." Rumsfeld's Brief ("R. Br.") 14. There is no basis in the complaint for Rumsfeld's speculation; the President is not alleged to have known of – let alone played any role in – the abuse suffered by Padilla. To the contrary, the complaint alleges specific actions by Rumsfeld that set in motion Padilla's treatment.[4]

[4] Specifically, the complaint alleges that Rumsfeld set in motion the alleged violations by (1) developing an "extra-judicial, ex parte assessment of enemy combatant status followed by indefinite military detention, without notice or opportunity for a hearing of any sort," C ¶ 36; (2) recommending application of this protocol to Padilla, C ¶¶ 38, 42; (3) "order[ing] the U.S. Armed Forces to take control of Padilla as an 'enemy combatant' and hold him at the Naval Consolidated Brig," C ¶ 43; (4) [giving] specific instructions for the interrogations and conditions of confinement applicable to detainees . . . including Padilla," C ¶¶ 56, 107, 109; (5) personally authorizing the use on suspected "enemy combatants" of abusive interrogation techniques – including stress positions, isolation, removal of religious items, sensory deprivation, environmental manipulation, and sleep "adjustment" – that were applied to Padilla, C ¶¶ 69, 81, 107; (6) encouraging abusive interrogation of suspected "enemy combatants including Padilla by "sen[ding] the message through military ranks that [Rumsfeld] wanted intelligence results fast and that use of harsh techniques was acceptable for that purpose," C ¶ 105, issuing "orders . . .

Rumsfeld's "natural incidents" theory boils down to this: when a President orders a citizen detained as an enemy combatant, he *must* mean that the citizen should be treated as Padilla was. Even if the President never issues any order on the subject, Rumsfeld implies, he should be presumed – as a matter of law – to have silently and secretly ordered that the citizen be subjected to incommunicado detention, death threats, sleep deprivation, sensory deprivation, and forced stress positions. R. Br. 14; *see also id.* at 17 (describing this treatment as "the normal and inevitable result of his classification and detention"). That implication is not only offensive to the institution of the Presidency, but completely at odds with this Nation's history and traditions. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (reiterating that "Certainly . . . indefinite detention for the purpose of interrogation is not authorized.").

Lest it be lost in the loose rhetoric of Rumsfeld's theory, here are what he argues are "the normal and inevitable result[s]" of the designation and detention as an enemy combatant of a U.S. citizen seized in the U.S. and imprisoned in the U.S.:

- solitary confinement for more than three and a half years, C ¶¶ 45, 79, 83, 90-92
- incommunicado confinement for 21 months, without any access to counsel, C ¶ 82;
- inability to communicate in any way with family for 21 months, except for one brief message, ten months after detention, informing mother he was alive, C ¶¶ 90-92

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that the Geneva Conventions were to be reinterpreted to allow tougher methods of interrogation," C ¶ 48; (7) instructing Defendant Haynes to tell Guantanamo interrogators to "do whatever needed to be done," C ¶ 62; (8) directing Deputy Assistant Attorney General John Yoo to "draft a series of legal memoranda . . . crafted to provide a veneer of legality for [aggressive interrogation] policies and to provide immunity from prosecution for those who implemented them," C ¶ 49; (9) supervising decisions whether to permit suspected "enemy combatants" to have access to legal correspondence, legal counsel, and family members, C ¶¶ 109, 100; and (10) failing to take any steps to prevent violations despite warnings that the conditions that he had authorized were illegal and were causing harm to detainees at the Brig, including Padilla. C ¶¶ 72-74, 78, 102, 104, 112, 114-118. Rumsfeld's "endeavors were, as intended, [the] effective cause" of Padilla's unlawful detention and abuse, and he may therefore be held liable. *Sales v. Grant*, 158 F.3d 768, 778 (4th Cir. 1998); *see generally* Opp. 43-46.

- sleeping on a steel slab, deprived of mattress, blanket, sheet, and pillow, C ¶ 81p
- subjection to sleep "adjustment" by extreme temperature variations, noxious odors, and deliberate interruptions of loud noises and glaring light, C ¶ 81 d, e, m, o, q
- subjection to glaring artificial light day and night, C ¶ 81c, 95
- sudden removal of all religious materials, C ¶¶ 81t, 98, 99
- prolonged shackling in stress positions, C ¶ 81k
- threats of being sent to another country for even worse torture, C ¶ 81h
- threats of cutting with a knife and having alcohol poured into the wounds, C ¶ 81f
- threats of immediate death, C ¶ 81g
- forced injections with drugs that interrogators say contain a "truth serum," C ¶ 81i
- "grossly inadequate" medical care, or denial of all medical care. C ¶¶ 101-103.

If President Bush intended these results to flow from Padilla's designation as an enemy combatant, he never said so in the order.

Because the President never authorized such brutal treatment, this Court need not consider whether the AUMF would have permitted such an order. It is worth noting, though, that an order authorizing the brutal treatment would have violated the AUMF.[5] The AUMF

[5] It also would have violated the Constitution. The Fifth Amendment gave Padilla, a U.S. citizen detained without charge on U.S. soil, rights "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). The brutal treatment that Rumsfeld approved violated Padilla's constitutional rights. *See* Opp. 39-48. Courts have consistently characterized acts like these as egregious enough to "shock[] the conscience." *Rochin v. California*, 342 U.S. 165, 172, 172 (1952). The Supreme Court has held that shackling a prisoner in a painful stress position, particularly while subjecting him to extreme heat, isolation, taunting, deprivation of water, and deprivation of a toilet was "antithetical to human dignity," and constituted "obvious cruelty." *Hope v. Pelzer*, 536 U.S. 730, 737-38, 745 (2002); *see also Austin v. Hopper*, 15 F. Supp. 2d 1210, 1265 (M.D. Ala. 1998) (finding Eighth Amendment violation where inmates were shackled in painful positions); *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (same, as to deprivation of clothing, food, and hygienic items, exposure to the cold, isolation in total darkness, and shackling in painful

authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ." In *Hamdi v. Rumsfeld*, the Supreme Court explained that a Presidential action taken – there the detention of a combatant captured on the battlefield in Afghanistan – could be justified under the AUMF only if it was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. 507, 518 (2004). Under the AUMF, the President could authorize the treatments outlined in the bullet points above only if they were "so fundamental and accepted an incident to war."

Nothing in established law-of-war principles supports the notion that Padilla's status as an alleged enemy combatant justified his inhumane treatment. Rumsfeld notes that the purpose of military capture is to prevent an individual from serving an enemy, and cites sources supportive of that general proposition. But none supports the notion that incommunicado detention, forced stress positions, sleep deprivation and the like are in any way permissible under the law of war.

Rumsfeld's own authorities make that clear. He cites a military law treatise by William Winthrop, noting that military detention is "devoid of all penal character." R. Br. at 15-16

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positions); *Evicci v. Baker*, 190 F. Supp. 2d 233, 238-39 (D. Mass. 2002) (same, as to beating shackled inmates); *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1223 (D. Colo. 2001) (same, as to excessive physical force). Nor can Rumsfeld support his argument that 18-months of incommunicado detention accords with the Constitution. *See* Opp. at 46-47. Padilla had a "fundamental constitutional right of access to the courts," *Bounds v. Smith*, 430 U.S. 817, 828 (1977) and a Due Process right to "effective assistance of counsel." *Evitts v. Lucey*, 469 U.S. 387, 397 (1985); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). This right extends also to individuals that the government alleges are enemy combatants. The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), held that the plaintiff, also subject to detention as an enemy combatant, "unquestionably [has] the right to access to counsel." *Id*. at 539 (emphasis added).

(quoting Winthrop). That citation is accurate, and true, but Rumsfeld misses its import. As Winthrop explained: "'Captivity is neither a punishment nor an act of vengeance,' but "'merely a temporary detention which is devoid of all penal character.'" William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). Even more concisely: "Prisoners of war . . . are therefore to be treated with humanity." *Id.* at 790. It goes without saying that the Geneva Conventions contain nothing vaguely suggestive of the notion that prolonged shackling in stress positions, sleep adjustment and the like are "fundamental and accepted" incidents of war.[6]

In short, the President's order did not approve this treatment, and could not have approved it consistent with the AUMF. So even if Presidential approval of an unconstitutional action strips a plaintiff of standing, that principle has no place here. As Part II below shows, there is no such principle anyway.

II. Plaintiffs' injuries from unlawful designation and detention are traceable to Rumsfeld.

Rumsfeld contends that plaintiffs' alleged injuries cannot be traced to him because President Bush signed an order designating Padilla as an enemy combatant and ordering him

[6] Rumsfeld's argument reaches its nadir when he contends that the Geneva Conventions somehow condone the sort of brutal treatment that Padilla received. R. Br. at 16. Rumsfeld notes that the Geneva Conventions ban the interrogation of prisoners of war but not the interrogation of detainees not entitled to POW status. He then presumes that the Geneva Conventions implicitly condone the abusive treatment of anyone who can be questioned. R. Br. at 16. But as the Supreme Court recognized in Hamdan, the Geneva Conventions mandate humane treatment of all persons captured during armed conflict, regardless of status. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629-32 (2006); *see also* Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("[I]ndefinite detention for the purpose of interrogation is not authorized."); Opp. at 41-42. Indeed, it is precisely because the Geneva Conventions prohibit the sort of treatment Padilla received that Rumsfeld and some of his former colleagues engaged in what the military's highest uniformed lawyers – the Judge Advocate Generals – characterized as "a calculated effort to create an atmosphere of legal ambiguity" about the meaning of the Geneva Conventions. C ¶ 48.

taken into military custody. R. Br. 6. In essence, he argues that plaintiffs lack standing because President Bush was more at fault than he was. The contention has no application to the claims of brutal treatment. *See supra* Pt. I. It also fails for several reasons in response to the claims of illegal designation and detention.

First, there is no basis for Rumsfeld's radical theory that purported presidential approval for illegal acts strips plaintiffs of standing to sue those who devise and implement the illegal actions. To the contrary, the law has long been clear that plaintiffs have standing to challenge the constitutionality of actions by governmental actors below the President, even when the President issues an order on the subject. As Rumsfeld acknowledges, the Supreme Court has repeatedly exercised jurisdiction over habeas suits brought against those detaining alleged enemy combatants pursuant to presidential order. *See* R. Br. 5; *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

Rumsfeld offers no basis for distinguishing habeas cases from cases seeking other kinds of relief; nor could he. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) – ignored by Rumsfeld – a cabinet officer acted under a direct presidential order to conduct a seizure outside of ordinary legal processes. As here, the asserted basis for the presidential order was wartime necessity, and also as here the seizure and its consequences were challenged under the Constitution. *See* 343 U.S. at 583-84. The Court upheld the injunction granted by the trial court, citing improper use of presidential powers. *Id.* at 587-89. There was no trace of a suggestion that the Secretary of Commerce had been improperly named as a defendant, or that the steel companies lacked standing to pursue their constitutional claims because the President had issued an Executive Order to seize the steel mills.

If anything, a plaintiff's standing to seek *damages* against a governmental actor below the President – including for actions purportedly authorized by the President – is of even longer pedigree. In 1804, the Supreme Court held the commander of American warship liable in damages for seizing of a Danish cargo ship even though he was acting on direct order from the President because President's order was contrary to law and his instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804). And in *Harlow v. Fitgerald*, 457 U.S. 800 (1982), the Supreme Court held that a *Bivens* action for damages could proceed against two White House aides who allegedly conspired – through internal White House memoranda – to fire the plaintiff in retaliation for negative congressional testimony. *Id*. If Rumsfeld's traceability theory were correct, the Supreme Court would have lacked subject matter jurisdiction in both these cases. It did not.

Because he knows he has no support in *Bivens* or Section 1983 case law, or in any damages cases at all, Rumsfeld relies wholly on cases seeking injunctive relief under the Administrative Procedure Act of 1946, 5 U.S.C. § 704 (2010) ("APA") and other statutes that specifically condition judicial review on final agency action. Those cases are wholly inapposite. Plaintiffs are not attempting to challenge internal agency recommendations that may or may not lead to final agency action that may or may not cause them harm. They are seeking to hold Rumsfeld accountable directly under the Constitution for his part in causing Padilla to be unconstitutionally designated as an enemy combatant, and subjected for years to incommunicado detention and brutal interrogation. Under *Little*, *Youngstown*, *Harlow*, not to mention *Boumedienne* and the other habeas cases, plaintiffs clearly have Article III standing to assert those claims.

Far from eroding plaintiffs' standing, Rumsfeld's cases emphasize the difference between claims for damages for already-concluded constitutional harms and challenges to as yet unimplemented agency recommendations. To be sure, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Court declined to enjoin the Secretary of Commerce from issuing a census report to the President because it "carrie[d] no direct consequences for the reapportionment," and "serve[d] more like a tentative recommendation than a final and binding determination" and therefore could not be reviewed on the merits as "final agency action" under the APA. *Id*. at 796, 798. But the Court could and did reach the merits of Massachusetts' claim for injunctive relief directly under the Constitution, rejecting that claim not for lack of standing but *"on the merits."* *Id*. at 806 (emphasis added). Indeed, the Court was quite clear: "Although the President's actions may still be reviewed for constitutionality, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), we hold that they are not reviewable for abuse of discretion under the APA." 505 U.S. at 801 (parallel citations omitted).[7]

Rumsfeld's reliance on *Dalton v. Specter*, 511 U.S. 462 (1994), similarly underscores that this case falls squarely within this Court's jurisdiction. There too a plaintiff sought to enjoin

[7] Rumsfeld argues that constitutional review occurred in *Franklin* only because the Secretary was exercising rights vested in her alone. R.Br.10. He misreads the case. True, *Franklin* found that declaratory relief against the secretary would redress the constitutional injury, because the "Secretary certainly has an interest in defending her policy determinations concerning the census" and "an interest in litigation [over the census'] accuracy." But *Franklin* repeatedly noted that the Secretary's report did not bind the President: "the Secretary cannot act alone; she must send her results to the President, who makes the final apportionment to Congress. That the final act is that of the President is important to the integrity of the process and bolsters our conclusion that his duties are not merely ceremonial or ministerial." *Id*. at 800; *see also id*. at 798 ("[T]he Secretary's report to the President carries no direct consequences for the reapportionment . . . ."), 799 (the President "is not expressly required to adhere to the policy decisions reflected in the Secretary's report"); *cf. id*. at 803 (President not even bound by district court declaration against Secretary).

non-final agency action under the APA on the ground that the agency had exceeded its statutory grant of power. 511 U.S. at 469-70. As in *Franklin*, the Court found that the government officials' actions "cannot be reviewed under the APA because they are not 'final agency actions.'" *Id.* at 476-77. In reaching that conclusion, the Court noted that Congress had delegated ultimate decision-making to the President, but that those decisions are *per se* unreviewable under the APA because the President himself is not "an agency" for APA purposes. *Id*. at 469-70. And again, the Court expressly noted that *Bivens* claims are fundamentally different than APA challenges to agency actions in excess of statutory authority. *Id*. at 472. "The distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Id*. at 474. In short, Rumsfeld's effort to distort a final agency action rule for injunctive claims into a standing rule for damages actions cannot survive a plain reading of his own cases, *Franklin* and *Dalton*.[8]

[8] Rumsfeld's other cases also involve efforts to enjoin non-final agency action. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) involved a challenge to an agency report under the APA, *see id.* at 857-60, and the court concluded that there was no reviewable "final agency action" under the APA. *Id.* at 862. In *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998), Guam, the Northern Mariana Islands and Hawaii sought an injunction under the APA and a mandamus concerning administrative agency actions around a required annual report to Congress; the court rejected the APA claim because there was no final agency action, *id.* at 1195-96 (report "triggers no legal consequences and determines no rights or obligations"), and rejected the mandamus claim because the injunction sought was not ministerial. *Id*. at 1197. In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), an administrative agency denied an airline a certificate for an international air route and the airline sought judicial review under the act empowering the agency. The Court concluded that the agency action was not ripe for review because it was subject to the President's approval or disapproval, and the President's decision was not reviewable because it constituted a foreign policy decision that was inherently political, not judicial. *Id.* at 111. Finally, the passage of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), that Rumsfeld cites merely stands for the uncontroversial proposition that there are some areas in which the Executive has such complete discretion that its actions are unreviewable political questions. As *Youngstown*, *Little*, *Hamdi* and *Boumedienne* among other clearly show, actions that threaten individual liberties,

The radicalism of Rumsfeld's reasoning is breathtaking. On his view, a presidential order to murder a detainee would immunize those officers who carried out the order from any legal consequence.[9] No court has ever so held. To the contrary, even *judicial* orders do not have that immunizing effect for defendants. For example, the Supreme Court has denied absolute immunity for police officers executing warrants. Though a magistrate judge must issue warrants, police officers must still be conscious of their independent constitutional obligations in submitting applications and carrying out warrants. *Malley v. Briggs*, 475 U.S. 335, 343-44 (1985); *see also Miller v. Prince George's County*, 475 F.3d 621, 632 (4th Cir. 2007) (stating that the defendant police officer "seems to claim entitlement to qualified immunity on the theory that the magistrate found that his affidavit provided probable cause to issue the warrant. Twenty years ago in *Malley*, however, the Supreme Court rejected such a contention."). Similarly, in *Groh v. Ramirez*, 540 U.S. 551 (2004), a federal agent was liable under *Bivens* for acting on a "plainly invalid" search warrant that he prepared and which was signed by a magistrate judge.

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even in wartime, do not fall into that category. To the contrary, as *Marbury* recognized in the very same passage, the Executive's actions are unreviewable only where its "subjects are political [that is they] respect the nation, not individual rights." 5 U.S. at 166. By contrast, as *Marbury* stressed, "[i]f one of the heads of departments commits any illegal act under color of his office by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law." *Id*. at 170.

[9] Rumsfeld aims to make such conclusions palatable by restating his flawed policy assertions, *supra* n. 1, and passingly invoking other doctrines – not raised in his motion – that he thinks support those policy arguments. R.Br. 2 n.1. But the Supreme Court has consistently held that claims by alleged enemy combatants are justiciable, rejecting arguments that the political question doctrine or "other [unnamed] constitutional or prudential barriers," preclude jurisdiction. *See Boumediene*, 553 U.S. 723; *Hamdan*, 548 U.S. 557; *Hamdi*, 542 U.S. 507; *Rasul*, 542 U.S. 466. The same is true of the state secrets privilege, which can be invoked only by the government, and has not been raised in this case. There is nothing "paradoxical and counterproductive," R.Br. 2 n.1, about judicial review of Executive actions; to the contrary, Padilla could (and did) challenge his detention as an enemy combatant, an issue never reached by the Supreme Court because the government ultimately abandoned its claim to domestic military detention of a citizen, acceding to Padilla's ongoing assertion that he had to be charged with a crime or released. *See* Statement of Facts, *supra*.

The Supreme Court held that "[i]t is incumbent on *the officer* executing a search warrant to ensure the search is lawfully authorized and lawfully conducted." *Id*. at 557, 563 (emphasis added); *see also Miller*, 475 F.3d at 632 (rejecting qualified immunity by police officer for constitutionally-deficient warrant because "[a] magistrate's issuance of the warrant will not shield an officer when the warrant affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'").

To embrace Rumsfeld's theory of standing, this Court would have to conclude that all of these cases were wrongly decided, and that the Supreme Court neglected its duty to assure itself of its Article III jurisdiction before deciding *Youngstown*, *Little*, and *Harlow*. Of course it did not, because neither judicial nor presidential order-signing has the talismanic effect of erasing the responsibility of subordinates who violate the Constitution.[10]

III. Monetary damages would redress the injuries.

Rumsfeld asserts that an award of damages to plaintiffs would not redress their injuries. R.Br. 12-13. His assertion is flatly at odds with the law. Money damages "of course" redress injuries, as the Supreme Court has repeatedly noted.

Injunctive claims can present difficult redressability issues. But as Justice Scalia noted, writing for the Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), it is "a different matter if the relief requested by the plaintiffs" is "money damages," which "of course" redress an injury. *Id.*. at 96.

[10] Rumsfeld has previously made the same blame-the-President argument under the rubric of the "personal participation" element of *Bivens* claims. Though that argument ignores the pleaded facts and the ordinary principles of causation, and is premature on a motion to dismiss, plaintiffs addressed it in detail in plaintiff's opposition to the individual federal defendants' Rule 12(b)(6) motion to dismiss. *See* Opp. 43-46.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court went even further, recognizing that "courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Id.* at 266. The Court reaffirmed that practice in constitutional damages suits: "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . ." *Id.* Given the importance of due process rights, the Court concluded "that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.*

Plaintiffs here do not ask this Court to go even as far as *Carey*. They ask only for the opportunity to prove actual injury, seeking damages, which "have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

Instead of directing the Court to cases like *Carey* and *Bivens*, which make plain that money damages redress constitutional injury, Rumsfeld points to cases involving injunctive relief. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), plaintiffs sought an injunction denying tax exempt status to hospitals providing only limited care of indigents. The Court concluded that it was speculative whether such an injunction would redress the indigent plaintiffs' injuries (lack of medical care) because hospitals might just decide "to forgo favorable tax treatment" instead of providing care to indigents. *Id*. at 43. *See also Newdow v. Bush*, 355 F. Supp. 2d 265, 281-82 (D.D.C. 2005) (involving only injunctive claim) (cited in R.Br. at 13). Rumsfeld also cites *Bronsen v. Swensen*, 500 F.3d 1099 (10th Cir. 2007) for support, but there too, the court discusses redressability only in the context of injunctive claims. *Id.* at 1111-12. Even in the injunctive context, when a "plaintiff is himself an object of

the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Lacking any support in the case law, Rumsfeld revives his argument that he was not to blame for any constitutional injury – President Bush was. R.Br. 13. This time the argument sounds in redressability rather than traceability. But it fares no better here than there, for the same two reasons: more than one person can be responsible for a constitutional injury, and in any event President Bush's order never approved the brutal treatment at issue in this case.

CONCLUSION

For the foregoing reasons, the motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, a copy of the foregoing Opposition was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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