No. 12-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KORI CIOCA *et al.*

Plaintiffs-Appellants,

v.

DONALD RUMSFELD *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For The Eastern District of Virginia, Alexandria Division
Case No. 1:11-cv-00151
The Honorable Liam O'Grady, United States District Judge

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (final judgment rule).

STATEMENT OF THE ISSUES

This dispute presents an important issue: Should the federal courts hear a lawsuit alleging former Secretaries Rumsfeld and Gates repeatedly violated the laws adopted by Congress to reduce the high incidence of unpunished rape and sexual assault in the military, and by so doing deprived rape survivors of their Constitutional rights?

STATEMENT OF THE CASE

On September 6, 2011, twenty eight military service members who were raped while on active duty (hereinafter "rape survivors") filed an amended complaint. *See* J.A. 1-60. The rape survivors' complaint alleges former Secretaries of Defense Rumsfeld and Gates (hereinafter "Defendants") knowingly and intentionally violated the laws passed by Congress to reduce sexual predation in the military, and by these violations deprived the rape survivors of their Constitutional rights. *See* J.A. 1-60.

On September 20, 2011, Defendants filed a motion to dismiss the rape survivors' complaint, arguing that the lawsuit should be barred because rape and sexual assault are "incident to service." *See* Dkt. No. 10 and Dkt. 11.

On November 18, 2011, the District Court (J. O'Grady) heard oral argument. Defendants argued, in essence, that unpunished rape and sexual assault should be viewed as "incident to service" -- *i.e*. an occupational hazard -- for those who join the military services. Defendants argued that the federal courts are not permitted to adjudicate whether they violated the law because doing so would intrude upon military discipline. J.A. 66-68.

On December 9, 2011, the District Court dismissed the lawsuit, reasoning in a two-page decision that the judicial branch should voluntarily abstain from hearing any Constitutional claims made by servicemembers in order to further military discipline. J.A. 61-62.

The rape survivors filed a notice of appeal in a timely fashion. J.A. 84-85.

STATEMENT OF THE FACTS

Twenty-five women (Cioca, Gallagher, Havrilla, Haider, Albertson, De Roche, Bertzikis, Boatman, Curdt, Kenyon, Neutzling, Reuss, Hinves, Schroeder, Yeager, Lockhart, Castillo, and Thatcher) and three men (Jeloudov, Schmidt, and Stephens) were raped and/or sexually assaulted while they were on active duty. *See* J.A. 5-46, ¶¶ 7-298. The rapes and assaults, however, were only the beginning. When the rape survivors reported being raped by their colleagues, they were labeled "troublemakers" and forced to endure severe retaliation and harassment. In

many instances, reporting the rapes led to the termination of their military careers. *See* J.A. 5-46, ¶¶ 7-298.

For example, Seaman Cioca was harassed, threatened and eventually raped by her superior officer. Cioca reported her supervisor after he told her that she was a "stupid f****** female who didn't belong in the military," spit in her face, and grabbed her buttocks. After she reported the harassment, the supervisor began to engage in even more frightening conduct, including threatening her life, breaking into her room at night, and standing over her bed, masturbating. *See* J.A. 5-8, ¶¶ 7-28.

On another occasion, the supervisor thrust his groin into her buttocks as she bent over to pick up some trash, and called her a "f****** whore" and laughed. Cioca and another shipmate who had witnessed this incident went together and again reported the supervisor's misconduct. The reporting led to nothing other than the supervisor threatening to stab Cioca, the eyewitness, and the families of both. *See* J.A. 5-8, ¶¶ 7-28.

On another occasion, the supervisor broke into Cioca's room, drunk with an erection, and directed her to touch his penis. When Cioca refused loudly (hoping another shipmate would hear), he grabbed her hand and pushed it into his groin. As she resisted, the supervisor struck her so hard against the left side of her face that she was thrown across the room and against the wall. Cioca again went for help,

this time with two other shipmates. Instead of receiving substantive help, Cioca's chief brought her to his church, and along with two other men, prayed for her safety and for help from God. The chief explained he could do nothing other than pray because the Officer in Charge had told him to "let her burn" because "she ruins careers." *See* J.A. 5-8, ¶¶ 7-28.

In December 2005, the supervisor's pattern of abuse escalated into rape. He grabbed Cioca by her hair, pulled her into his stateroom, shut the door, and raped her. When Cioca attempted to report the rape, she was ordered to stand watch and stay in radio communications with her rapist. Thereafter, Cioca was ordered to sign a false statement, and told that she would be court-martialed for lying if she pressed charges for rape. The rapist pled guilty to hitting Cioca, and received a minor loss of pay and 30 days base restriction. *See* J.A. 5-8, ¶¶ 7-28.

As another example, rape survivor Albertson, a Marine Corps corporal, was raped by a fellow Marine. When Albertson reported the rape, she was told that she and the rapist would both be charged with "Inappropriate Barracks Conduct" for consuming alcohol, as if they had engaged in the same level of misconduct. Albertson was directed not to discuss the rape with anyone else, and to "respect" her assailant and follow his orders because he outranked her. After she reported the rape, Albertson was assigned to a "Body Composition Program" and forced to report daily to her rapist. Although the Navy Criminal Investigative Service

investigated, the military refused to permit the matter to be adjudicated within the military system of justice. Albertson's rapist was never prosecuted or otherwise brought to justice in any way. *See* J.A. 13-14, ¶¶ 55-68.

The rape survivors were directed to be silent, and refrain from telling anyone about the rapes and the subsequent mistreatment. *See* J.A. 7 -36, ¶¶ 21, 59, 83, 87, 108, 123 and 216. The rape survivors could not take any actions that civilians are able to take to protect themselves from sexual predators, such as calling the police, going to a shelter, changing housing or jobs, or relocating. *See* J.A. 51 ¶ 318.

Most of the rape survivors were drummed out the military services for being "troublemakers." *See* J.A. 5- 46, ¶26 (discharged after reporting rape); ¶74 (forced out); ¶92 (denied rank due to "pending investigation"); ¶ (forced out); ¶114-116 (left due to extreme emotional distress); ¶124 (demoted, docked pay, then discharged under "Other Than Honorable"); ¶184 (subjected to Article 15-6 investigation after reporting rape); ¶192 (demoted and lost rank of Captain); ¶212 (chaptered out early); ¶220-222 (lost promotable status, forced to deploy then retire); ¶267 (medical discharge related to injuries sustained during rape); ¶281 (forced out); ¶298 (forced out).

In contrast to the rape survivors, the sexual predators escaped any serious punishment. The vast majority were not prosecuted or punished in any meaningful way. *See* J.A. 5- 46, ¶23 (reduction in pay and 30 day base restriction); ¶36

(reassignment and no contact order); ¶67 (no punishment); ¶82 (six months of reduced pay, reduced rank); ¶88 (no punishment); ¶105 (forced to apologize); ¶134 (demoted in rank, assigned forty-five days extra duty); ¶148-149 (forced resignation, permitted to re-enlist as Major in the Reserves); ¶157 (no punishment); ¶166 (no punishment); ¶185 (demoted); ¶197 (no judicial action); ¶206 (extra pushups); ¶237 (no punishment); ¶254 (no punishment); and ¶262 and 264 (no punishment, promoted twice during investigation). In short, in striking contrast to rape survivors, the sexual predators suffered little or no consequences.

The dismal frequency of unpunished sexual predation in the military did not escape the attention of Congress, which has the Constitutional responsibility to set rules and regulations to govern the military. Congress repeatedly held hearings and enacted legislation designed to reduce the amount of unpunished rapes and sexual assaults occurring in the military. *See* J.A. 52-57 ¶¶ 321-322, 336-37. These facts are undisputed, as Defendants admitted on record that Congress is responsible for setting the rules and regulations, and that Congress did so. *See* Dkt. No. 11 at 2.

The rape survivors' lawsuit arises, however, because the Defendants intentionally violated the laws passed by Congress. *See* J.A. 52-57 ¶¶ 321-322, 336-37. When Defendant Rumsfeld took office in 2001, Congress began to grow increasingly concerned about the extent of unpunished rape and sexual assault in

the military services. *See* J.A. 46, 52-55, ¶¶ 300, 321-22. Defendant Rumsfeld was (1) granting "waivers" to accept convicted criminals into the military, (2) permitting those convicted of sexual predation to be honorably discharged, (3) permitting commands to sweep rapes and sexual assaults under the rug, and (4) otherwise taking steps that led to significant increases – 24 % -- in the number of unpunished rape and sexual assaults during Defendant Rumsfeld's tenure. *See* J.A. 52-55, ¶319-322.[1]

Congress acted by enacting legislation designed to remedy the military's sexual predation problem. Congress passed Public Law 105-85, which required then-Secretary Rumsfeld to establish a task force to investigate the manner in which the military was handling reports of sexual predation. Defendant Rumsfeld violated this Congressional directive. For two years, acting in knowing and direct contravention of Public Law 105-85, Defendant Rumsfeld refused to select any members of the task force and refused to direct the task force to begin its Congressionally-mandated investigation regarding the military's handling of sexual predation. *See* J.A. 52-55, ¶ 319-322.

[1] By March 2004, members of Congress sent a letter to Defendant Rumsfeld expressing their concern that the military was ignoring Congressional directions regarding how best to eradicate sexual predation in the military. *See* J.A. 52-53, ¶322.

Matters did not improve when Defendant Gates took office on December 18, 2006. Defendant Gates also violated Congressional rules and regulations designed to remedy the military sexual predation problem. *See* J.A. 46, 55-57, ¶¶ 301, 333-340. Defendant Gates directed his subordinate to ignore a Congressional subpoena issued by the Congressional House Oversight Committee on National Security and Foreign Affairs. *See* J.A. 55-56 ¶ 336. Defendant Gates violated the National Defense and Authorization Act for Fiscal Year 2009. That law required Defendant Gates to establish a centralized database with all reports of sexual predation in the military services. Defendant Gates ignored the law, and failed to establish the database. *See* J.A. 56 ¶ 337. As a result of Defendant Gate's misconduct, the rate of rape and sexual assault rose again – increasing by 9% between 2007 and 2008, and increasing by 11% between 2008 and 2009. *See* J.A. 56-57, ¶ 339.[2]

The rape survivors' allege that Defendants' repeated violations of the Congressional mandates deprived them of their Constitutional rights to due process (substantive and procedural), equal protection, freedom of speech and right to jury trial. *See* J.A. 52-59, ¶¶ 319-358.

[2] The rates rose even higher in combat areas – increasing by 25% between 2007 and 2008, and by 16% between 2008 and 2009. *Id*.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's dismissal of the rape survivors' lawsuit under Fed.R.Civ.P. 12(b)(6). *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). This Court construes all of the rape survivors' Complaint allegations in the manner most favorable to them. *See e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993)); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir.1978), *cert denied*, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979).

SUMMARY OF ARGUMENT

This Court should overturn the District Court's dismissal of the rape survivors' *Bivens* lawsuit. The rape survivors allege that they were deprived of their Constitutional rights because Defendants Rumsfeld and Gates repeatedly and knowingly violated the laws enacted by Congress, which were designed to reduce the high rate of unpunished sexual predation in the military.

As explained in Section A (pages 10 – 13), Congress, not Defendants, is the entity with the Constitutional duty to regulate military conduct. Defendants are not free to violate Congressional legislation. As explained in Sections B – D (pages 13 - 17), when Defendants violated Congressional legislation, and by so doing harmed the rape survivors, they subjected themselves to adjudication in the federal courts, which have a duty to adjudicate Constitutional claims, particularly those brought

by persons with no other means to vindicate their Constitutional rights. Finally, as explained in Section D (pages 17 – 30), permitting the federal courts to adjudicate instances when Executive Branch officials intentionally violate Congressional mandates on military discipline furthers the goal of military discipline. Any other outcome would undermine military discipline and place the military outside civilian control, a Constitutionally-impermissible result.

ARGUMENT

I. The Constitution Requires Congress To Establish the Rules and Regulations Governing the Military.

This nation's strength rests on the delicate balance of power established by the Constitution. The balance was explained by James Madison in *The Federalist* No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* as being "essential to the preservation of liberty. . .." *The Federalist* No. 51 (Madison), 353-54. *See also The Federalist* No. 47 (Madison) 325-26, J Cook Edition. 1961, in which Madison further explains that separation of powers sets up a system of checks and balances in which the branches have control over "the acts of each other."

The Constitution's delicate balance is designed to ensure democracy, and protect all citizens. As the Supreme Court held in *Bond v. United States*, __U.S.___, ___, 131 S.Ct. 2355, 2365 (2011), "Separation-of-powers principles

are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. *The structural principles secured by the separation of powers protect the individual as well*." (emphasis added).

Congress -- not Defendants – is vested with the Constitutional power to decide the rules and regulations governing the manner in which the military operates. The founding fathers placed control of the military decisively in the hands of the civilian government. Article 1, Section 8 of the Constitution provides that "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces."

The Constitution did not elevate the military into a special status beyond the reach of the Congress and the Judiciary. Instead, the Constitution requires Congress to set military policy and decide on the manner in which the military is permitted to conduct military matters. The drafters of the Constitution were mindful of two dangers: the English model, where the Executive (king) controlled the military, and the military dictatorship, where the military controlled the government. Both models were antithetical to democratic ideals, and were rejected by the Constitution's adoption of a balance of power, with Congress setting policy for the military. *See generally*, *The Federalist* No. 8 (Hamilton), *The Federalist* No. 28 (Hamilton).

The Supreme Court has repeatedly cautioned the lower courts to adhere to the delicate balance of power enshrined in the Constitution, and refrain from elevating the military beyond the reach of civilian authority (exercised through Congress). For example, in *Reid v. Covert*, 354 U.S. 1, 33-40 (1957), the Court cautioned against "break[ing] faith with this Nation's tradition - firmly embodied in the Constitution - of keeping military power subservient to civilian authority." (internal citation omitted). *See also Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) (Burger, C.J.) ("has deep roots in our history and found early expression ... in the constitutional provisions for civilian control of the military").

To like effect, the Court of Appeals for the Fourth Circuit has taken great care to explain that granting deference to military expertise on certain warfighting matters not governed by law should not be read to mean that deference to the military is required when there are allegations that federal statutory law or regulations were violated. For example, in *Tiffany v. United States*, 931 F.2d 271, 280 (4th Cir. 1991), although the Court held that the federal courts should not adjudicate whether military personnel made the right instantaneous judgment call on whether an aircraft invading U.S. airspace was hostile or not, the federal courts should adjudicate those instances when plaintiffs were alleging "that the

government violated any federal laws contained either in statutes or in formal published regulations such as those in the Code of Federal Regulations."

This jurisprudence rightfully draws the line between (1) negligence claims designed to second-guess discretionary military judgments on matters within its expertise that are not the subject of Congressional rules and regulations, and (2) Constitutional claims seeking justice for those instances when military personnel violate Congressional rules and regulations. This lawsuit falls into the latter category, which is why the District Court's dismissal must be overturned.

II. The Constitution Requires the Courts To Adjudicate Claims Arising from Defendants' Intentional Violations of Congressional Acts.

The rape survivors each took an oath[3] to defend this Nation and its Constitution. They are entitled to enjoy the same protection from deprivation of their Constitutional rights as any other American citizen. To make Constitutional rights meaningful, however, there must be a system available to seek redress when a person cloaked in government power violates those rights.

[3] Plaintiffs and all service members swear to defend the Constitution when they take the following oath: "I, ____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God." 10 U.S.C. § 502.

As has been clear since the 1803 *Marbury v. Madison* decision, that system is the judicial system. *See Marbury v. Madison* (5 U.S. (1 Cranch) 137 (1803). The very essence of civil liberty, wrote Mr. Chief Justice Marshal, "certainly consists of the right of every individual to claim the protection of the laws when he receives an injury. One of the first duties of government is to afford that protection."

Neither Congress nor the Executive Branch is permitted to self-adjudicate allegations of Constitutional deprivations. Under "the basic concept of separation of powers ... that flow[s] from the scheme of a tripartite government" adopted in the Constitution, "the 'judicial Power of the United States' ... can no more be shared" with another branch than "the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States v. Nixon,* 418 U.S. 683, 704, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (quoting U.S. Const., Art. III, § 1). The functioning of our democracy relies upon this balance.

Servicemembers must be permitted to seek redress in the federal courts when their Constitutional rights are violated. Otherwise, their Constitutional rights are meaningless. As the Supreme Court explained in *Davis v. Passman*, 442 U.S. 228, 242 (1979), "unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated,

and who at the same time have no effective means under than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of the judiciable constitutional right."

There, the Court ruled in favor of adjudicating a Congressional staffmember's claim that she had been fired by a Congressman because she was female. By law, Congressional staff do not enjoy protections from sex discrimination afforded by Title VII. The Supreme Court ruled, however, that Davis was entitled to bring forward her sex discrimination claim under the Fifth Amendment, which affords a Constitutional right to be free from discrimination. *Id.*

The rape survivors here are in the same posture as Congressional staffer Davis. They have no means to enforce their Constitutional rights except litigation in the federal courts. When such Constitutional deprivations are alleged, the federal courts need to hear the claims unless some other avenue of redress (such as a state law tort claims) is available. *See Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Here, the rape survivors are pursuing the only path open to them to obtain justice for the injuries they suffered when their Constitutional rights were violated.

III. The Constitution Is Self-Executing.

The Supreme Court has made clear that Constitutional deprivations should not go unchecked. In *Bivens*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court reasoned that the right to sue federal officials for violating Constitutional rights does **not** turn on whether Congress has promulgated a statutory remedy for the specific Constitutional violations at issue. Rather, the Constitution is self-executing, and permits those who have been injured by federal officials to sue for money damages. Any other outcome, reasoned the Court, would fail to deter federal officials from violating the Constitution. *Id.* at 408.

The *Bivens* Court addressed deprivations of the Fourth Amendment right to be free from unreasonable searches and seizures. In subsequent cases, the Court extended the self-executing *Bivens* remedy to Constitutional deprivations under the Fifth Amendment (*Davis v. Passman*, 442 U.S. 228 (1979)), the Eighth Amendment prohibition on cruel and unusual punishment (*Carlson v. Green*, 446 U.S. 14 (1980)), and the First Amendment (*Bush v. Lucas*, 462 U.S. 367 (1983)). As the Court stated in *Lucas*, the "federal courts have jurisdiction to decide all cases [arising] under the Constitution, laws, or treaties of the United States. This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution . . . but also the authority to choose among available judicial remedies

in order to vindicate constitutional rights." *Lucas*, 462 U.S. at 369 (internal citations omitted).

This reasoning applies with particular force to Constitutional deprivations suffered by servicemembers who lack any other means of vindicating their Constitutional rights. *See Wilkie v. Robbins*, 551 U.S. 537, 586 (2007) (want of other means of vindication); *Saum v. Widnall*, 912 F.Supp. 1384, 1396 (D.Colo. 1996) (servicemember's *Bivens* claims "tread on an area of expertise long conceded to the courts.")

Congress has made clear that federal officials such as Defendants are subject to *Bivens* claims brought by those who suffered Constitutional deprivations at their hands. The Westfall Act expressly preserves actions against federal officials "brought for violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The legislative history of the Westfall Act reveals Congress did not want to limit "the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violated their Constitutional rights." *See* H.R. REP. NO. 100-700, at 5-6 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949-50. *See also* Carlos Manuel Vazquez and Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the Bivens Question after Minneci v. Pollard*, 161 U. Pa. L. Rev. (2012). There is no legal reason to permit Defendants Rumsfeld and Gates to evade accountability for their refusals to abide by the laws passed by Congress.

IV. This Court Should Not Abstain From Adjudicating this Lawsuit.

The District Court appeared troubled by the egregious abuses of power alleged in the rape survivors' complaint (J.A. 73 and 83) and agreed a *Bivens* action is available against federal officials such as Defendants Rumsfeld and Gates. *See* J.A. 61 ("A *Bivens* cause of action permits a plaintiff to recover damages against a federal official who violates the plaintiff's constitutional rights, even when Congress has not expressly authorized such suits.")(internal citations omitted). The District Court held, however, that Supreme Court jurisprudence compelled dismissal. Citing *Chapell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L.Ed. 2d 586 (1983)* and *United States v. Stanley*, 483 U.S. 669, 682 (1987), the District Court held the "unique disciplinary structure of the military establishment" constituted a "special factor counseling hesitation." J.A. 62. Stated differently, the District Court ruled that the rape survivors' lawsuit must be dismissed to avoid negatively impacting military discipline.

A. The Federal Courts Have A Duty To Adjudicate Constitutional Claims.

The District Court erred. Hearing this lawsuit, not dismissing it, will best serve military discipline. At the outset, the Supreme Court's "special factors" abstention doctrine cannot be read to bar adjudication of all disputes involving the military. Indeed, much harm has been done as a result of this overreading of the

Supreme Court's ruling. *See, e.g.*, *Brown v. United States*, 739 F.2d 362, 363, 365 (8th Cir. 1984) (refusing to hear claims arising from a racially-motivated mock lynching) and *Bartley v. U.S. Dept. of Army*, 221 F.Supp.2d 934, 937, 948 (C.D.Ill. 2002) (refusing to hear rape and sodomy claims).

The "special factors" doctrine, properly understood, strikes a balance between protecting individual Constitutional rights and protecting the military's ability to pursue lawful military missions. The federal courts should not apply the "special factors" doctrine – a judicial creation – each and every time a servicemember brings a Constitutional claim without regard to the underlying allegations. Doing so would result in the federal courts creating the very situation the Constitution is carefully designed to avoid: a military operating outside of and beyond the reach of civilian control. Congress, not Defendants, has the power to set the rules and regulations to govern the military. Article 1, Section 8 of the Constitution provides that "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces." When Congress does so (as here), and those rules are blatantly violated with foreseeable resulting harms, the federal courts necessarily need to adjudicate.

The federal courts have a duty to adjudicate whether federal officials, including Defendants Rumsfeld and Gates, violated the law. As the Supreme Court held in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), executive branch

officials cannot evade judicial review when they ignore Congressional mandates. *See also Committee on Judiciary, U.S. House of Representatives v. Miers, et al.*, 558 F.Supp. 2d 53 (D.D.C. 2008) (duty of courts to rule).

Here, the lawsuit alleges Defendants violated Congressional law. These bad acts were not designed to further any military mission whatsoever, served no rational relationship to any important government objective, and instead deprived the rape survivors of their Constitutional rights. *Craig v. Boren*, 429 U.S. 190, 197 (1976). If Defendants Rumsfeld and Gates thought Congress misguided in passing the laws governing how the military handled sexual predations in its ranks, they were free to ask Congress to amend the law. But Defendants are not free to view themselves as wiser than Congress, and simply ignore any laws they do not like.

B. There Are No Special Factors Compelling Abstention on the Facts Here.

The District Court interpreted *Chapell v. Wallace,* 462 U.S. 296, 103 S. Ct. 2362, 76 L.Ed. 2d 586 (1983) as controlling precedent requiring it to dismiss the rape survivors' lawsuit. The District Court explained:

> The "unique disciplinary structure of the military establishment" is a "special factor" that counsels against judicial intrusion. *Chappell v. Wallace*, 462 U.S. at 304; *see also Orloff v. Willougby*, 345U.S. 83, 93-94 (1953). Instead, ***matters of military discipline should be left to the "political branches directly responsible—as the judicial branch is not—to the electoral process***." *Gilligan v. Morgan*, 413U.S. 1, 10 (1973). . . .

J.A. 62 (emphasis added).

The District Court's reasoning, however, misses the mark. The rape survivors are ***not*** asking the federal courts to adjudicate the substance of military discipline and invade the province of Congress, the political branch. Rather, they are asking the federal courts to adjudicate whether Defendants violated the laws passed by Congress, the political branch directly responsible to the electorate.

In *Chappell*, five enlisted men serving on a combat vessel sued their direct supervisors (commanding officer, four lieutenants, and three non-commissioned officers), alleging the supervisors had "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." *Chappell*, 462 U.S. at 297.

The *Chappell* Court held that the servicemen could not sue their direct superiors and challenge lawful military orders as motivated by discriminatory animus. The *Chappell* Court held that *Bivens* claims should be subjected to the same "incident to service" analysis as FTCA claims. The *Chappell* Court stated, "[a]lthough this case concerns the limitations on the type of nonstatutory damage remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case." *Id.*

The *Chappell* Court held that combat required immediate compliance with military procedures and orders. As a result, the plaintiffs were challenging conduct

(military orders from a direct supervisor) that had a military function and purpose: training servicemembers to show the absolute discipline and obedience to command that is needed in combat. The *Chappell* Court held that "that relationship [of immediate obedience] is at the heart of the necessary or unique structure of the military establishment." *Id.*

Although the *Chappell* Court found abstention warranted by the facts (combat, lawful direct orders, etc.), the Court expressly rejected a *per se* exclusion against *Bivens* claims by servicemembers. The Supreme Court held that "[t]his Court has never held, ***nor do we now hold***, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chapell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L.Ed. 2d 586 (1983). The Court cited with approval a series of cases in which military personnel were permitted to seek redress in federal courts: *Brown v. Glines*, 444 U.S. 348, 200 S.Ct. 609, 62 L.Ed.2d 540 (1980); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct.2547, 41 L.Ed.2d 439 (1974); and *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

It is clear that the District Court created a *per se* rule against servicemembers' *Bivens* claims because it dismissed the lawsuit without any fact-finding on whether adjudication would impact military discipline in any way, let alone in a negative way. The rape survivors allege Defendants substituted their

own views on what should be done for the views of Congress. They allege former Secretaries Rumsfeld and Gates refused to cooperate with Congressional oversight and violated, among others, Public Law 105-85 and the National Defense Authorization Act for Fiscal Year 2009. They allege they were harmed by the Defendants' intentional flouting of the Congressional rules and regulations designed to reduce unpunished rape and sexual assault in the military. J.A. 52-57 ¶¶ 319-340.

The federal courts generally have a duty to adjudicate Constitutional claims, and should voluntarily abstain from such adjudication only in those rare instances when adjudication undermines, rather than strengthens, the democratic values enshrined in the Constitution. In the instant case, adjudication, not abstention, serves to ensure that the entity answerable to the electorate, Congress, controls military discipline, and that its efforts to do so are not intentionally thwarted by unelected Executive branch officials.

Rapes and sexual assaults serve no military mission, as has been conclusively established by the military's own statements. *See* J.A. 47¶ 304, quoting the *2009 Annual Report on Sexual Assaults in the Military*: "In the armed forces sexual assault not only degrades individual resilience but also erodes unit integrity. Service members risk their lives for each other to keep fellow service members out of harm's way. Sexual assault breaks this important bond and tears

apart military units. An effective fighting force cannot tolerate sexual assault within its ranks. Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable."

It is for all these reasons that Congress acted, not once but repeatedly, to direct Defendants on what they should do to reduce the amount of unpunished sexual predation in the military. Yet Secretaries Rumsfeld and Gates intentionally violated these directives, and instead ushered in an era of an ever-greater number of unpunished rape and sexual assaults.

Holding Defendants accountable for intentionally violating Congressional rules and regulations cannot possibly negatively impact military discipline. To the contrary, allowing wrongdoing to flourish at the very highest level of the military, and allowing Defendants to ignore the civilian control required by the Constitution, undermines not only military discipline but the Constitution itself.

Our democracy has never elevated the military to a special status outside the reach of Congress and its laws. Yet these two men persuaded the District Court, and seek to persuade this Court, that they should be considered above the law of the land. This Court should reject this cynical and democracy-destroying effort, and hold that a jury of Americans should decide whether these two men should pay damages to the individuals irreparably harmed by their misconduct.

The District Court erred by adopting a *per se* rule and concluding without any fact finding that permitting the rape survivors to bring *Bivens* claims would impair military discipline or impede a military mission. Such a *per se* rule contradicts, not adheres to, the Supreme Court's *Chappell* decision. Permitting the rape survivors to seek *Bivens* damages from the former military leaders who viewed themselves as beyond the reach of Congressional rules and regulations will send a clear message of accountability and civilian control over the military.

C. The Rape Survivors' Injuries Were Not "Incident To Service."

The District Court also relied upon, but misconstrued, the Supreme Court's ruling in *United States v. Stanley*, 483 U.S. 669, 682 (1987) as reason to dismiss the rape survivors' claims. The District Court reasoned:

> In *United States v. Stanley*, the Supreme Court clarified that a major factor in determining at which point ... one should apply *Chappell's* 'special factors' analysis consists of the degree of disruption that will be produced. 483 U.S. 669, 682 (1987).
>
> ***In the present case, the Plaintiffs sue the Defendants for their alleged failures with regard to oversight and policy setting within the military disciplinary structure. This is precisely the forum in which the Supreme Court has counseled against the exercise of judicial authority.*** Where the Supreme Court has so strongly advised against judicial involvement, not even the egregious allegations within Plaintiffs' Complaint will prevent dismissal. *See id*. at 683. . . The special factor that counsels hesitation is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that ***congressionally uninvited intrusion into military affairs by the judiciary*** is inappropriate.")

J.A. 62 (emphasis added, internal quotations omitted).

The District Court's reasoning again misses the mark for two reasons: First, the rape survivors' lawsuit challenges the Defendants' intentional violation of Congressional directives, not any discretionary "oversight and policy setting."

Second, the District Court relied on the reasoning in *Stanley*, 483 U.S. 669, 681 (1987), but failed to engage in any analysis as to whether the rape survivors' injuries fit within the "incident to military service" test articulated therein. They do not.

In *Stanley*, as in *Chappell*, the Supreme Court refrained from adopting a *per se* rule barring servicemembers from bringing *Bivens* claims. Instead, the Court reasoned that such claims could be brought if they arose from Constitutional deprivations that were not "incident to military service." [4] The *Stanley* Court held that the "incident to service" formulation defined the parameters of the abstention

[4] That formulation first appeared in the Supreme Court's decision in *Feres v. United States*, 340 U.S. 135, 146 (1950). The *Feres* Court adopted this test based on the legislative history of the Federal Tort Claims Act ("FTCA"). The Court explained that Congress passed the FTCA in response to "a strong demand that claims for tort wrongs be submitted to adjudication" rather than being subject to private bills. The Court noted, however, that Congress was suffering from no plague of private bills on the behalf of military and naval personnel because a comprehensive system of relief had been authorized for them and their dependents by statute."

required by the *Bivens* "special factors counseling hesitation" language. *Id.* at 683-84.

The *Stanley* Court, however, did not actually decide whether the "incident to military service" test barred Plaintiff Stanley's Constitutional claims alleging he had been given LSD without his knowledge or consent. The Supreme Court noted that -- if it were to review the issue *de novo* -- Plaintiff Stanley may be able to show that the Constitutional deprivation was not incident to service. (Stanley argued that no military purpose had been shown.) The Supreme Court clearly envisioned factual findings as a prerequisite to special factors abstention, holding that "even if *Feres* principles apply fully to *Bivens* actions, further proceedings are necessary to determine whether they apply to this case."

The Supreme Court ruled against Stanley, however, because it was not considering the issue *de novo*. Rather, Stanley had litigated and lost the "issue of service incidence" in lower court proceedings.[5] In the lower court, the United States prevailed because it made a persuasive factual showing that Stanley was

[5] Justice O'Connor dissented, as she believed the conduct at issue – giving the solider LSD without his consent – could not, as a matter of law, be considered "incident to service." She reasoned that "conduct of the type alleged in this case is so far beyond the bounds of human decency that ***as a matter of law it simply cannot be considered a part of the military mission.***. . .No judicially created rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case."

given the LSD "for the purpose of ascertaining the effects of the drug on their ability to function as soldiers and to evaluate the validity of the traditional security training . . . . in the fact of unconventional drug enhanced interrogations." *Id*. at 696, n.14.

Here, no such showing has been made. Defendants have not made any evidentiary showing that rape and sexual assault, and the resultant failures to punish the perpetrators, served a military mission. Yet the District Court dismissed the lawsuit on the pleadings under Fed.R. Civ. P. 12(b)(6) without explaining why the rapes and sexual assaults should be considered incident to military service.[6]

There are no facts to support such a finding. The rape survivors were active-duty servicemembers when they were raped by their colleagues, but controlling Supreme Court jurisprudence establishes that plaintiff's status as an active duty service member, standing alone, does not mean that an injury is "incident to service." *United States v. Brown, 348 U.S. 110, 75 S. Ct. 141, 99 L.Ed. 139, (1954).* In order to fall within the scope of the "incident to service," the injury must actually arise from conduct done to further a military mission.

In *Brown*, a solider had injured his knee performing a military mission, and received an honorable discharge. After his discharge, he sought medical care from

[6] According to media reports, at least one high-ranking Naval Admiral has publicly criticized the District Court's holding that rape and sexual assault should be considered incident to service.

a Veterans Administration Hospital, which acted negligently, and permanently injured the knee. When the United States sought to dismiss Brown's lawsuit as arising from an injury "incident to service," the Supreme Court refused, holding that the case was controlled by *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), not by *Feres*. The Court reasoned that "[t]he *Feres* decision did not disprove of the *Brooks* case. It merely distinguished it, holding that the Federal Tort Claims Act does not cover injuries to servicemen where the injuries arise out of or in the course of activity incident to service." *Brown*, 34 U.S. 135, 146, 71 S. Ct. 153, 159. [7]

In *Brooks*, two active duty soldiers (and brothers) and their father, all named Brooks, were driving on a public highway when a civilian employee driving an Army truck ran into them. The accident killed the father and one of the soldiers, and seriously wounded the other soldier. The United States persuaded the Court of Appeals for the Fourth Circuit that members of the Armed Forces could not sue the United States.

On appeal, the Supreme Court reversed, holding that servicemembers are permitted to bring tort claims against the United States. *Brooks v. United States*,

[7] Three Justices (Black, Reed, Minton) dissented, reasoning the veteran would not have been entitled to care at the Veterans Administration Hospital "but for" his military service. The majority was not persuaded the "incident to service" formulation should be so broadly construed.

337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949). The Supreme Court reasoned that Congress did not preclude servicemembers from the scope of the FTCA. The Court held "[w]e are not persuaded that 'any claim' [in the FTCA] means 'any claim but that of a serviceman." *Id*. at 50. The Court explained that the exceptions themselves revealed that Congress intended to include servicemembers within the scope of the Act: "[i]t would be absurd to believe that Congress didn't have Servicemen in mind in 1946, when the statute was passed. The overseas and combatant activities exceptions make this plain." *Id*.

The United States argued there would be "dire consequences" if the Court permitted servicemembers to sue the United States. But the Court rejected that argument because the conduct at issue did not serve a military function. Rather, the Court held "we are dealing with an accident which had nothing to do with Brooks' army careers, injuries not caused by their service except in the sense that all human events depend on what has already transpired." *Id.* at 52. The Court expressly noted that "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented." *Id*.

The District Court ignored Supreme Court jurisprudence by adopting a *per se* rule barring *Bivens* claims by servicemembers. The District Court ignored Supreme Court jurisprudence by implicitly adopting the very "but for" formulation of the "incident to service" test that the Supreme Court rejected in *Brown*. The

record lacks any shred of evidence or argument to suggest that the rape survivors were raped to advance a military mission. The Defendants does not – and cannot – argue that the rapes and assaults were designed to further a military mission, such as teaching soldiers to be "obedient" to those higher up in the military hierarchy.

The Supreme Court's reasoning in *Brown* and *Brooks* controls here. The mere fact that the rape survivors were on active duty when they were raped does not transform the activity – raping – into an activity incident to military service any more than the Brooks brothers' duty status transformed their activity -- driving -- into a military activity. The rape survivors' injuries are not injuries "caused by their service except in the sense that all human events depend on what has already transpired." *Brown*, 337 U.S. 49 at 52.

CONCLUSION

The United States Constitution places the power to control the military in civilian hands. This power is exercised by Congress, which alone has the authority to make rules and regulations governing military discipline. Here, the very Executive Branch officials tasked with implementing Congressional directives (former Secretaries Rumsfeld and Gates) instead violated them, causing grave and serious harm to servicemembers' Constitutional rights. These circumstances compel this Court to overturn the District Court's misguided dismissal, and remand the lawsuit for adjudication of the rape survivors' allegations.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Susan L. Burke, hereby certify that:

1. I am an attorney representing Appellants.
2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8023 words (including Table of Contents, Table of Authorities, Addendum, and Certificate of Compliance and Service).
3. 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 2007 in Times New Roman 14-pt. type.

/s/Susan L. Burke
Susan L. Burke

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of April, 2012, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of Appellants' Opening Brief to be served by first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

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