

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

_____	)	
AMIR MESHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-cv-2178 (EGS)
	)	
CHRIS HIGGINBOTHAM, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS’ NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants Steve Hersem, Chris Higginbotham, John Doe 1, and John Doe 2 (collectively, the “Defendants”) respectfully submit this Notice to alert the Court to the United States District Court for the District of South Carolina’s recent decision in *Estela Lebron and Jose Padilla, et al. v. Rumsfeld, et al.*, No 2:07-410-RMG, 2011 WL 554061 (D.S.C. Feb. 17, 2011) (“*Padilla*”), which is relevant to the Court’s consideration of the Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint.

In *Padilla*, the United States District Court for the District of South Carolina considered constitutional and statutory claims brought by Jose Padilla, an American citizen who was designated by the President in June 2002 as an “enemy combatant” for being “closely associated with Al Qaeda,” and his mother, Estela Lebron. *See Padilla*, 2011 WL 554061, at \*1-2. (alteration omitted). Padilla and Lebron claim that Padilla’s alleged incommunicado detention and coercive interrogation in a military facility in South Carolina violated Padilla’s constitutional rights as well as the Religious Freedom Restoration Act (“RFRA”). *Id.* at \*13. Judge Richard Gergel rejected all of the plaintiffs’ claims.

Judge Gergel found that the “practical implications” of recognizing the *Bivens* remedy the plaintiffs’ sought for Padilla’s alleged treatment during detention and coercive interrogation, including the potential impact on the Nation’s foreign affairs, intelligence, and national security, and “the likely burden of such litigation on the government’s resources in these essential areas,” were special factors that counseled against creating a *Bivens* remedy for Padilla and Lebron. *Id.* at \*11-12. In his Opposition to the Defendants’ Motion to Dismiss, Meshal relies repeatedly on district court decisions in *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010), and *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009). Judge Gergel “carefully considered” both decisions, which he recognized as presenting nearly identical factual and legal issues” as *Padilla v. Rumsfeld*, 2011 WL 554061, at \*11, and specifically rejected their rationale. Judge Gergel stated that

“the *Vance* and *Yoo* Courts view the Supreme Court case law since 1980 as limiting the extension of *Bivens* claims in cases which have identical factual presentations but permitting the extension of *Bivens* actions in other contexts . . . This Court views the case law as holding that the creation of any new *Bivens* claim is “disfavored” and “rarely if ever applied in new contexts,” *particularly in such sensitive areas as national security, military affairs and foreign intelligence.*

*Id.* (italics added) (internal citations omitted).

Judge Gergel also found that the plaintiffs’ *Bivens* and RFRA claims were barred by qualified immunity. In reaching this determination, Judge Gergel observed that at the time of his detention, Padilla “was essentially a class of one, an American citizen detained on American soil and designated an enemy combatant.” *Id.* at \*14. With respect to the particular issue of whether the treatment Padilla alleges he experienced – including incommunicado detention without access to counsel or the courts, and the use of certain coercive interrogation techniques – violated Padilla’s clearly established constitutional rights, the interrogation techniques described by Padilla in his Complaint are far more severe than those alleged by Meshal here. *Compare Padilla* Third

Am. Compl. (Docket No. 91) ¶¶ 81-120 *with Meshal* Amended Compl. (Docket No. 31) ¶¶ 82-88, 147-53. The *Padilla* Opinion thus also supports dismissal of Meshal's claims against the Defendants on qualified immunity grounds.

*Padilla v. Rumsfeld* represents the most recent statement by a federal district court on the issues at the heart of this case. A copy of the decision is attached as an exhibit to this motion.

Respectfully submitted,

Dated: March 3, 2011

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