No. 12-976

In the Supreme Court of the United States

DONALD VANCE AND NATHAN ERTEL, PETITIONERS

v.

DONALD H. RUMSFELD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal courts should recognize a common-law damages action under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against a former Secretary of Defense for the alleged creation of military detention policies that were applied in a combat zone in a foreign country.

2. Whether petitioners have plausibly pleaded that the former Secretary of Defense was personally responsible for their alleged mistreatment.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-81a) is reported at 701 F.3d 193. The opinion of the panel of the court of appeals (Pet. App. 82a-169a) is reported at 653 F.3d 591. The opinion of the district court (Pet. App. 170a-215a) is reported at 694 F. Supp. 2d 957.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2012. The petition for a writ of certiorari was filed on February 5, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. According to the allegations in their complaint, petitioners Donald Vance and Nathan Ertel began working in the fall of 2005 for Shield Group Security (SGS), an

Iraqi security-services company owned by a dual Iraqi-British citizen, which provided services during the armed conflict in Iraq to the Iraqi government and to multinational forces. Pet. App. 238a. In the course of their work in Iraq, petitioners began to suspect that individuals at SGS were engaged in a variety of suspicious activities, including bribery, arms trading, stockpiling of weapons, and fraudulent contract procurement. *Id.* at 240a, 243a, 246a-247a, 249a-251a. Petitioners reported their suspicions to various U.S. government officials. *Id.* at 240a-241a.

In April 2006, petitioner Ertel resigned from SGS. Pet. App. 253a. A company official collected his Common Access Card (which had permitted him freedom of movement among various U.S. installations in Iraq). *Id.* at 254a. Around the same time, another SGS official collected petitioner Vance's access card. *Ibid.* Petitioners believed that the confiscation of their access cards was tantamount to holding them "hostage" within the SGS compound in Baghdad's "Red Zone." *Ibid.*

The next morning, another SGS official returned Vance's access card to him and asked Vance to accompany him to another compound. Pet. App. 254a-255a. Vance suspected that the request was a "set-up" designed to injure or kill him. *Ibid.* He and Ertel therefore proceeded to arm and barricade themselves in a room within the SGS compound, purportedly on the advice of U.S. government officials. *Ibid.*

United States military forces arrived on the scene and "rescue[d]" petitioners from their barricaded position, seizing their laptop computers, cell phones, and digital and video cameras in the process. Pet. App. 255a-256a. Petitioners were advised that they were being detained as security internees because of their

affiliation with SGS, which was suspected of supplying weapons and explosives to insurgents and terrorists and of receiving stolen arms from Coalition Forces, in part because of a large weapons cache found at the SGS compound. *Id.* at 257a-258a, 266a-267a, 316a, 320a.

Petitioners allege that they were first held in solitary confinement for two days at Camp Prosperity, a United States military installation in Iraq. Pet. App. 259a. There, they allege that they were threatened with force; that the lights in their cell were kept on all the time; and that they were allowed meals and trips to the toilet only twice per day. *Ibid.*

Petitioners allege that they were then transported to Camp Cropper, a military facility near Baghdad International Airport, where they were held in solitary confinement in a military detention facility principally used to house foreign prisoners. Pet. App. 260a. They further allege that their cells were small, cold, unclean, and uncomfortable; that the lights were always on, except when the compound's generators failed; and that guards made it difficult for them to sleep by playing loud music or pounding on their cell doors. *Id.* at 260a-261a. The guards sometimes did not provide petitioners with food and drinking water for as long as a day. *Id.* at 261a. Petitioners were given only one shirt and one pair of overalls to wear and were not given "adequate" shoes. *Ibid.* Vance alleges he was denied dental-hygiene equipment and treatment for an extracted tooth, and Ertel alleges he was often denied antacids for an ulcer. *Id.* at 261a-262a. Finally, petitioners allege that guards threatened them with force and physically assaulted them by steering them into walls as they were transported blindfolded around the installation. *Id.* at 262a.

Plaintiffs further allege that, during their confinement, they were repeatedly interrogated without the assistance of counsel (whom they requested at each session). Pet. App. 264a. According to their complaint, "[t]he main constant throughout all of the sessions was the interrogators' aggressive techniques and their repeated threats that if [petitioners] did not 'do the right thing,' they would never be allowed to leave." *Id.* at 266a.

Following hearings convened by the Detainee Status Board, petitioners were both released—after about six weeks of detention in Ertel's case and three months in Vance's case. Pet. App. 273a-274a.

2. In December 2006, petitioners brought this suit in federal district court against former Secretary of Defense Donald Rumsfeld, unidentified government officials, and the United States. Pet. App. 4a. As relevant here, they seek to hold the former Secretary personally liable in damages under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the mistreatment they allegedly experienced during their detention by U.S. military forces in Iraq. Pet. App. 289a-290a.

Petitioners allege that, in December 2002, Secretary Rumsfeld approved a list of harsh interrogation techniques for use on detainees at Guantanamo Bay, Cuba. Pet. App. 281a. Although he rescinded that authorization the next month, petitioners allege that he continued to authorize their use in individual cases requested by the Commander with authority over the Americas and the Caribbean (including Cuba). *Ibid.*

Petitioners allege that, in April 2003, Secretary Rumsfeld approved for Guantanamo Bay "a new set of interrogation techniques, which included isolation for up

to thirty days, dietary manipulation, and * * * sleep deprivation." Pet. App. 282a. He then sent Major General Geoffrey Miller to review the prison system in Iraq to "make suggestions on how prisons could be used to more effectively obtain actionable intelligence from detainees." *Ibid.* "In so doing," petitioners allege, "[the Secretary] knew and tacitly authorized Major [General] Miller to apply in Iraq the techniques that Rumsfeld had approved for use at Guantanamo and elsewhere." *Ibid.* Petitioners allege that Major General Miller's mandate was implemented by Lieutenant General Ricardo Sanchez, the Commander of the U.S.-led armed coalition in Iraq, who signed a memorandum in which he authorized 29 interrogation techniques, including yelling, loud music, light control, and sensory deprivation. *Id.* at 283. The next month, he "modified" the techniques authorized by that memorandum. *Ibid.*[1]

In December 2005, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Title X, 119 Stat. 2739, which limited interrogation techniques by individuals in the Department of Defense to those authorized by the Army Field Manual. Pet. App. 284a. Petitioners, however, allege that Secretary Rumsfeld secretly "modified the Field Manual" to include

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[1] Petitioners allege (Pet. App. 283a) that the modified policy "continued to allow interrogators to control the lighting, heating, food, shelter and clothing given to detainees." But the Senate Report that petitioners cite (Pet. 9) explained that Lieutenant General Sanchez's modified policy "eliminat[ed] all techniques not listed in either the 1987 or 1992 version of the Army Field [M]anual," and removed from the list of authorized techniques "dietary manipulation, environmental manipulation, sleep adjustment," "sleep management," "yelling, loud music, and light control." S. Comm. on Armed Servs., 110th Cong., 2d Sess., *S. Prt. No. 110-54, Inquiry into the Treatment of Detainees in U.S. Custody* 204 (Comm. Print 2008) (*Senate Report*).

"interrogation techniques that apparently authorized, condoned, and directed the very sort of violations that [petitioners] suffered." *Id.* at 285a. They also allege that he received reports concerning detainee abuse that should have put him on notice of abuses in Iraq, but he "took no steps to investigate or correct the abuses." *Id.* at 283a, 285a-286a, 287a.[2]

3. Secretary Rumsfeld moved to dismiss petitioners' claims against him. Pet. App. 170a. In March 2010, the district court dismissed petitioners' allegations about procedural due process and access to the courts, *id.* at 209a-215a, but it refused to dismiss the count alleging a violation of petitioners' substantive due process rights. *id.* at 177a-208a. The court found that no special factors counseled against recognizing a *Bivens* remedy because petitioners' case would not "require th[e] court to govern the armed forces" but only to decide "at a more targeted level whether it is appropriate to provide enforceable limits on the treatment of American citizens." *Id.* at 204a. The court also concluded that petitioners had adequately alleged Rumsfeld's personal involvement by citing his role in adopting (and rescinding) policies about interrogation practices at Guantanamo Bay, the fact that the commander of allied forces in Iraq later "authoriz[ed] the use of 29 interrogation techniques which included yelling, loud music, light control, and

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[2] Petitioners' claim against the United States alleged that the government's failure to return some of their seized personal property was arbitrary and capricious. Pet. App. 313a-314a. The government appealed the district court's denial of its motion to dismiss that claim, and the court of appeals reversed on the ground that the conduct in question fell within the exception to the Administrative Procedure Act for "military authority exercised in the field in time of war or in occupied territory." *Id.* at 155a (quoting 5 U.S.C. 701(b)(1)(G)). Petitioners do not press that claim in this Court.

sensory deprivation, amongst others," and the allegation that Rumsfeld secretly modified (and later secretly repealed those modifications to) the Army Field Manual's description of permissible interrogation techniques. *Id.* at 180a-182a.

4. A divided panel of the court of appeals affirmed in relevant part. Pet. App. 82a-169a. The panel majority rejected the Secretary's argument that a federal court should not create a common-law *Bivens* action in the sensitive context of military detention during an overseas armed conflict, in which "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Id.* at 160a (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)). The panel asserted it was "sensitive to * * * concerns that the judiciary should not interfere with military decision-making," *id.* at 137a, but it concluded that allowing a damages action against the former Secretary of Defense for his involvement in military detention policy during an overseas conflict would not "impinge inappropriately on military decision-making," *id.* at 138a. The panel also believed it "significant that Congress has taken no steps to foreclose a citizen's use of *Bivens*." *Id.* at 147a. The panel further rejected the argument that there was no plausibly pleaded connection between Secretary Rumsfeld's generalized detention policies and the specific mistreatment petitioners allege they experienced during their military detention. *Id.* at 105a-109a.

Judge Manion dissented, explaining that "[i]f anything qualifies as a 'special factor[] counseling hesitation,' it is the risk of the judiciary prying into matters of national security or disrupting the military's efficient execution of a war." Pet. App. 162a.

5. On respondent's petition, the court of appeals granted rehearing en banc and reversed. Pet. App. 1a-81a.

a. The majority of the en banc court explained that petitioners "propose a novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone no less." Pet. App. 9a. The court rejected the contention that the common-law *Bivens* remedy should be extended to that sensitive context, observing that petitioners seek "an award of damages premised on the view that * * * the Secretary of Defense must do more (or do something different) to control misconduct by interrogators and other personnel on the scene in foreign nations." *Id.* at 12a. The court noted that, although Congress has addressed the subject of detainee treatment in a number of statutes, it has never created a damages action against "military personnel or their civilian superiors" for mistreatment of detainees. *Id.* at 13a-14a. The court explained that its holding was in agreement with the decisions of both of the other courts of appeals that have addressed whether a *Bivens* action against Secretary Rumsfeld should be created in the sensitive context of military detention. *Id.* at 2a (citing *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012), and *Doe* v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012)).

In the alternative, the court of appeals also held that petitioners' complaint failed to plead plausibly that the Secretary was personally responsible for their alleged mistreatment. Pet. App. 19a-24a. Although petitioners made allegations about the Secretary's involvement in creating policy with respect to detainees, the "orders concerning interrogation techniques concerned combatants and terrorists, not civilian contractors" like peti-

tioners. *Id.* at 19a; see *id.* at 23a. The court acknowledged that petitioners "should be compensated, if their allegations are true," but it explained that "a public official's inability to ensure that all subordinate federal employees follow the law has never justified personal liability." *Id.* at 20a. The court further rejected the contention that petitioners had plausibly alleged that Secretary Rumsfeld acted with "[d]eliberate indifference" to their mistreatment, because they had not alleged that he "knew of risks [to them] with sufficient specificity to allow an inference that [his] inaction [was] designed to produce or allow harm." *Id.* at 21a-22a. Moreover, they did not contend that Rumsfeld's 2002 and 2003 "policies authorized harsh interrogation of security detainees, as opposed to enemy combatants." *Id.* at 23a. As a result, the court found it "unnecessary to decide when, if ever, a Cabinet officer could be personally liable for damages caused by the proper application of an unlawful policy or regulation." *Ibid.*

b. Judge Wood filed an opinion concurring in the judgment. Pet. App. 24a-36a. She agreed with the majority that "the link between [petitioners' alleged] mistreatment and the Secretary's policies authorizing extreme tactics for enemy combatants is too attenuated to support this case." *Id.* at 34a. She also agreed with the majority's decision to leave "to another day" whether "untenable directives, policies, and regulations may support awards of damages." *Ibid.* (quoting *id.* at 24a). Judge Wood disagreed, however, with the majority's conclusion that special factors counsel caution before recognizing a *Bivens* remedy in this context. *Id.* at 25a-33a.

c. Judges Hamilton, Rovner, and Williams each filed dissenting opinions in which all three joined. Pet. App. 37a-68a, 69a-70a, 71a-81a.

ARGUMENT

Petitioners contend (Pet. 24-37) that the court of appeals erroneously refused to recognize a damages remedy against the former Secretary of Defense under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for allegedly unconstitutional treatment that they received when they were detained by U.S. military forces in a combat zone in Iraq. The court of appeals' decision in that regard is correct and appropriately limited, and it does not conflict with any decision of this Court or any other court of appeals. Indeed, it is consistent with decisions of two other circuits. See *Doe* v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012). Review on that question is also unwarranted because the court of appeals correctly rested its judgment on an independent, alternative holding: that petitioners' complaint fails to plead the former Secretary's personal involvement in petitioners' mistreatment. Pet. App. 19a-24a. While petitioners contend (Pet. 38-43), with respect to that alternative holding, that the court of appeals improperly imposed a "heightened mental-state requirement in all constitutional tort claims involving supervisors," that contention rests on a mischaracterization of the decision below. The court of appeals applied the same, deliberate-indifference standard urged by petitioners, and its fact-bound conclusion about the insufficiency of petitioners' allegations does not warrant this Court's review. Certiorari should be denied.

1. With respect to their first question presented, petitioners contend (Pet. 24-37) that the court of appeals erred in declining to recognize a *Bivens* action for damages against former Secretary Rumsfeld to remedy the mistreatment that petitioners allegedly suffered pursuant to military detention and interrogation policies as they were applied to civilian contractors during an armed conflict in a foreign country. The court of appeals correctly declined to recognize a *Bivens* remedy in that context, and its decision is consistent with the decisions of the other courts of appeals that have addressed similar questions.

a. In its 1971 decision in *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of his home. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). "The Court has therefore on

multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly* v. *Scott*, 434 F.3d 287, 290 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 547 U.S. 1168 (2006); see *Iqbal*, 556 U.S. at 675 (explaining that *Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored").

Indeed, in the 40 years since *Bivens* itself, the Court "has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause; and in the context of an Eighth Amendment violation by prison officials." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (citations omitted), cert. denied, 130 S. Ct. 3409 (2010). Since 1980, the Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68; see also *Minneci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases). Of particular salience, the Court has "never created or even favorably mentioned the possibility of a nonstatutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages." Pet. App. 9a (citing *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and *United States* v. *Stanley*, 483 U.S. 669 (1987)). Nor has the Court ever "created or even favorably mentioned a nonstatutory right of action for damages that occurred outside the borders of the United States." *Ibid.*

In describing how to decide whether to extend *Bivens* to a new context, the Court has described a two-step process. First, a court should consider whether there is "any alternative, existing process for protecting" the

plaintiff's interests; if so, such an established process implies that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007). Second, "even in the absence of [such] an alternative" process, inferring a remedy under *Bivens* is still disfavored, and a court must make an assessment "appropriate for a common-law tribunal" of whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* at 550 (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

b. The court of appeals correctly applied that framework in declining to extend *Bivens* to petitioners' "novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone, no less." Pet. App. 9a. Even assuming, as the court of appeals did, that there are no statutes that provide "full substitutes for a *Bivens* remedy" here (*id.* at 15a), a lawsuit seeking to impose damages liability for the creation and implementation of military policy in that context presents precisely the kinds of special considerations that counsel hesitation. Even outside the context of *Bivens*, the courts are generally "reluctant to intrude upon the authority of the Executive in military and national security affairs," "unless Congress specifically has provided otherwise." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). And that is especially so in "[m]atters intimately related to foreign policy and national security," which "are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). But the case for judicial hesitation is even stronger where, as here, the judiciary is asked to create an implied dam-

ages remedy directly under the Constitution. As the Court has explained: "the insistence * * * with which the Constitution confers authority over the Army, Navy, and militia upon the political branches * * * counsels hesitation in our creation of damages remedies in this field." *Stanley*, 483 U.S. at 682; see also *Chappell*, 462 U.S. at 301-304.

Petitioners' suit squarely implicates those sensitivities. Petitioners seek to hold the former Secretary of Defense personally liable for allegedly creating military detention policies that were assertedly applied to mistreat them in a combat zone in a foreign country. That suit would enmesh the Judiciary in deciding, to the extent that those alleged military interrogation policies existed, who implemented those policies and whether their creation and implementation up and down the military chain of command in a combat zone in Iraq violated the Constitution.

As the court of appeals explained, "[w]hat [petitioners] want is an award of damages premised on a view that * * * the Secretary of Defense must do more (or do something different) to control misconduct by interrogators and other personnel on the scene in foreign nations." Pet. App. 12a. That intrusion "would come at an uncertain cost in national security." *Ibid.* This Court has previously recognized "in *Chappell* and *Stanley* that Congress and the Commander-in-Chief (the President), rather than civilian judges, ought to make the essential tradeoffs, not only because the constitutional authority to do so rests with the political branches of government but also because that's where the expertise lies." *Id.* at 13a; see *Stanley*, 483 U.S. at 683 (noting the risk of "erroneous judicial conclusions" in the military context).

The creation of a novel cause of action for damages in this sensitive context is thus best left to Congress.

c. The court of appeals' decision in this regard is consistent with those of the only other two courts of appeals that have resolved similar questions. In *Doe* v. *Rumsfeld*, *supra*, an individual sued former Secretary Rumsfeld, claiming that the Secretary created interrogation policies that were applied to mistreat him during his military detention in Iraq. The D.C. Circuit declined to recognize a damages action, reasoning that the plaintiff "challenge[d] the development and implementation of numerous military policies and decisions," which "would require a court to delve into the military's policies * * * governing interrogation techniques." 683 F.3d at 395-396. The court concluded that "allowing such an action would hinder our troops from acting decisively in our nation's interest for fear of judicial review of every detention and interrogation." *Id.* at 396; see *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (declining to create a *Bivens* action against Secretary Rumsfeld for creating policies that were assertedly applied to mistreat Afghan and Iraqi detainees held overseas by the U.S. military).

Similarly, in *Lebron* v. *Rumsfeld*, *supra*, the Fourth Circuit declined to recognize a damages remedy under *Bivens* to address allegations that a number of U.S. officials, including Secretary Rumsfeld, were liable in damages for developing global interrogation policies that were allegedly applied to mistreat a U.S. citizen who was detained by the military in the United States. See 670 F.3d at 547-548. The court reasoned that the context precluded a *Bivens* action because the complaint sought "quite candidly to have the judiciary review and disapprove sensitive military decisions made after ex-

tensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values." *Id.* at 551. This Court denied certiorari. See 132 S. Ct. 2751 (2012).

d. Petitioners ask this Court to overturn that consensus in the courts of appeals because they contend (Pet. 29) that this Court's cases "impose no limits on civilian *Bivens* actions against the military" so long as the plaintiff himself is not a military "servicemember[]." This Court did indeed disallow *Bivens* actions by military servicemembers in *Stanley* (483 U.S. at 683-684) and *Chappell* (462 U.S. at 304). But it has never held—and it would be illogical to conclude—that a *Bivens* action that would otherwise implicate sensitivities about U.S. military policy in a foreign country may proceed against someone in the military chain of command as long as the plaintiff is a civilian. On the contrary, as the court of appeals observed, Pet. App. 13a, *Stanley* and related cases in which this Court has counseled caution in this sensitive field rest not merely on the plaintiffs' identity as servicemembers, but also on the more general ground that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. at 683; *id.* at 681-682 (noting that caution was warranted because "here we are confronted with an explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces'" (quoting U.S. Const. Art. I, § 8, Cl. 14) (alteration in original)); see *Chappell*, 462 U.S. at 304 (noting that a *Bivens* remedy "would be plainly inconsistent with Congress' authority" in military affairs); see also, *e.g.*, *Egan*, 484 U.S. at 530; *Haig*, 453 U.S. at 292. Despite petitioners' contrary suggestions (Pet. 29, 37) those sensitivities do not vanish simply because the

plaintiff is a civilian (much less, as here, a contractor). See *Doe*, 683 F.3d at 394 ("Doe is a contractor and not an actual member of the military, but we see no way in which this affects the special factors analysis").

For similar reasons, petitioners err in suggesting (Pet. 36-37) that their U.S. citizenship required the court of appeals to disregard the sensitivities raised by their damages action. As the Fourth Circuit observed when it refused to recognize a *Bivens* remedy for a U.S. citizen who allegedly suffered mistreatment during military detention, "[t]he source of hesitation is the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff." *Lebron*, 670 F.3d at 554. The D.C. Circuit has also concluded that "citizenship does not alleviate the other special factors counseling hesitation." *Doe*, 683 F.3d at 396. Petitioners' U.S. citizenship would, of course, be relevant in determining the extent of their clearly established constitutional rights allegedly violated by Secretary Rumsfeld. See Pet. 36-37 (citing, *inter alia*, *Reid* v. *Covert*, 354 U.S. 1 (1957) (plurality opinion)). But the Court has explained that whether a federal court should extend *Bivens* to a new, sensitive context "is analytically distinct from the question of official immunity from *Bivens* liability." *Stanley*, 483 U.S. at 684.

e. Petitioners also err in contending (Pet. 26, 28, 30) that the decision below erects "a complete bar to judicial involvement in enforcing the constitutional rights of civilians harmed by the military," and that it "creates a split among the lower courts," which had previously "permitted civilians to bring *Bivens* actions against military officials who violated their constitutional rights." Petitioners incorrectly presume—based on statements in the other judges' opinions—that the court of appeals'

decision necessarily applies "to military mistreatment of civilians not only in Iraq, but also in Illinois, Wisconsin, and Indiana," Pet. 24 (quoting Pet. App. 38a (Hamilton, J., dissenting)), or on the grounds of Fort Hood in Texas, *ibid.* (quoting Pet. App. 27a (Wood, J., concurring in the judgment)). The court of appeals itself, however, did not speak so broadly. Instead, it indicated that its *Bivens* hesitation rested in part on petitioners' challenge to the application of military policies *in a foreign country*. See Pet. App. 7a (referring to "the Constitution's application to interrogation outside the United States"); *id.* at 9a (noting the lack of precedent for "damages on account of conduct that occurred outside the borders of the United States" and that petitioners propose a "novel damages remedy against military personnel who acted in a foreign nation"); *id.* at 10a (describing Secretary Rumsfeld's argument that it is "inappropriate for the judiciary to create a common-law remedy for damages arising from military operations in a foreign nation"); *id.* at 12a (describing petitioners as seeking damages because they think the Secretary "must do more * * * to control misconduct * * * in foreign nations"); *id.* at 20a (referring to "the military and foreign-location issues" raised by the case).

There is accordingly no basis for petitioners' assertion (Pet. 29-31) that the decision below conflicts with *Saucier* v. *Katz*, 533 U.S. 194 (2001), and with several court of appeals opinions that supposedly "permitted * * * *Bivens* actions against military officials." In fact, three of the five cases that petitioners cite dismissed *Bivens* claims. More importantly, none of the cited cases even discussed whether special factors precluded the recognition of a *Bivens* action (perhaps in part because they, like *Bivens* and *Davis*, principally involved

alleged violations of the Fourth and Fifth Amendments). Nor did any of those cases involve conduct in a foreign country.[3]

In any event, to the extent that petitioners' argument depends on the assumption that the court of appeals' rationale would be overbroad as applied to unconstitutional mistreatment suffered at the hands of military personnel in the United States, their case would be an especially poor vehicle for drawing that line, because their alleged injuries were all incurred in a foreign country.

2. Petitioners also contend (Pet. 31-34) that Congress's actions with respect to interrogation techniques indicate a belief that *Bivens* actions would be available against military officials. But the comprehensive attention that Congress has devoted to the subject of detainee treatment without ever creating such a damages action provides strong support for the court of appeals' refusal to recognize a *Bivens* remedy here.

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[3] See *Saucier*, 533 U.S. at 197-199 (considering alleged Fourth Amendment violation on Army base in California); *Case* v. *Milewski*, 327 F.3d 564, 565-566 (7th Cir. 2003) (considering alleged Fourth and Fifth Amendment violation on Navy base in Illinois; affirming dismissal of *Bivens* claim); *Morgan* v. *United States*, 323 F.3d 776, 778-779 (9th Cir. 2003) (considering alleged Fourth Amendment violation at entry gate to Air Force base in California); *Roman* v. *Townsend*, 224 F.3d 24, 29 (1st Cir. 2000) (considering alleged Fourth, Fifth, Ninth, and Fourteenth Amendment violations on Army base in Puerto Rico; affirming dismissal of *Bivens* claim as time-barred); *Applewhite* v. *United States Air Force*, 995 F.2d 997, 998-999, 1001 (10th Cir. 1993) (considering alleged Fourth and Fifth Amendment violations by military police officers outside of an Air Force base in New Mexico; holding that *Bivens* claims should be dismissed), cert. denied, 510 U.S. 1190 (1994).

a. As the Court has explained, "the concept of 'special factors counseling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423. Here, Congress has enacted detailed and comprehensive legislation on the subject of detainee treatment. In the Detainee Treatment Act of 2005, it established uniform standards for interrogating detainees without "cruel, inhuman, or degrading treatment or punishment," 42 U.S.C. 2000dd(a), and it prohibited Department of Defense officials from using "any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." Pub. L. No. 109-148, Div. A, Tit. X, § 1002(a), 119 Stat. 2739. Congress has also spoken to the available remedies for addressing abusive treatment in several other statutes, including the Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note; the Military Commissions Acts of 2006 and 2009, 10 U.S.C. 948a *et seq.*; the federal torture statute, 18 U.S.C. 2340-2340A; the War Crimes Act of 1996, 18 U.S.C. 2441 *et seq.*; and the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* "This history reveals a Congress actively engaged with what interrogation techniques were appropriate." *Lebron*, 670 F.3d at 552. And, as the decision below observed, "[t]hese statutes have one thing in common: *none* provides for damages against military personnel or their civilian superiors." Pet. App. 14a.

Instead of providing a private federal-court damages action for mistreatment by military officials, Congress has enacted the Military Claims Act, a carefully crafted discretionary administrative remedy for, as relevant

here, "personal injury or death" that is "caused by a civilian officer or employee" of the military. 10 U.S.C. 2733(a)(3); see 32 C.F.R. 536.75(a)(1) (providing that such claims are "payable" when caused by "negligent or wrongful" actions of military personnel or civilian military employees); 32 C.F.R. 536.76(g) (specifying that a prisoner of war or an interned enemy alien is not excluded from bringing a claim).[4] "[T]he fact that Congress has provided for compensation tells us that it has considered how best to address the fact that the military can injure persons by improper conduct." Pet. App. 15a. A federal court should not "presume to supplant Congress's judgment in a field so decidedly entrusted to its purview." *Doe*, 683 F.3d at 397. "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation'" and "can tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389).

b. Petitioners contend (Pet. 32-34) that the Detainee Treatment Act of 2005 indicates that Congress expected a *Bivens* remedy to be available against military officials, because it "provided a right to counsel and qualified immunity to military officials accused of torture in civil suits." But, as this Court explained in *Stanley*, "*Bivens* itself explicitly distinguished the question of

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[4] Judge Hamilton's dissenting opinion contended that the Military Claims Act would not apply to petitioners' case because the Department of Defense, as a matter of policy, generally excepts claims arising from intentional torts from the reach of the Military Claims Act. See Pet. App. 58a (citing 32 C.F.R. 536.45(h)). But, as the court of appeals pointed out, *id.* at 14a, even that discretionary administrative exception to the Military Claims Act does not apply to certain intentional torts, including "assault" and "battery," committed in the course of an investigation by "law enforcement officers of the U.S. government." 32 C.F.R. 536.45(h).

immunity from the question whether the Constitution directly provides the basis for a damages action against individual officers." 483 U.S. at 684. In any event, petitioners miss the point when they assert that the grant of immunity necessarily assumes the existence of an underlying *Bivens* action. See Pet. 32 ("As Judge Wood concluded, by providing this immunity, 'Congress can have been referring only to a *Bivens* action.'") (quoting Pet. App. 30a).

Even if their assertion were true—and it is not, as shown by non-*Bivens* causes of action that other plaintiffs have brought against United States government personnel based on their involvement in allegedly unlawful interrogations[5]—Congress simultaneously made clear that in providing for immunity, it did not mean to "limit or extinguish *any defense or protection* otherwise available to any person or entity from suit, civil or criminal liability, or damages," 42 U.S.C. 2000dd-1(a) (emphasis added), which would include a special-factors defense to, or protection against, a *Bivens* suit. In other words, as the court of appeals noted, "[t]he existence of safeguards against personal liability does not imply legislative authorization for the judiciary to create personal liability." Pet. App. 16a.

Petitioners' reliance on the Detainee Treatment Act's immunity provision is especially misplaced because they no longer press their contention that that statute itself creates a damages action. See Pet. App. 200a-201a, 290a. If the Detainee Treatment Act does not create a damages action, it surely does not, indirectly and

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[5] See *Ali*, 649 F.3d at 774-778 (state-law tort claims and international-law claims brought under the Alien Tort Statute); *Lebron*, 670 F.3d at 556-560 (suit brought under the Religious Freedom Restoration Act).

through an avowedly nonexclusive immunity defense, delegate common-law authority to the federal courts to recognize a *Bivens* remedy. See *Doe*, 683 F.3d at 397.

c. Petitioners further suggest (Pet. 24-26, 34-35) that a *Bivens* remedy should be available to them because they would otherwise have no adequate remedy. But petitioners conceded before the court of appeals that they made no attempt to seek compensation for their injuries under the Military Claims Act. Pet. App. 14a. In any event, "[t]he absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker*, 487 U.S. at 421-422; see *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 683. On the contrary, Congress's decision to legislate in the area *without* creating a private right of action for damages only underscores the inappropriateness of doing so through judicial implication.[6]

3. With respect to their second question presented, petitioners contend (Pet. 38) that the court of appeals "misconstrue[d] *Iqbal* as imposing a heightened mental-state requirement in all constitutional tort claims involv-

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[6] Petitioners refer in passing (Pet. 19) to the "requirements of *Minneci* v. *Pollard*, 132 S. Ct. 617 (2012)." But *Minneci* held only that a *Bivens* remedy was precluded under *Wilkie*'s first step when there were adequate state-law tort remedies against private-prison employees. 132 S. Ct. at 625. The Court reiterated that "even in the absence of an alternative" remedy, courts must "pay[] particular heed" to "any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 621 (citation omitted). *Minneci* thus contains no suggestion that a *Bivens* remedy will be appropriate whenever alternative tort-like remedies do not exist, or that Congress's failure to create a damages remedy in this field is irrelevant to the special-factors analysis.

ing supervisors." In petitioners' view, the decision below therefore "create[d] a circuit split about whether supervisors are liable for their deliberate indifference." *Ibid.* That view, however, is based on a mischaracterization of the decision below, which correctly concluded that petitioners' allegations are insufficient. There is, accordingly, no conflict or other basis for further review.

a. Despite petitioners' contrary characterization, the court of appeals did not purport to exempt government supervisors from liability predicated on deliberate indifference. Instead, the court expressly recognized that "[d]eliberate indifference to a known risk is a form of intent" that a plaintiff may invoke in a case against a government supervisor. Pet. App. 21a. The court found, however, that, in light of the specific allegations in their complaint, petitioners had failed to allege that Secretary Rumsfeld "knew of risks with sufficient specificity to allow an inference that [his] inaction [was] designed to produce or allow harm" to petitioners or persons like them. *Id.* at 21a-22a; see also *id.* at 33a-34a (Wood, J., concurring in the judgment).

b. That conclusion was correct and sufficient to support the dismissal of petitioners' complaint even if a *Bivens* remedy were recognized in this novel context. To hold a government official personally liable for damages under *Bivens*, a plaintiff must plead not only a violation of clearly established law, but also that the official's own personal conduct violated that clearly established law. See *Iqbal*, 556 U.S. at 675-677. Petitioners contend that Secretary Rumsfeld was personally responsible for creating policies that resulted in their alleged mistreatment. Pet. App. 276a, 282a-283a. But, as the court of appeals observed, the only specific facts they allege in support of that contention concerned

policies the Secretary created for use with respect to enemy combatants detained at Guantanamo Bay, not security internees detained in Iraq. *Id.* at 19a-20a; see *id.* at 281a-283a, 285a. Moreover, the Senate Report on which petitioners rely (Pet. 9) specifically noted that the Secretary's list of interrogation techniques was limited to Guantanamo Bay and that Lieutenant General Sanchez's list of techniques that could be used in Iraq "eliminat[ed] all techniques not listed in either the 1987 or 1992 versions of the Army Field [M]anual," and removed from the list of authorized techniques "dietary manipulation, environmental manipulation, sleep adjustment," "sleep management," "yelling, loud music, and light control." *Senate Report* 132, 204. Thus, the court of appeals correctly concluded that petitioners had not plausibly alleged Secretary Rumsfeld's personal involvement in their mistreatment.

In any event, apart from their misguided focus on deliberate indifference, petitioners do not allege that the court of appeals' fact-specific holding conflicts with the decision of any other court of appeals. Further review of that decision is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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