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Battling the Unforeseen Enemy: The Constitutional Attack on Military Sexual Assault

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BATTLING THE UNFORESEEN ENEMY: THE CONSTITUTIONAL ATTACK ON MILITARY SEXUAL ASSAULT

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I. INTRODUCTION

In December 2005, Kori Cioca was raped.¹ This rape was the culmination of a series of assaults that included verbal and physical attacks on her person,² harassing phone calls and voicemail messages making threats on her life,³ and a series of break-ins where her attacker would expose himself to her, attempt to masturbate in her presence,⁴ and strike her in the jaw with enough force to throw her across the room when she refused to

1. First Amended Complaint at para. 20, *Cioca v. Rumsfeld*, No. 11-CV-00151 (E.D.Va. Sept. 6, 2011) [hereinafter First Amended Complaint].

2. *Id.* at paras. 9–10 (including being called a “stupid fucking female,” being spit upon, and being told she was a “fucking disrespectful non-rate” as her assaulter grabbed her in the buttocks).

3. *Id.* at para. 11.

4. *Id.*

comply with his demands for sexual contact.⁵ But because all of this happened while she was a seaman serving in the U.S. Coast Guard and living on base at the time her superior officer raped her,⁶ her options for reporting the rape within the military were limited to either a restricted or unrestricted report.⁷ In addition to these limited options, Ms. Cioca had to face the high likelihood that even if she used the unrestricted reporting option in an effort to initiate a criminal investigation against her superior officer, her attacker would not face criminal consequences for his deplorable actions.⁸ Despite this likelihood, Ms. Cioca did report her rapist to her Command, but Command took no immediate action.⁹

The action that Command later initiated included obtaining an “admission of sex” from Ms. Cioca’s rapist, though Command told her that if she continued to report the sex as rape, she would be prosecuted under court-martial for lying.¹⁰ Her rapist, on the other hand, pled guilty not to rape or sexual assault, but only to hitting Ms. Cioca, and he suffered only “minor loss of pay” and restriction to the base for thirty days as punishment.¹¹ Subsequent to that court-martial proceeding, Command forced Ms. Cioca to “sign a paper stating she had had an inappropriate relationship with her rapist,” and Command silenced Ms. Cioca when she objected that the paper “falsely portrayed [her] rape as consensual sex.”¹² In addition, Command failed to keep Ms. Cioca’s rape and assault confidential, and allowed members of her unit and other military staff to “harass [her], call her names, and spit on her.”¹³ When military physicians deemed Ms. Cioca’s injury to her jaw serious enough for surgery, Command transferred her to a duty station with no surgeon, permitted her to be subjected to further sexual harassment, and then discharged her from the Coast Guard on the grounds that “she had ‘a history of inappropriate relationships with individuals in the Coast Guard.’”¹⁴ Because of the rape and other assaults, she was diagnosed with “post-traumatic stress disorder, major depressive disorder, and anxiety.”¹⁵

5. *Id.* at para. 17.

6. *See id.* at para. 8.

7. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-924, REPORT TO CONGRESSIONAL REQUESTERS, MILITARY PERSONNEL: DOD’S AND THE COAST GUARD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS FACE IMPLEMENTATION AND OVERSIGHT CHALLENGES 1 (2008), available at <http://www.gao.gov/new.items/d08924.pdf> (stating that active duty service members have two options for reporting sexual assault, namely restricted and unrestricted). Restricted reporting allows victims to report a sexual assault and receive victim advocacy services without initiating criminal investigation against the perpetrator (i.e. their reporting is confidential). Unrestricted reporting requires notification to the chain of command, and a criminal investigation may ensue. While these requirements do not apply to the Coast Guard, the Coast Guard has implemented similar reporting options. *Id.*

8. *Id.* at 74. Table 8 states that in the year following the attack on Seaman Cioca, only seventy-eight out of 251 offenders against whom action was taken by Command resulted in court-martial proceedings. Eighty-one of those offenders against whom action was taken received non-judicial punishment, and ninety-two received administrative actions or discharges. *Id.*

9. First Amended Complaint, *supra* note 1, at para. 18.

10. *Id.* at para. 22.

11. *Id.* at para. 23.

12. *Id.* at para. 25 (stating Command ordered Ms. Cioca to sign the paper and that she “could not refuse to do so”).

13. *Id.* at para. 24.

14. *Id.* at para. 26.

15. *Id.* at paras. 27–28.

Ms. Cioca is far from being the lone victim of military sexual assault.¹⁶ To the contrary, military sexual assault has become such a problem that in 2005 Congress intervened, and in its National Defense Authorization Act, Congress directed the Defense Secretary to implement programs to thwart sexual assault in the military.¹⁷ Nevertheless, military sexual assault has persisted, leading Ms. Cioca and twenty-eight other plaintiffs (“MSA Plaintiffs”) with similar stories to file suit on February 15, 2011, against former Secretaries of Defense Donald Rumsfeld and Robert Gates.¹⁸ In this suit, the MSA Plaintiffs have alleged numerous violations of their constitutional rights, including violations of their substantive due process rights, procedural due process rights, equal protection rights under the Fourteenth Amendment, and freedom of speech rights under the First Amendment.¹⁹ Defendants Rumsfeld and Gates filed a motion to dismiss, which was granted on December 9, 2011.²⁰ The MSA Plaintiffs have appealed this decision to the Fourth Circuit Court of Appeals.²¹

This note will focus upon the alleged substantive due process violations and argue that, despite certain roadblocks and exceptions that hinder constitutional tort actions such as the current civil suit against Defendants Rumsfeld and Gates, there is an overarching need for the extension of these types of constitutional torts to cover sexual assaults in the military. Part II begins by introducing the history of the constitutional tort, the requirements that must be met to maintain such a cause of action, and the exceptions that may apply to effectively terminate a plaintiff’s case. Part III explores one of the constitutional violations at issue in *Cioca v. Rumsfeld* and analyzes the viability of this claim against Defendants Donald Rumsfeld and Robert Gates. Part IV sets forth policy arguments as to why a change in the limited legacy of the constitutional tort action may be needed so that the halls of justice do not close their doors to plaintiffs such as those in *Cioca v. Rumsfeld*. Part V concludes by summarizing the grounds that exist for a reversal of the trial court’s order granting Defendants’ motion to dismiss and for permitting the MSA Plaintiffs to, at the very least, have the opportunity to argue the merits of their claims.

II. THE CONSTITUTIONAL TORT

In 1971, the U.S. Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that a violation of a person’s Fourth Amendment rights by federal officers acting under color of federal law gives rise to a civil cause of action for damages incurred as a result of the federal officers’ unconstitutional conduct.²² From

16. See U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE CY 05 REPORT ON SEXUAL ASSAULT IN THE MILITARY, 2 (2005), available at http://www.sapr.mil/media/pdf/reports/2005_rtc_sexual_assaults.pdf (reporting that 2,374 assaults involving a service member victim and/or a service member offender were reported in calendar year 2005).

17. Megan N. Schmid, Comment, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assaults in the Military*, 55 VILL. L. REV. 475, 481–82 (2010) (citing Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 577, 118 Stat. 1926, 1926–27 (2004)).

18. First Amended Complaint, *supra* note 1, at para. 6.

19. *Id.* at paras. 341–56.

20. See generally Order, *Cioca v. Rumsfeld*, No. 11-CV-00151 (E.D.Va. Dec. 9, 2011), ECF No. 22 [hereinafter Order].

21. Notice of Appeal, *Cioca v. Rumsfeld*, No. 11-CV-00151 (E.D. Va. Jan. 5, 2012), ECF No. 23, appeal docketed, No. 12-1065 (4th Cir. Jan. 13, 2012).

22. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

this case, the constitutional tort was born.²³

In a line of cases following *Bivens*, a general rule has emerged (subject to certain exceptions) that victims of a violation of a federal constitutional right by a federal government official may recover damages against the government official even in the absence of any enumerated statute granting such a right.²⁴ Plaintiffs in *Bivens* actions must allege facts showing that the named defendants were personally involved and that their actions led to the violations of the plaintiffs' constitutional rights.²⁵ Because *Bivens* actions by their very nature involve defendants occupying federal positions, plaintiffs must also show that the federal officer involved has no absolute or qualified immunity protection.²⁶ After establishing these elements, a *Bivens* plaintiff must then show that no exceptions apply to his or her case.²⁷ These exceptions include: 1) cases in which Congress has provided an alternative statutory remedy that it has explicitly declared as a substitute for recovery directly under the Constitution, and that remedy is viewed as equally effective,²⁸ or 2) cases in which there are "special factors counseling hesitation in the absence of affirmative action by Congress."²⁹ If a defendant can show that one of the above-mentioned exceptions applies, the *Bivens* action is defeated.³⁰

At this juncture, it is important to note that *Bivens* actions closely parallel civil actions brought under 42 U.S.C. § 1983 in that both provide plaintiffs recovery for violations of their constitutional rights.³¹ Although *Bivens* actions operate solely upon federal actors and 1983 actions operate upon state actors, they are generally viewed as analogous insofar as qualified immunity and damages are concerned, and insofar as they both contribute to the expansion of constitutional tort law.³² However, unlike 1983 actions, which provide a remedy for all types of constitutional torts,³³ *Bivens* actions are subject to the previously mentioned exceptions.³⁴ *Bivens* actions usually involve constitutional violations dealing with the Fourth and Eighth Amendments and with the Fifth Amendment's Equal Protection Clause, as these are the only three constitutional rights upon which the

23. John L. Euler, *Personal Liability of Military Personnel for Actions Taken in the Course of Duty*, 113 MIL. L. REV. 137, 138 (1986).

24. Michael A. Rosenhouse, Annotation, *Bivens Actions—United States Supreme Court Cases*, 22 A.L.R. FED. 2d 159, § 2 (2007).

25. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

26. See Exceptions to the *Bivens* Doctrine, 6 FED. PROC., LAW. ED. § 11-249.

27. *Bivens*, 403 U.S. at 396–97.

28. Exceptions to the *Bivens* Doctrine, *supra* note 26, at 1.

29. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367 (1983) (addressing the civil service employee-Federal Government relationship)).

30. *Id.*

31. William N. Evans, Comment, *Supervisory Liability After Iqbal: Decoupling Bivens from Section 1983*, 77 U. CHI. L. REV. 1401, 1404 (2010). See also 42 U.S.C. § 1983 (2012), which provides

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id. For the remainder of this article, "1983" will refer to actions brought under 42 U.S.C. § 1983 (2012).

32. Evans, *supra* note 31, at 1404–05.

33. *Id.* at 1405.

34. *Id.*

U.S. Supreme Court has granted a *Bivens* remedy as of the year 2010.³⁵ Because *Bivens* actions are implied causes of action, the Court considers the exercise of such an authority with great caution.³⁶ These limitations and exceptions make *Bivens* remedies much less frequent than their 1983 counterparts.³⁷

A. Personal Involvement and Responsibility for Constitutional Violations

Until the U.S. Supreme Court case of *Ashcroft v. Iqbal*, circuit courts consistently held that a *Bivens* or 1983 plaintiff could hold a federal official responsible for the constitutional violations of his subordinates via a theory of supervisory liability.³⁸ In *Iqbal*, however, the Supreme Court announced that in these causes of action, “where masters do not answer for the torts of their servants — the term ‘supervisory liability’ is a misnomer.”³⁹ Accordingly, it seems that a plaintiff can no longer hold federal officials responsible for constitutional violations under *Bivens* via a theory of vicarious liability.⁴⁰ Rather, a plaintiff must show that the government actor, through his own actions, has violated the plaintiff’s constitutional rights⁴¹ and that this violation was the proximate cause of the plaintiff’s constitutional injury.⁴²

Depending on the type of constitutional violations at issue, the factors necessary to bring a *Bivens* action will vary.⁴³ At the forefront, the analysis requires examining the complaint to determine whether or not a plaintiff has met the pleading requirements sufficiently enough to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (i.e., the court must determine that the plaintiff has alleged detailed-enough allegations of the defendant’s personal responsibility for the constitutional violation).⁴⁴ In most instances, a *Bivens* plaintiff must show that the federal official acted with the mens rea applicable under the particular constitutional violation.⁴⁵ Even then, no constitutional injury will have occurred if the plaintiff cannot demonstrate the presence

35. See *id.* at 1406, n.34 (noting that the U.S. Supreme Court has only extended a *Bivens* remedy in three different constitutional contexts). See, e.g., *Carlson v. Green*, 446 U.S. 14, 23 (1980) (extending a remedy under the Eight Amendment’s Cruel and Unusual Punishment Clause); *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (extending a remedy under the Fifth Amendment’s Equal Protection Clause); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (extending a remedy under the Fourth Amendment’s Search and Seizure Clause).

36. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67–70 (2001).

37. *Evans*, *supra* note 31, at 1405.

38. *Id.* at 1411.

39. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). This decision held that the plaintiff had not established that Defendants Ashcroft and Mueller — then Attorney General and FBI Director, respectively — were personally responsible for allegedly discriminating against him on the basis of race, and that they authorized his detention and sanctioned his torture on that basis. *Id.* at 683. The Court further held that the named defendants were entitled to qualified immunity because the plaintiff could not show that Defendants had violated a “clearly established right” in order to overcome the qualified immunity defense. *Id.* at 682–83. Purpose, rather than knowledge, was required to assert liability against the defendants arising from their supervisory responsibilities. *Id.* at 683.

40. I say seemingly because a three-way circuit split has arisen since the *Iqbal* decision. For more on this split, see *Evans*, *supra* note 31, at 1417–20.

41. *Iqbal*, 556 U.S. at 675–76.

42. *Evans*, *supra* note 31, at 1406.

43. *Iqbal*, 556 U.S. at 676.

44. *Id.* at 679.

45. *Evans*, *supra* note 31, at 1406.

of that mens rea at the time the official acted.⁴⁶

Subsequent to *Iqbal* is the decision rendered in *Vance v. Rumsfeld*.⁴⁷ *Vance* involved two U.S. citizens who claimed that in 2006 U.S. military personnel detained and illegally tortured them while they were in Iraq working as civilian informants for the U.S. government.⁴⁸ The citizens brought a *Bivens* action against Donald Rumsfeld in his individual capacity, alleging violations of their due process rights under the Fifth Amendment.⁴⁹ Relying heavily on *Iqbal*, Defendant Rumsfeld answered that the plaintiffs therein had not alleged his personal responsibility for their treatment.⁵⁰ Rejecting Defendant Rumsfeld's argument, the court held that the plaintiffs had sufficiently alleged Defendant Rumsfeld's personal responsibility.⁵¹ It reasoned that, because the plaintiffs alleged that Defendant Rumsfeld was aware of detainee mistreatment through several generated reports⁵² and because this awareness would substantiate the plaintiffs' claims that Defendant "Rumsfeld was aware of the direct impact that his newly approved treatment methods were having on detainees," the plaintiffs pled Rumsfeld's personal involvement sufficient enough to survive Defendant Rumsfeld's motion to dismiss.⁵³ As to the requisite mens rea applicable to the plaintiffs' due process violations, the *Vance* court reasoned that "torturous treatment methods" may in and of themselves embody an intent to inflict harm,⁵⁴ and that this conduct is precisely the type of official action that is most likely to climb to the conscious-shocking level sufficient enough to sustain a due process claim.⁵⁵

B. Absolute and Qualified Immunity

Certain U.S. officials enjoy absolute immunity in *Bivens* actions; these officials include the President of the United States,⁵⁶ as well as U.S. judges,⁵⁷ prosecutors,⁵⁸ and their executive agency equivalents.⁵⁹ Other U.S. officials can only make use of qualified immunity,⁶⁰ whereby the official must show as an affirmative defense that his conduct did not violate "clearly established statutory or constitutional rights of which a reasona-

46. *Id.*

47. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010). *See also Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011) *rev'd en banc, opinion vacated* (Oct. 28, 2011) (affirming the district court's denial of Secretary Rumsfeld's motion to dismiss).

48. *Vance*, 694 F. Supp. 2d at 959–60.

49. *Id.* at 961–62.

50. *Id.* at 962–63.

51. *Id.* at 965.

52. *Id.* at 964. The reports alleging Rumsfeld's knowledge included a report from the Red Cross detailing that U.S. detainees in Iraq were mistreated and that Colin Powell, then Secretary of State, confirmed that Rumsfeld knew of these various reports and regularly informed President Bush of their contents. *Id.*

53. *Id.* at 964.

54. *Id.* at 967.

55. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

56. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1972).

57. *Butz v. Economou*, 438 U.S. 478, 508 (1978) (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871)).

58. *Id.* at 509 (citing *Yaselli v. Goff*, 275 U.S. 503 (1927)).

59. *Id.* at 515.

60. *See generally Rosenhouse, supra note 24*, §§ 14–15 (outlining several cases in which the Supreme Court addressed the qualified immunity of U.S. officials).

ble person would have known.”⁶¹ The qualified immunity doctrine balances two competing but important interests: the necessity of holding public officials accountable for irresponsible exercises of power and the necessity of shielding these officials from “harassment, distraction, and liability when they perform their duties responsibly.”⁶²

To resolve a qualified immunity defense, courts often use a two-part test that was first articulated in the U.S. Supreme Court case of *Saucier v. Katz*.⁶³ The first step is to determine, “in [a] light most favorable to the party asserting the injury, [whether] the facts alleged show that the [defendants’] conduct violated a constitutional right.”⁶⁴ Qualified immunity applies to the federal official unless the official violated such a right.⁶⁵ The second step is to determine if the constitutional right was “clearly established” at the time the constitutional violation occurred.⁶⁶ A right is clearly established if it would be clear to a reasonable official that his action in the situation was unlawful.⁶⁷ While the Supreme Court has since held that applying the two-part *Saucier* test is no longer mandatory, it is still often used as the appropriate test for measuring whether or not qualified immunity applies.⁶⁸

Applying the two-part *Saucier* test, the *Vance v. Rumsfeld* court held that Defendant Rumsfeld was not entitled to qualified immunity.⁶⁹ The court determined that he was not entitled to such a defense based on his contention that he, as a reasonable government official, could have believed in 2006 that the abuse the plaintiffs alleged was not unconstitutional.⁷⁰ As to the first part of the *Saucier* test, the court reasoned that when government conduct “shocks the conscience,” such behavior “can and should be deemed a violation of the Due Process Clause.”⁷¹ Further, the court found it clear that mental and physical torture such as the torture the plaintiffs suffered is conduct that embodies the “paradigmatic example of ‘shocks the conscience’ conduct.”⁷² As to the second part of the *Saucier* test, the court reasoned that the “right of American citizens to be free from torture is a well-established part of our constitutional fabric,” and that American citizens do not relinquish their constitutional rights upon traveling to foreign lands, “even when their destination is a foreign war zone.”⁷³ Thus, Defendant Rumsfeld violated a constitutional right that was clearly established, and the court permitted the plaintiffs to maintain their *Bivens* action as to the violation of their substantive due process rights.⁷⁴

61. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

62. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

63. *See generally Saucier v. Katz*, 533 U.S. 194 (2001).

64. *Id.* at 201.

65. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

66. *Saucier*, 533 U.S. at 201.

67. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citing *Anderson*, 483 U.S. at 201–02).

68. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that it shall be left to the sound discretion of the lower courts to determine if the two-part test should be substituted for a more fitting procedure in certain contexts).

69. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 970–71 (N.D. Ill. 2010).

70. *Id.* The plaintiffs’ alleged constitutional violations included: interrogations threatening physical violence, submission to cold prison cells with insufficient clothing, and deprivation of sleep, food, and medical care. *Id.* at 966–67.

71. *Id.* at 966.

72. *Id.*

73. *Id.* at 970.

74. *Id.* at 975.

C. Explicit, Alternative, and Equally Effective Remedy of Congress

A *Bivens* claim may not be maintained where there is an alternative statutory scheme that provides an equally effective remedy.⁷⁵ This *Bivens* prong balances the competing interests between the need to compensate persons for constitutional violations they have suffered and the importance of deferring to the lawmaking power of Congress.⁷⁶ However, if such a statutory scheme exists but Congress makes no mention that it intends the statute to be the exclusive source for a remedy, a *Bivens* action may still withstand the exception.⁷⁷

In *Carlson v. Green*, the U.S. Supreme Court held that a *Bivens* action invoking allegations of constitutional violations of due process, equal protection, and the Eighth Amendment right to be free from cruel and unusual punishment could withstand challenge even though the Federal Tort Claims Act (“FTCA”)⁷⁸ could have also provided a remedy.⁷⁹ The Court reasoned that nothing in the FTCA or its legislative history demonstrated an intention of Congress to pre-empt a *Bivens* remedy; rather, Congress viewed the FTCA and *Bivens* as “parallel, complementary causes of action.”⁸⁰ The Court also put forth four reasons why the FTCA would not provide an equally effective remedy: 1) a *Bivens* remedy would serve as a greater deterrent,⁸¹ 2) the petitioner could potentially recover punitive damages under a *Bivens* action where the FTCA expressly prohibits punitive damages,⁸² 3) a *Bivens* action permits a plaintiff to have his claims heard by a jury, whereas the FTCA does not permit jury trials,⁸³ and 4) an action under the FTCA would exist “only if the [s]tate in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward,” but since this case involved a federal officer’s exposure to liability for violating a prisoner’s federal constitutional rights, a *Bivens* action would allow the courts to apply uniform rules.⁸⁴

The equal protection component of the Fifth Amendment’s Due Process Clause may also afford a plaintiff a *Bivens* remedy where alternative remedies are unavailable to that plaintiff.⁸⁵ In *Davis v. Passman*, the plaintiff brought suit against her former employer, a Congressman at the time, alleging that he had wrongfully terminated her on account of her gender.⁸⁶ Even though she was an “able, energetic and . . . very hard worker,” the Congressman nonetheless concluded that the “understudy to [his] Administrative Assistant [should] be a man.”⁸⁷ The Supreme Court held that the plaintiff stated a cause

75. Exceptions to the *Bivens* Doctrine, *supra* note 26, at 1.

76. David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 GA. L. REV. 683, 686 (1985).

77. See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980).

78. See generally Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2012).

79. *Carlson*, 446 U.S. at 19–20.

80. *Id.* at 20.

81. *Id.* at 20–21 (noting that because a *Bivens* remedy names defendants individually, it is “almost axiomatic” that the threat of damages upon the individual federal official has a deterrent effect).

82. *Id.* at 21–22.

83. *Id.* at 22.

84. *Id.* at 23.

85. See *Davis v. Passman*, 442 U.S. 228, 245 (1979).

86. *Id.* at 231.

87. *Id.* at 230.

of action directly under the Fifth Amendment, which entitled her to a damages remedy under *Bivens* if she were to prevail on the merits at remand.⁸⁸ The Court reasoned that a damages remedy was appropriate under the circumstances,⁸⁹ that — although a suit against a Congressman for his unconstitutional acts did raise certain special factors counseling hesitation — those concerns were coextensive with a shield of defense already available to the Congressman,⁹⁰ that there existed no “explicit congressional declaration that persons” such as Plaintiff Davis who had been injured by “unconstitutional federal employment discrimination ‘may not recover money damages from’ those responsible for the injury,”⁹¹ and that there was no perceived potential for a “deluge” of similar claims if plaintiff were permitted to maintain her *Bivens* action.⁹² Thus, under the holding of *Davis*, a *Bivens* remedy can lie for a violation of a person’s equal protection rights in the absence of congressionally-created alternative remedies.⁹³

In theory, the alternative and equally effective remedy exception should not divest a *Bivens* plaintiff from seeking a remedy otherwise available to him or her directly under the Constitution.⁹⁴ When a *Bivens* claim is dismissed under this exception, it is quite possible that a *Bivens* plaintiff loses certain rights that would be available to him in the *Bivens* suit.⁹⁵ These lost rights are of particular concern because the Supreme Court has never elaborated upon how an act of Congress can forestall a right deriving directly from the Constitution.⁹⁶ The restriction does not even come into play, in any case, unless Congress has proactively provided for an alternative statutory remedy deemed equally effective.⁹⁷ This theoretical model, however, does not always transfer over to the Supreme Court and lower courts’ practical applications.⁹⁸ This has particularly been the case in decisions subsequent to the *Bivens* ruling, where the Supreme Court more readily emphasizes the separation of powers doctrine, favoring dismissal of a *Bivens* claim where Congress has fashioned some sort of remedy, although it may not be as effective as money damages under *Bivens*.⁹⁹

88. *Id.* at 248–49.

89. *Id.* at 245.

90. *Id.* at 246 (holding that any special factors concerns were “coextensive with the protections afforded by the Speech or Debate Clause”). This clause would shield the Congressman’s actions from judicial scrutiny if those actions were within the “sphere of legitimate legislative activity.” *Id.* at n.11 (citing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975)).

91. *Id.* at 246–47 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)).

92. *Id.* at 248.

93. *Id.*

94. Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 358 (1989).

95. *Id.* (noting that congressionally-created administrative remedies deprive *Bivens* plaintiffs of the jury trial and punitive damages that could be had in the constitutional tort action).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 358.

D. Special Factors Counseling Hesitation in an Absence of Affirmative Action by Congress

Even if a federal employee is personally responsible for a plaintiff's constitutional violation, that federal employee is not entitled to any type of immunity, and there is no alternate and equally effective remedy, a plaintiff may still fail to maintain a *Bivens* action if there are "special factors" present.¹⁰⁰ However, what constitutes "special factors" can seemingly be whatever the courts say; as the *Bivens* cases and 1983 cases have developed, the scope of this exception has become quite expansive.¹⁰¹

In a military context, the Supreme Court has been unreceptive to granting a *Bivens* or 1983 remedy if the constitutional injury is found to be "incident[al] to [military] service."¹⁰² The phrase "incidental to military service" has come to be known as the "*Feres* Doctrine."¹⁰³ *Feres v. United States* involved the consolidation of three cases brought by enlisted military service members,¹⁰⁴ all alleging under the FTCA that they suffered injuries while on active duty as the result of other service members' negligence.¹⁰⁵ Reflecting on pre-existing tort law and interpreting the provisions of the FTCA, the Supreme Court held that "[t]he [g]overnment is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident[al] to service."¹⁰⁶ The Court reasoned that federal law has always governed the relationship between military personnel and the government and that it was unaware of any law that has ever "permitted a soldier to recover for negligence, against either his superior officers or the [g]overnment he is serving."¹⁰⁷ Moreover, the *Feres* Court could not avoid considering that the military justice system itself provides "simple, certain, and uniform compensation for injuries or death of those in armed services."¹⁰⁸ That system, according to the Court, should likely pre-empt a civil court's examination of claims for injuries incidental to military service under the FTCA.¹⁰⁹ Since *Feres*, the Supreme Court has interpreted the phrase "incidental to military service" quite broadly.¹¹⁰ It has precluded suits by both previous and current service members for torts occurring during service.¹¹¹ It has applied to both recreational and strictly military activity,¹¹² and it has

100. *Id.* at 359.

101. *Id.*

102. *Feres v. United States*, 340 U.S. 135, 146 (1950).

103. Euler, *supra* note 23, at 144.

104. *Feres*, 340 U.S. at 136–37 (noting in the first case a negligence suit involving the wrongful death of a service man in a barracks fire, while the other two consolidated cases involved military medical malpractice).

105. *Id.* at 138.

106. *Id.* at 146.

107. *Id.* at 141.

108. *Id.* at 144.

109. *Id.*

110. Euler, *supra* note 23, at 145 (noting that the broad application includes "virtually any activity connected with military service").

111. *Henning v. United States*, 446 F.2d 774, 777 (3d Cir. 1971) (rejecting argument that the "critical time" under the *Feres* doctrine is when the injury occurs (in this case, after the serviceman was discharged)).

112. *Hass v. United States*, 518 F.2d 1138, 1142 (4th Cir. 1975) (holding that "an active duty serviceman temporarily in off-duty status" engaged in horseback riding on a military base cannot sue the federal government for the negligence of other servicemen or civilian military employees).

applied to off-duty assaults committed by one service member against another.¹¹³

In *United States v. Shearer*, a mother, serving as administratrix of her service member son's estate, brought a claim against the U.S. government under the FTCA for its alleged negligence arising from another serviceman's murder of her son.¹¹⁴ The Court held that with the passing of the FTCA, Congress did not intend to permit a service member "to recover from the Government for negligently failing to prevent another serviceman's assault and battery."¹¹⁵ The Court reasoned that even though the administratrix had framed her complaint in negligence, "[n]o semantical recasting of events" could change the fact that battery was the direct cause of the serviceman's death and, consequently, battery formed the basis of the administratrix's claim.¹¹⁶ Thus, the administratrix could not avoid the breadth of 28 U.S.C. § 2680(h) — which provides that the FTCA shall not apply to claims arising out of certain acts such as assault, battery, false imprisonment, false arrest, and other intentional torts¹¹⁷ — by pleading the allegations in her complaint in terms of negligent failure of the government to stop the assault and battery upon her son.¹¹⁸ Moreover, the Court found its interpretation of the § 2680(h) exception consistent with the *Feres* Doctrine in that it is of great importance to consider how a claim based on the FTCA would "require[] [a] civilian court to second-guess military decisions and whether the suit might impair essential military discipline."¹¹⁹ Because the complaint "str[uck] at the core of these concerns," the majority found its opinion to be a sound one.¹²⁰

In *Chappell v. Wallace*, the U.S. Supreme Court relied on both its own dicta in *Bivens* and on the *Feres* doctrine to deny the plaintiffs therein any *Bivens* remedy.¹²¹ *Chappell* involved claims by men enlisted in the Navy who alleged that their superior officers violated their constitutional rights by discriminating against them on the basis of race.¹²² The Court rendered a broad holding that "enlisted military personnel may not maintain a [*Bivens*] suit to recover damages from a superior officer for alleged constitutional violations."¹²³ It reasoned that the military's unique disciplinary structure constituted a "special factor" counseling hesitation, which dictated that "it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."¹²⁴ This conclusion, the *Chappell* Court reasoned, was supported by even a cursory review of the Constitution, within which Congress was granted the plenary power "'To raise and support Armies'; 'To provide and maintain a Navy'; and 'To make Rules for the Government and Regulation of the land and naval Forces.'"¹²⁵ In the face of clear

113. *United States v. Shearer*, 473 U.S. 52, 54–55 (1985).

114. *Id.* at 53–54.

115. *Id.* at 59.

116. *Id.* at 54–55.

117. 28 U.S.C. § 2680(h) (1974).

118. *Shearer*, 473 U.S. at 55.

119. *Id.* at 57.

120. *Id.* at 58.

121. *Chappell v. Wallace*, 462 U.S. 296, 299, 304 (1983).

122. *Id.* at 297.

123. *Id.* at 305.

124. *Id.* at 304.

125. *Id.* at 300–01.

evidence that the Constitution grants the legislature alone the power to regulate the military — a power that would include regulation of military discipline — the judiciary was unwilling to extend a civil remedy to enlisted soldiers.¹²⁶

On the same day that the U.S. Supreme Court decided *Chappell v. Wallace*, it rendered a similar “special factors” decision in *Bush v. Lucas*.¹²⁷ *Bush v. Lucas* involved the termination of a National Aeronautics and Space Administration (“NASA”) employee after he made a number of disparaging public statements about one of the NASA-operated flight centers in which he worked.¹²⁸ The Court declined to extend the employee a *Bivens* remedy under the First Amendment for violations of his right to free speech.¹²⁹ The Court reasoned that Congress had already created a comprehensive scheme addressing remedies to civil service employees who had been disciplined or terminated in violation of their First Amendment rights, that Congress was in a better position than the judiciary to determine the ramifications of a new type of litigation involving federal employees and the efficiency of the civil service,¹³⁰ and that such facts constituted “special factors” counseling the Court’s hesitation in this instance to extend *Bivens*.¹³¹

Even injuries arising from the secret administration of hallucinogenic drugs to service members have been determined to fall within the phrase “incidental to military service.”¹³² *United States v. Stanley* involved the secret administration in 1958 of lysergic acid diethylamide (“LSD”) to an army master sergeant who thought he was volunteering for experiments designed “to test the effectiveness of protective clothing and equipment as defenses against chemical warfare.”¹³³ Shortly after being administered the drug, the sergeant began suffering from hallucinations, incoherency, and memory loss.¹³⁴ His military performance deteriorated, and he would occasionally engage in violent fits of rage upon his wife and children without having any recollection of doing so.¹³⁵ It was not until after his discharge that he received a letter asking for his participation “in a study of the long-term effects of LSD on volunteers who participated in the 1958 tests” that the sergeant learned of the true nature of the studies.¹³⁶ He then filed suit under the FTCA and *Bivens* for his injuries.¹³⁷

The appellate court held that the sergeant’s injuries arose out of an activity “incidental to military service” and thus his claims were barred by the *Feres* doctrine.¹³⁸ Not finding grounds to disturb the decision of the district court and the Court of Appeals for the Fifth Circuit, the Supreme Court left intact those lower court determinations that the

126. *Id.* at 301, 303–04.

127. *Bush v. Lucas*, 462 U.S. 367 (1983).

128. *Id.* at 369.

129. *Id.* at 390.

130. *Id.* at 389–90.

131. *Id.* at 390 (Marshall, J., concurring).

132. *United States v. Stanley*, 483 U.S. 669, 684 (1987).

133. *Id.* at 671.

134. *Id.*

135. *Id.*

136. *Id.* at 671–72.

137. *Id.* at 672.

138. *Id.* at 684.

sergeant was at all relevant times “on active duty and participating in a bona fide Army program during the time the alleged negligence occurred.”¹³⁹ This status foreclosed any FTCA suit as a result of the *Feres* doctrine.¹⁴⁰ The Court stressed that the “special factor” exception does not require analysis as to whether Congress has chosen to permit some form of relief in the particular *Bivens* or 1983 case involving the “Military Establishment,” but rather “the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.”¹⁴¹

III. THE *BIVENS* CONSTITUTIONAL VIOLATIONS ALLEGED IN *CIOCA V. RUMSFELD*

In their amended complaint, the MSA Plaintiffs made specific allegations against Defendants Rumsfeld and Gates.¹⁴² As to Defendant Rumsfeld, the plaintiffs alleged he was aware in 2002 that twenty percent of female veterans were victims of sexual assaults perpetrated against them by other service members¹⁴³ and that, per the passing of Public Law 105-85,¹⁴⁴ Defendant Rumsfeld, as Secretary of Defense, was required to set up a commission to investigate the procedures for the reporting of instances of sexual misconduct in the military.¹⁴⁵ He allegedly ignored this congressional command and “failed to appoint any member to the commission,” even after members of Congress wrote him regarding their concerns that he and the Department of Defense had disregarded recommendations for substantive change in combating military sexual assault found in eighteen reports over a sixteen-year span.¹⁴⁶ The MSA Plaintiffs allege that as Secretary of Defense, Defendant Rumsfeld “expressed scorn and derision” toward the congressional efforts to eliminate military sexual misconduct, and that his inaction demonstrated how the military was battling Congress’ efforts to change the culture of the military, “where rape, sexual assault and sexual harassment were not prosecuted or otherwise deterred.”¹⁴⁷

In addition, the MSA Plaintiffs contended that Defendant Rumsfeld repeatedly allowed military Command to prosecute these rape, sexual assault, and sexual harassment offenders not through court-martial proceedings, but rather under 10 U.S.C. § 815,¹⁴⁸ where the so-called punishments often included extra push-ups,¹⁴⁹ promotions,¹⁵⁰ transfers to other divisions before investigations could be concluded,¹⁵¹ and orders to refrain from contact with the victims.¹⁵² Defendant Rumsfeld allegedly allowed Command to

139. *Id.* at 672, 680 (“The issue of service incidence . . . was decided adversely to [Stanley] . . . and there is no warrant for reexamining that ruling here.” (citation omitted)).

140. *Id.* at 680.

141. *Id.* at 683.

142. First Amended Complaint, *supra* note 1, at paras. 319–40.

143. *Id.* at para. 320.

144. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629, § 591 (codified as amended at 10 U.S.C. § 1561 (2012)).

145. First Amended Complaint, *supra* note 1, at para. 321.

146. *Id.* at paras. 321–22.

147. *Id.* at para. 322.

148. 10 U.S.C. § 815 (2012) (“Commanding officer’s non-judicial punishment”).

149. *See* First Amended Complaint, *supra* note 1, at para. 206.

150. *See id.* at paras. 66, 114, 264.

151. *See id.* at para. 264.

152. *See id.* at para. 36.

“interfere with the impartiality of criminal investigations,”¹⁵³ and he permitted Command to charge these perpetrators under the general provision for punishment¹⁵⁴ as opposed to the specific provision for rape, sexual assault, and other sexual misconduct.¹⁵⁵ Additionally, Defendant Rumsfeld allegedly made certain that military authorities, as opposed to civilian authorities, prosecuted perpetrators who committed rape and sexual assault, and did so “knowing that the military judicial system prosecutes only eight percent of those alleged to have engaged in rape or sexual assault, as compared to the civilian system, which prosecutes forty percent of those alleged to be such perpetrators.”¹⁵⁶ Furthermore, “Defendant Rumsfeld authorized acceptance of [military] recruits” with a history of domestic and sexual assault convictions through “moral waivers,”¹⁵⁷ presumably in contradiction of the Lautenberg Amendment to the Gun Control Act.¹⁵⁸ This demonstrated to Defendant Rumsfeld’s subordinates that the prevention of sexual assault and rape in the military was not of high concern.¹⁵⁹

As to Defendant Gates, the MSA Plaintiffs allege that he too permitted military Command to prosecute rape, sexual assault, and sexual harassment offenders under 10 U.S.C. § 815, and he permitted Command “to otherwise interfere [with criminal] investigations.”¹⁶⁰ In addition, he allowed military Command to retaliate against the MSA Plaintiffs after they reported the crimes against them and “interfered with and opposed Congressional directives designed to eliminate rape and sexual assault in the military.”¹⁶¹ In 2008, Defendant Gates and his subordinates allegedly ordered the director of the Sexual Assault Prevention and Response Office (“SAPRO”) to ignore the Congressional House Oversight Committee on National Security and Foreign Affairs’ subpoena to testify concerning “[SAPRO’s] efforts to eradicate military sexual assault.”¹⁶² He also failed to make sure that the Department of Defense “met its statutorily-mandated deadline”¹⁶³ for executing a database that would “centralize all reports of rapes and sexual assaults”¹⁶⁴ as prescribed by the National Defense Authorization Act for Fiscal Year 2009.¹⁶⁵ As of the time of filing of the MSA Plaintiffs’ complaint, Defendant Gates had

153. *Id.* at para. 324.

154. 10 U.S.C. § 934 (2012). This section states

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id.

155. 10 U.S.C. § 920 (2012).

156. First Amended Complaint, *supra* note 1, at para. 326.

157. *Id.* at para. 329 (noting that these recruits could not have enlisted in the military due to its minimum enlistment requirements without the “moral waivers”).

158. 18 U.S.C. § 922(d)(9) (2012). This statute provides: “It shall be unlawful for any person to sell or otherwise dispose of any firearm or any ammunition to any person knowing or having reasonable cause to believe that such person . . . has been convicted in any court of a misdemeanor crime of domestic violence.” *Id.*

159. First Amended Complaint, *supra* note 1, at para. 329.

160. *Id.* at para. 334.

161. *Id.* at paras. 335–36.

162. *Id.* at para. 336.

163. *Id.* at para. 337.

164. *Id.*

165. *Id.* (citing Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-

yet to create that database nearly two years after the deadline, and the MSA Plaintiffs alleged that he had no justification for his failure to implement the database and comply with this law.¹⁶⁶

A. Personal Involvement of Defendants Rumsfeld and Gates

After *Iqbal*, the MSA Plaintiffs must show that Defendants Rumsfeld and Gates, through their own actions, violated Plaintiffs' constitutional rights¹⁶⁷ and that these violations are the "proximate cause of [their] constitutional injur[ies]."¹⁶⁸ Defendants have argued that the MSA Plaintiffs are asking the court to hold them liable not for their direct involvement in the injuries alleged, but rather because, "as Secretaries of Defense, they failed to alter the military's command structure, change how the military investigates and prosecutes sex crimes, adequately follow congressional directives, and better manage the Defense Department's response to sexual assaults within the military."¹⁶⁹ They have also maintained that there are "no allegations that Defendants had any knowledge of Plaintiffs' alleged injuries, or that they were even in a position to learn of those injuries"¹⁷⁰ and that the MSA Plaintiffs' allegations "amount to little more than that Defendants had ultimate responsibility for managing the armed forces."¹⁷¹ Thus, Defendants Rumsfeld and Gates have argued that the MSA Plaintiffs are attempting to hold them responsible via a theory of vicarious liability, which *Iqbal* forbids.¹⁷²

Because the MSA Plaintiffs' case involves alleged violations of due process, it is distinguishable from *Iqbal* in that *Iqbal* — an invidious discrimination case — required a showing that Defendants Ashcroft and Mueller acted with a mens rea equivalent to discriminatory purpose.¹⁷³ The MSA Plaintiffs' allegations concerning denial of due process fall more in line with *Vance v. Rumsfeld*, which also involved violations of due process,¹⁷⁴ though the mens rea in *Vance* concerned intent to harm,¹⁷⁵ whereas the MSA Plaintiffs' mens rea allegations fall more in line with deliberate indifference.¹⁷⁶ In

417, § 563(a), 122 Stat. 4356 (2008)). The Act states

The Secretary of Defense shall implement a centralized, case-level database for the collection, in a manner consistent with Department of Defense regulations for restricted reporting, and maintenance of information regarding sexual assaults involving a member of the Armed Forces, including information, if available, about the nature of the assault, the victim, the offender, and the outcome of any legal proceedings in connection with the assault.

§ 563(a).

166. First Amended Complaint, *supra* note 1, at para. 337.

167. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

168. *Evans*, *supra* note 31, at 1405.

169. Memorandum in Support of Defendant's Motion to Dismiss at 5, *Cioca v. Rumsfeld*, No. 11-CV-00151 (E.D.Va. Sept. 20, 2011) [hereinafter Memorandum].

170. *Id.* at 13.

171. *Id.* at 15.

172. *Iqbal*, 556 U.S. at 677.

173. *Id.* at 676.

174. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 959–60 (N.D. Ill. 2010).

175. *Id.* at 967. Though the district court does not delve much into the mens rea aspect of the plaintiffs' substantive due process claims, the court does state that it disagrees with the plaintiffs' argument that the allegations are "sufficient to separately demonstrate personal involvement through deliberate indifference." *Id.* at 964.

176. First Amended Complaint, *supra* note 1, at paras. 321–22, 336–37 (alleging that Defendants wholly ignored and refused to comply both with congressional mandates and attempts at congressional oversight of

Vance, the inquiry before the court in regards to personal responsibility was whether the plaintiffs had sufficiently pled Defendant Rumsfeld's personal involvement in establishing the policies authorizing the torture of those plaintiffs.¹⁷⁷ Similarly, the MSA Plaintiffs must sufficiently plea that Defendants Rumsfeld and Gates were personally involved and deliberately indifferent to preventing ongoing constitutional deprivations with respect to military sexual assault.¹⁷⁸

The notice pleading standard under Rule 8 of the Federal Rules of Civil Procedure determines the sufficiency of a pleading and would, in this case, determine if the MSA Plaintiffs have properly pled personal involvement.¹⁷⁹ A complaint will survive under this standard if it contains "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'"¹⁸⁰ A claim is plausible on its face when a plaintiff has pled factual allegations permitting the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."¹⁸¹ Moreover, a complaint full of legal conclusions without factual allegations to support those legal conclusions is "not entitled to the assumption of truth."¹⁸² When well-pled factual allegations are present, a court assumes their authenticity and then considers whether or not those facts "plausibly give rise to an entitlement to relief."¹⁸³ This plausibility standard often involves determining if a plaintiff has "nudged" his or her claims "across the line from conceivable to plausible."¹⁸⁴

While *Iqbal* requires a court to be vigilant to ensure that claims without plausibility do not take up the time of high-ranking government officials,¹⁸⁵ it does not serve as an absolute bar of claims against those officials.¹⁸⁶ Although *Iqbal*'s application is an exercise in "context-specific" inquiries requiring "judicial experience and common sense" to determine whether a complaint shows a plausible claim for relief,¹⁸⁷ the MSA Plaintiffs have alleged specific acts and knowledge on the part of Defendants Rumsfeld and Gates.¹⁸⁸ In their opposition to the Defendants' dismissal brief, the MSA Plaintiffs point to their allegations that Defendants Rumsfeld and Gates knew sexual assaults were occurring in the military,¹⁸⁹ and they knew that those service members who reported these crimes "confronted a widespread culture of retaliation" for reporting.¹⁹⁰ Despite this knowledge, the MSA Plaintiffs maintain that Defendants Rumsfeld and Gates "intention-

SAPRO's policies and efforts).

177. *Vance*, 694 F. Supp. 2d at 965.

178. See Opposition to Defendants' Motion to Dismiss at 19–20, *Cioca v. Rumsfeld*, No. 11-CV-00151 (E.D. Va. Oct. 28, 2011) [hereinafter Opposition].

179. See FED. R. CIV. P. 8.

180. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

181. *Id.* (citing *Twombly*, 550 U.S. at 556).

182. *Id.* at 679 (noting that legal conclusions may "provide the framework of a complaint," but cannot stand alone).

183. *Id.*

184. *Id.* at 680 (quoting *Twombly*, 550 U.S. at 570).

185. *Id.* at 686.

186. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 961 (N.D. Ill. 2010).

187. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

188. See Opposition, *supra* note 178, at 19–21.

189. *Id.* at 20 (citing First Amended Complaint, *supra* note 1, at paras. 302–04).

190. *Id.* (citing First Amended Complaint, *supra* note 1, at paras. 305–09, 319–20, 333–34).

ally and knowingly . . . ignored and refused to comply with Congressional mandates” addressing military sexual assault, and they obstructed “Congressional oversight” through their refusal to comply with congressional subpoenas to testify regarding SAPRO’s efforts to rid the military of the unparalleled frequency of sexual assault that military members have experienced.¹⁹¹ In fact, Defendants have conceded that they were aware of sexual assaults in the military,¹⁹² and Plaintiffs have asked that this judicial admission be treated as an established fact.¹⁹³ In so doing, the MSA Plaintiffs have argued this admission shows that “Defendants themselves, [and] not [solely] their subordinates, acted with regard to rape and sexual assault” in the military.¹⁹⁴

The MSA Plaintiffs’ allegations are not legal conclusions unsupported by factual development, and thus these allegations should meet Rule 8’s pleading requirements.¹⁹⁵ The allegations are factual allegations that are entitled to an assumption of authenticity.¹⁹⁶ They also “nudge” the line from a conceivable to plausible level of deliberate indifference.¹⁹⁷ There is no other likely explanation as to why a federal official would command his executive branch employee to ignore a congressional subpoena to testify concerning the military sexual assault matters that Congress had delegated to that employee’s division, if not to show a deliberate indifference toward military sexual assault.¹⁹⁸ There is no other likely explanation as to why Defendants Rumsfeld and Gates would permit military Command, time and time again, to punish sexual criminals through non-judicial punishment,¹⁹⁹ to personally authorize “moral waivers” of persons with known sexual assault backgrounds,²⁰⁰ and to “interfere[] with and oppose[] Congressional directives “designed to eliminate rape and sexual assault in the military,”²⁰¹ if not to show their deliberate indifference towards the MSA Plaintiff’s constitutional rights. Accordingly, Defendants Rumsfeld and Gates have been given sufficient notice of the claims against them as required by Rule 8 and *Iqbal*,²⁰² and these claims should be plausible and sufficient enough to satisfy Rule 8’s pleading requirements.²⁰³

B. The Qualified Immunity Status of Defendants Rumsfeld and Gates

To address Defendants Rumsfeld and Gates’ qualified immunity defense, one must address whether a reasonable official in Secretary Rumsfeld and Secretary Gates’ positions would have known that the conduct they allegedly authorized violated the U.S.

191. *Id.* (citing First Amended Complaint, *supra* note 1, at paras. 321–22, 336–37).

192. Memorandum, *supra* note 169, at 2.

193. Opposition, *supra* note 178, at 2.

194. *Id.* at 22.

195. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

196. *See id.*

197. *See id.* at 680 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

198. Opposition, *supra* note 178, at 20 (citing First Amended Complaint, *supra* note 1, at paras. 321–22, 336–37).

199. *See supra* notes 148–52.

200. First Amended Complaint, *supra* note 1, at para. 329.

201. *Id.* at para. 336.

202. *See supra* notes 179–84.

203. *See Vance v. Rumsfeld*, 653 F.3d 591, 601 (7th Cir. 2011) (“The detailed Complaint provided Secretary Rumsfeld sufficient notice of the claims against him and stated plausible claims that satisfy Rule 8 and *Iqbal* and *Twombly*.”).

Constitution.²⁰⁴ In their memorandum in support of their motion to dismiss, Defendants have meshed the issue of personal involvement and the doctrine of qualified immunity.²⁰⁵ Some courts have held that the issue of personal involvement and the doctrine of qualified immunity are distinct and should be separately determined.²⁰⁶ Blending the two may, however, be proper in certain circumstances where the “sufficiency of [a plaintiff’s] pleading[] is both ‘inextricably intertwined with’ . . . and ‘directly implicated by’ . . . the qualified immunity defense.”²⁰⁷ This approach would seemingly abandon the *Saucier v. Katz* test,²⁰⁸ which is something the Supreme Court might condone in this instance based upon the test’s shortcomings²⁰⁹ and the fact that it would probably be more wise here to first determine whether Defendants are entitled to qualified immunity — and are thus entitled to the district court’s ordered dismissal of the lawsuit — before determining whether the MSA Plaintiffs have alleged a constitutional violation.²¹⁰

C. The MSA Plaintiffs’ Substantive Due Process Claim

The MSA Plaintiffs maintain that they have a “right to bodily integrity under the Fifth Amendment,”²¹¹ that both Defendants during their time as Secretaries of Defense condoned a military culture permitting rape, sexual assault, and sexual harassment to flourish,²¹² and that their acts and failures to act in respect to these crimes “violated [the MSA] Plaintiffs’ substantive due process rights” under the Fifth Amendment.²¹³ As the law of due process has evolved, substantive due process claims will lie in order to protect the individual against arbitrary government action.²¹⁴ While substantive due process limits the government in both its legislative and executive capabilities, the factors that determine what is “fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.”²¹⁵ In the executive realm, case law has stressed “that only the most egregious official conduct can be said to be arbitrary in the

204. See *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

205. Memorandum, *supra* note 169, at 11.

206. *Vance*, 653 F.3d 591 (affirming the district court decision).

207. *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (citations omitted).

208. See *supra* notes 63–68 and accompanying text.

209. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding, after a lengthy discussion of its shortcomings, that the sequential two-step *Saucier* test is no longer mandatory); *Id.* at 237 (quoting Brief for Nat. Assoc. Crim. Defense Lawyers as Amicus Curiae Supporting Respondents at 30, *Saucier v. Katz*, 533 U.S. 194 (2001)) (arguing that the *Saucier* test “disserve[s] the purpose of qualified immunity” because it “forces the parties to endure additional burdens of suit — such as the costs of litigating constitutional questions . . . — when the suit could otherwise be disposed of more readily”); *Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring in judgment) (arguing that the two-part test has quite the potential to confuse); *Purtell v. Mason* 527 F.3d 615, 622 (7th Cir. 2008) (criticizing *Saucier*’s “rigid order of battle”); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–76 (2006) (arguing that the *Saucier* test’s requirement that a court first decide whether the official’s alleged conduct violated the Constitution is a question that forces courts to either “gratuitously declare a new constitutional right in dictum or decide that the claimed right does not exist”).

210. See *Pearson*, 555 U.S. at 237 (quoting Brief for Nat. Assoc. Crim. Defense Lawyers as Amicus Curiae Supporting Respondents at 30, *Saucier v. Katz*, 533 U.S. 194 (2001)).

211. First Amended Complaint, *supra* note 1, at para. 342.

212. *Id.* at para. 343.

213. *Id.* at para. 344.

214. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

215. *Id.* at 846.

constitutional sense.”²¹⁶ Three different types of culpability may pertain to substantive due process violations: negligence, deliberate indifference, and intent.²¹⁷

The U.S. Supreme Court has been reluctant to expand substantive due process claims below a requisite mens rea of intention to harm.²¹⁸ This is so because the substantive due process concept of conscious-shocking “points clearly away from liability, or clearly toward it, only at the ends of the tort law’s spectrum of culpability.”²¹⁹ In accordance with judicial tradition limiting the breadth of substantive due process, courts have recurrently held that liability cannot be had for negligently inflicted harm because it is “categorically beneath the threshold of constitutional due process.”²²⁰ On the other hand, conduct falling within the culpability category of intent-to-harm is the type of conduct that will most likely support a substantive due process claim because it is this level of conduct that will most likely shock the conscience.²²¹ In the middle lies deliberate indifference, where gauging what rises to a level of conscious-shocking demands a more exacting analysis of the circumstances found in each case.²²²

By common sense and definition, the term “deliberate indifference” is reasonably invoked “only when actual deliberation is practical,”²²³ and not in situations requiring quick decision-making without the luxury of precautionary planning.²²⁴ Actual deliberation has been found to be practical in cases involving the custodial detention of inmates, where foresight into a prisoner’s welfare “is not only feasible but obligatory.”²²⁵ This is so because the Constitution imposes a duty upon the government to assume responsibility for a person’s welfare after the government has deprived that person of his liberties, and a failure to meet that duty is a transgression upon due process.²²⁶ When there is an opportunity for reflection coupled with a prolonged failure to care, that is the point at which indifference becomes truly shocking.²²⁷

Without evidence of intent-to-harm, the MSA Plaintiffs’ substantive due process claims fall into the close-call category of deliberate indifference.²²⁸ There is no question that Defendants Rumsfeld and Gates found themselves in situations where actual deliberation concerning eradication of military sexual assault was practical.²²⁹ Eliminating sexual assault in the military does not require fast-paced remedial thought, as it has been

216. *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)).

217. Brad K. Thoenen, Note, *Stretching the Fourteenth Amendment and Substantive Due Process: Another “Close Call” For 42 U.S.C. § 1983*, 71 MO. L. REV. 529, 534–35 (2006).

218. *Id.* at 534.

219. *Lewis*, 523 U.S. at 848.

220. *Id.* at 848–49.

221. *Id.* at 849.

222. *Id.* at 850.

223. *Id.* at 851 (citation omitted).

224. *Id.* at 853.

225. *Id.* at 851 (citation omitted).

226. *Id.* at 851–52.

227. *Id.* at 853 (citing *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

228. See First Amended Complaint, *supra* note 1, at paras. 321–22, 336–37 (alleging that the defendants ignored congressional mandates and knew of the pervasive sexual assault in the military, but lacking evidence of intentional harm).

229. See *id.* at paras. 302–04 (stating that data gathered regarding sexual assault from 2006 to 2009 shows that military sexual assault and rape grew with each new year).

the subject of much deliberation and discussion since as early as the year 1991.²³⁰ Additionally, punishing sexual assault in the military does not require split-second decision-making, as it is a process of reporting the crime, gathering evidence, and determining what judicial — or non-judicial — methods should be taken against the accused.²³¹ Where Defendants Rumsfeld and Gates will likely launch their attack on this substantive due process claim is whether or not their executive action was so egregious as to be “arbitrary in the constitutional sense,”²³² and whether or not the close call of deliberate indifference should favor or disfavor a finding of liability in this instance.²³³

The MSA Plaintiffs have likened their situation to situations that prisoners face,²³⁴ at least in the sense that members of the armed forces, like prisoners, cannot engage in “self-help against Constitutional deprivations” like civilians can.²³⁵ Active duty service members cannot move homes or change cities, they cannot take personal actions like civilians can — such as calling the police, seeking the aid of a shelter, or getting out of town²³⁶ — and they cannot simply quit their jobs to go find new employment away from the rapists that they are forced to live near, work with, and salute everyday.²³⁷ In this respect, the argument can potentially be made that Defendants Rumsfeld and Gates should have had the obligatory foresight to consider the welfare and bodily integrities of members of the armed services.²³⁸

The MSA Plaintiffs could argue that Defendants’ deliberate instructions to subordinates to ignore congressional subpoenas concerning the eradication of rape in the military,²³⁹ their authorization and execution of moral waivers for known sexual offenders,²⁴⁰ and their interference with and opposition to congressional directives designed to eliminate military sexual assault and rape²⁴¹ constituted conscious-shocking conduct that is contrary to substantive due process. If the MSA Plaintiffs can show the availability of a time for reflection coupled with a convincingly prolonged failure to care — either through evidence that Defendants ignored and undermined legislation directed at eradicating military sexual assault and that their acknowledgement of the problem and commitment to positive change is merely lip service, or through evidence of their “scorn and

230. Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 657 (1996) (stating that the 1991 Tailhook convention for Navy and Marine aviators, where U.S. military men sexually assaulted at least ninety people, led to the Inspector General of the Department of Defense conducting a report and finding that the sexual assaults at the convention represented only “the small visible tip of an underlying iceberg of military sexual assault”).

231. See U.S. DEP’T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 5–8 (2004), available at <http://www.defense.gov/news/May2004/d20040513SATFReport.pdf> (outlining the various rules, stages, and forms of punishment in the military justice system).

232. *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992).

233. See Thoenen, *supra* note 217, at 534–38 (discussing the analysis of deliberate indifference in various cases and its fine-line status as a mens rea for evaluating substantive due process claims).

234. See Transcript of Hearing on Motions at 12–13, *Cioca v. Rumsfeld*, No. 11-CV-00151 (2011) [hereinafter Transcript]; Opposition, *supra* note 178, at 20; First Amended Complaint, *supra* note 1, at para. 318.

235. Opposition, *supra* note 178, at 20.

236. First Amended Complaint, *supra* note 1, at para. 318.

237. Transcript, *supra* note 234, at 13.

238. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

239. See *supra* note 162.

240. See *supra* note 157.

241. See *supra* note 201.

derision toward Congressional efforts to eradicate” military sexual assault and rape²⁴² — then perhaps their substantive due process claims of deliberate indifference may draw the line of liability in a place that falls in their favor.²⁴³

D. Is there an Explicit, Alternative, and Equally Effective Congressional Remedy?

This exception does not apply unless Congress has proactively provided for an alternative statutory remedy that it has deemed equally effective.²⁴⁴ There is no alternative remedy for the MSA Plaintiffs under the FTCA, as that has specifically been eliminated as an avenue of recovery in the *Feres v. United States* decision.²⁴⁵ In their memorandum in support of their motion to dismiss, Defendants Rumsfeld and Gates did not raise the question of whether or not there is an explicit, alternative, and equally effective congressional remedy that would bar the MSA Plaintiffs’ *Bivens* suit.²⁴⁶ This issue has been discussed in other Supreme Court *Bivens* cases, namely with respect to the fact that Congress has enacted statutes establishing a framework “of justice to regulate military life, taking into account the special patterns that define the military structure.”²⁴⁷ For example, Article 138 of the Uniform Code of Military Justice (“UCMJ”) provides service members with the opportunity to challenge the wrongs of commanding officers, whereby an officer exercising general court-martial over the offending commander hears the complaint and takes measures to remedy the wrong complained of.²⁴⁸ Whether or not a remedy under the UCMJ would provide what Congress would deem to be an equally effective remedy for these plaintiffs is a question that could arguably be answered in favor of the MSA Plaintiffs based upon many of the same factors the Supreme Court considered in *Carlson v. Green*.²⁴⁹

E. Are There Special Factors Present That Should Defeat the MSA Plaintiffs’ Claims?

Defendants Rumsfeld and Gates have argued that because there is a strong presumption against extending *Bivens* remedies in new contexts,²⁵⁰ and because the MSA

242. First Amended Complaint, *supra* note 1, at para. 322.

243. *See Lewis*, 523 U.S. at 853.

244. *See Rosen*, *supra* note 94, at 358.

245. *See Feres v. United States*, 340 U.S. 135, 146 (1950) (barring a remedy under the FTCA “where the injuries arise out of or are in the course of activity incident to service”). *See also Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (noting how the *Feres* Court held that, even assuming the FTCA “might be read literally to allow tort actions against the United States for injuries suffered by a soldier in service, Congress did not intend to subject the Government to such claims by a member of the armed forces”).

246. *See generally* Memorandum, *supra* note 169.

247. *Chappell*, 462 U.S. at 302.

248. 10 U.S.C. § 938 (2012). This statute specifically provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Id.

249. *See Carlson v. Green*, 446 U.S. 14, 20–23 (1980); *supra* text accompanying notes 81–84.

250. Memorandum, *supra* note 169, at 6 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)).

Plaintiffs' claims are "incident to their military service,"²⁵¹ special factors condemn the MSA Plaintiffs' *Bivens* claims to failure and require dismissal of their case.²⁵² These arguments are the grounds on which the district court granted Defendants' motion to dismiss.²⁵³ Specifically, the district court judge found that because the MSA Plaintiffs are suing the defendants for "their alleged failures with regard to oversight and policy setting within the military disciplinary structure," their claims fall within the special factors that counsel hesitation because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."²⁵⁴ In his ruling, the judge found it difficult to get around "clear mandates from the Supreme Court not to involve the courts in inherently and inextricably-tied military oversight issues."²⁵⁵

However, Supreme Court jurisprudence has determined that "judicial abstention should occur only when the injuries being litigated are casually connected to the military service, not merely occurring during the time of military service."²⁵⁶ Jurisdiction should be had when service members make claims involving injuries "not caused by their service except in the sense that all human events depend [on] what has already transpired."²⁵⁷ When there is no military function or purpose being served, special factors do not prevent a court from hearing the claims of military personnel.²⁵⁸ This is the argument that the MSA Plaintiffs attempted to set forth during their hearing on Defendants' motion to dismiss.²⁵⁹

The distinguishing factor that sets the MSA Plaintiffs' case apart from the incidence to military service rationale found in *United States v. Stanley* and *Chappell v. Wallace* is the fact that those cases involved conduct for a military purpose.²⁶⁰ There can be no military purpose furthered by the incidence of sexual assault and rape amongst military personnel.²⁶¹ It has no military function, and "in fact is antithetical to military discipline."²⁶² Moreover, the defendants themselves even state there can be "no question that

251. *Id.* at 9 (arguing that because the MSA Plaintiffs were raped while they were serving in the U.S. military, there "can be no question that [their] claims are incident[al] to their military service, necessitating precisely the type of judicial review of military organization and discipline that is squarely foreclosed by *Chappell* and *Stanley*") (emphasis added) (citing *Chappell v. Wallace*, 462 U.S. 296 (1983) and *United States v. Stanley*, 483 U.S. 669 (1987)).

252. Memorandum, *supra* note 169, at 11.

253. Order, *supra* note 20, at 2.

254. *Id.* (quoting *United States v. Stanley*, 483 U.S. 669, 683 (1987)).

255. Transcript, *supra* note 234, at 11.

256. Opposition, *supra* note 178, at 4.

257. *Brooks v. United States*, 337 U.S. 49, 52 (1949) (holding that two plaintiffs, as members of the armed forces, could maintain their 1983 claims against the United States for the negligence of one of its civilian army truck drivers in injuring and/or killing said plaintiffs because the personal injury suit "had nothing to do with the [plaintiffs'] army careers").

258. *See id.*

259. Transcript, *supra* note 234, at 11–12. The MSA Plaintiffs' attorney, Susan L. Burke, claimed that "[h]ere . . . you have conduct that the military itself has said has absolutely no military function, absolutely no military purpose . . ." *Id.*

260. *See United States v. Stanley*, 483 U.S. 669 (1987) (administering LSD to soldier without their consent found to further government's national security interest because its use was tested to see if a soldier could withstand interrogation); *Chappell v. Wallace*, 462 U.S. 296 (1983) (ordering soldiers to perform duties on a naval battleship on an allegedly discriminatory basis found to fall within the line of duties intended to further the military mission).

261. Opposition, *supra* note 178, at 5.

262. Transcript, *supra* note 234, at 11–12.

rape, sexual assault, and sexual harassment are contrary to law and Department of Defense policy.”²⁶³ Here, the injuries merely occurred during the time that the MSA Plaintiffs were serving in the military, the injuries are not “casually connected to military service,” and thus there should be no special factors encouraging judicial abstention in this case.²⁶⁴ The MSA Plaintiffs maintain it is “perfectly permissible in this democracy for a jury to sit and adjudicate whether or not [Defendants Rumsfeld and Gates] took adequate steps” to counter what they knew to be a rampant military sexual assault problem.²⁶⁵

IV. THE SPECIAL FACTORS SPECTRUM: A POLICY DECISION

At this point in the litigation, the MSA Plaintiffs have seen the district court’s dismissal of their case without an opportunity to proceed on the merits of their claims.²⁶⁶ This is so because of the harsh legal ground that encompasses *Feres*’ incident to military service doctrine.²⁶⁷ Case law subsequent to *Bivens* and *Feres* speaks of the “varying levels of generality at which one may apply [the] ‘special factors’ analysis.”²⁶⁸ On the narrow end of the spectrum, one might require there to be “reason to believe that in the particular case the disciplinary structure of the military would be affected.”²⁶⁹ A bit more broadly, one could prohibit *Bivens* actions whenever there is any underlying officer-subordinate relationship present in the circumstances of the case.²⁷⁰ Even more broadly, *Bivens* actions could be prohibited in officer-subordinate situations and beyond “when it affirmatively appears that military discipline would be affected.”²⁷¹ Even more broadly, and where the Supreme Court currently chooses to apply special factors analysis, “one might disallow *Bivens* actions whenever the injury arises out of activity ‘incident to service.’”²⁷² Most broadly, the Court could conceivably prohibit *Bivens* actions by servicemen altogether.²⁷³ Where the Court chooses to place its rule along this narrow to broad scale “depends upon how prophylactic one thinks the prohibition should be,” i.e., how often the Court thinks it is appropriate to have occasional impairment of the military discipline structure, “which in turn depends upon how harmful and inappropriate judicial intrusion upon military discipline is thought to be.”²⁷⁴ Gauging this scale is of course a policy decision, without any truly right answer, but the Supreme Court has thus far been unwilling to change the place along the scale on which it has decided to rest its special factors decisions.²⁷⁵

Here — where the MSA Plaintiffs’ allegations do seem to involve relationships be-

263. Memorandum, *supra* note 169, at 1.

264. See Opposition, *supra* note 178, at 4.

265. Transcript, *supra* note 234, at 14.

266. See Order, *supra* note 20, at 2 (granting Defendants’ Motion to Dismiss); Defendants’ Motion to Dismiss at 1-2, *Cioca v. Rumsfeld*, No. 11-CV-00151 (E.D. Va. Sept. 20, 2011) [hereinafter Motion to Dismiss].

267. See generally *Feres v. United States*, 340 U.S. 135 (1950).

268. *United States v. Stanley*, 483 U.S. 669, 681 (1987).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* (deciding to maintain the “incident to service” bar to both *Bivens* and FTCA claims).

tween officers and their subordinates, where on a broad level they do seem to be allegations that may affect military discipline,²⁷⁶ and where it would seem that even a narrower interpretation of the special factors spectrum could fall outside their favor — there is a distinguishing factor that sets their case apart. This distinguishing factor is that, delving deeper into the issues, this case would not be one in which the judiciary decided to make law affecting military discipline.²⁷⁷ The legislative branch is the body to which the Constitution grants the authority “[t]o make Rules for the Government and Regulation of the land and Naval Forces.”²⁷⁸ In this case, the legislative body has spoken; it has passed legislation pertaining to the examination of military policies and procedures regarding the investigation and report of sexual misconduct within the military,²⁷⁹ and it has made efforts to change the culture of the military, which the leaders of the executive branch have resisted.²⁸⁰ Instead of making case law that would affect military discipline, a decision favorable to the MSA Plaintiffs would simply mean that the judiciary has taken a “look at the Executive Branch system and measure[d] whether or not the people in charge have done their job.”²⁸¹ In the event the Fourth Circuit does not agree with the MSA Plaintiffs that their claims are not incidental to military service,²⁸² this policy argument favoring a narrowing of the special factors application — particularly since such an application would arguably not affect military discipline — could potentially be an alternate ground to vacate Defendants’ motion to dismiss and let the case proceed on the merits.

V. CONCLUSION

In November of 2011, House Representative Jackie Speier introduced House Bill 3435, the Sexual Assault Training Oversight and Prevention Act.²⁸³ If passed, this bill would take the “reporting, oversight, and investigation of sexual assaults out of the hands of the military’s normal chain of command and place it in an autonomous office of military experts.”²⁸⁴ While the new Secretary of Defense has just recently announced two new Department of Defense policies designed to help victims of military sexual assault, military-focused human rights organizations say the new measures are not enough.²⁸⁵ These measures do nothing to change the broad discretion given to individual military

276. See generally First Amended Complaint, *supra* note 1.

277. See *id.*

278. U.S. CONST. art. I, § 8, cl. 14.

279. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629, § 591 (codified as amended at 10 U.S.C. § 1561 (2012)).

280. First Amended Complaint, *supra* note 1, at para. 322.

281. Transcript, *supra* note 234, at 12. Counsel for the MSA Plaintiffs argues here that the judicial branch should be able to determine whether the executive branch has done the job Congress has mandated that it do. For example, she asks, have the leaders of the executive branch “followed Congressional directives” pertaining to sexual assault and rape in the military?

282. See *Brooks v. United States*, 337 U.S. 49, 52 (1949); Transcript, *supra* note 234, at 11–12; *supra* text accompanying notes 257–59.

283. See H.R. 3435, 112th Cong. (2011).

284. Laura Bassett, *Military Rape Policies Announced By Defense Department Don’t Fix Problem, Groups Charge*, HUFFINGTON POST (Dec. 29, 2011, 3:57 PM), http://www.huffingtonpost.com/2011/12/29/military-rape-sexual-assault-department-of-defense_n_1174736.html.

285. *Id.*

commanders who often have glaring conflicts of interest, as they frequently “may be responsible for both the victim and the perpetrator, making it difficult for him or her to make objective decisions about whether the case will go forward, who will prosecute, who will defend, and what disciplinary actions to take.”²⁸⁶ House Bill 3435, however, would solve this problem and is an active congressional step necessary to implement real change to eradicate military sexual assault.²⁸⁷

Although these changes are steps along the path toward progressively eliminating the military sexual assault problem, they do little to remedy the damages that have already happened to the MSA Plaintiffs. These plaintiffs have made the valid argument that what has happened to them is not something incidental to their military service.²⁸⁸ If this is not something incidental to military service, then there are no special factors precluding this *Bivens* case on that issue. Reflecting on Supreme Court jurisprudence, one may ask for what purpose the special factors have been created. If they have been created because the judiciary must be deferential to the military when the circumstances involve unique issues within the control of the military and outside the expertise of the judicial branch — including topics such as “when to fire rockets, when to drop bombs, how to interrogate enemies, and so forth”²⁸⁹ — then perhaps the incident to military service test best serves that goal.²⁹⁰ But when the circumstances involve “[a]djudication, the prosecution of rapists . . . the investigatory process, none of that is something unique to the military structure or outside [judicial] expertise.”²⁹¹ Rape is not something service men and women sign up for when they join the armed forces.²⁹² Perpetuation of the problem through the deliberate indifference of those who are charged with leading the military is a wrong that can be remedied through judicial determinations. The MSA Plaintiffs have “chartered a path” that distinguishes their case from those decisions that have interpreted incidence to service and limited *Bivens* actions not found to meet that test.²⁹³ The *Bivens* case stood for the principles that “no official is above the law,” and “no violation of [a] right should [go] without a remedy.”²⁹⁴ Permitting this case to proceed on the merits of the MSA Plaintiffs’ constitutional claims would uphold those principles and provide the strong incentive needed to boost efforts toward eliminating the enduring epidemic of military sexual assault.

—Tara D. Zickefoose*

286. *Id.*

287. *See generally* H.R. 3435.

288. *See* Opposition, *supra* note 178, at 4.

289. Transcript, *supra* note 234, at 10.

290. *Id.*

291. *Id.*

292. *Id.* at 14.

293. *Id.*

294. *United States v. Stanley*, 483 U.S. 669, 706 (1987) (O’Connor, J., dissenting in part) (referencing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)).

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