ORAL ARGUMENT SCHEDULED FOR OCTOBER 6, 2011

No. 10-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TALAL AL-ZAHRANI, et al.,

Appellants,

v.

DONALD RUMSFELD, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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GLOSSARY

ATS	Alien Tort Statute
CSRT	Combatant Status Review Tribunal
FCA	Foreign Claims Act
FTCA	Federal Tort Claims Act
MCA	Military Commissions Act of 2006
NCIS	Navy Criminal Investigative Services

STATUTES AND REGULATIONS

10 U.S.C. § 1089 (Gonzalez Act) and 28 U.S.C. § 2241(e)(2) (Military Commissions Act of 2006) are included in the Addendum attached hereto. All other pertinent statutes are contained in the Addendum to the Corrected Brief for Appellants.

INTRODUCTION

Plaintiffs' case at this stage is not about conduct that Defendants carried out pursuant to executive policies at the time of the deceased's detention that led to the men's torture and deaths. Such conduct does describe the majority of cases and incidents of detainee abuse at Guantanamo and other U.S. facilities since 9/11, and was the premise of Plaintiffs' original complaint, but is no longer at issue here. Rather, as the result of the revelations of four soldiers stationed at Guantanamo at the time of the deaths, this case is now about evidence of conduct that fell outside of authorized policies—the narrow category of violations that Plaintiffs and the Executive agree should be investigated and for which there should be accountability, and that sets this case apart from others that have been before this Court. *See infra*, 11.

Defendants' brief largely avoids or misstates Plaintiffs' arguments about how the new facts and allegations distinguish this case. Failing that, Defendants attempt to diminish the significance of the soldiers' accounts, dismissing their publication in an article as "a reporter's version" of the evidence, while citing commentary by two other reporters whose critiques of the article are "versions" Defendants are willing to cite as support for their point. Defs.' Br. at 21 & 21 n.5. Defendants aim to distract from the fact

that the accounts constitute eye-witness observations from soldiers whose trustworthiness earned one, Joe Hickman, the post of "sergeant of the guard" at Guantanamo, and whose accounts render aspects of the NCIS report inexplicable, provide direct evidence of a cover-up, and strongly suggest that Plaintiffs' relatives were killed at a location outside of the facilities authorized for the men's detention and interrogation—indeed, outside the prison camp at Guantanamo.

ARGUMENT

I. ANY NATIONAL SECURITY IMPLICATIONS OF PLAINTIFFS' *BIVENS* CLAIMS SHOULD NOT BAR A REMEDY

As shown in Plaintiffs' opening brief, the district court abused its discretion in holding that their *Bivens* claims, if amended with allegations that their relatives were killed as the result of conduct that violated official policies governing military detentions at Guantanamo, were barred by this Court's decisions in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"), *cert. denied*, 130 S. Ct. 1013 (2009), and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), simply because the claims implicate national security.[2] National security factors are not a categorical bar to *Bivens*

[2] As Plaintiffs noted in their opening brief, the district court accepted the new allegations as true for the purposes of its *Bivens* analysis. App. at 34 n.4.

actions, and the new allegations distinguish Plaintiffs' case from *Sanchez-Espinoza* and *Rasul II*, where the perceived risks of obstructing the conduct of foreign policy and national security emanated from claims involving a direct challenge to executive policies and policy judgments.

Defendants contend with Plaintiffs' argument about why *Rasul II* does not control their amended claims by mischaracterizing it. Defs.' Br. at 34 ("[Plaintiffs] argue that *Rasul II*'s special factors holding should be read in limited fashion because it was only in a 'brief footnote.'"). Plaintiffs argued, however, that the footnote in *Rasul II* referenced Judge Brown's more extensive discussion of the special factors issue in her concurrence in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*"), which clarified that the national security concerns at issue related to the implications of a court inquiry into allegations that would require the examination and assessment of official detention and interrogation policies. As Plaintiffs discussed, those concerns have less force here because Plaintiffs allege conduct that fell outside of those policies. Pls.' Br. at 19-20. Judge Brown's concern about the risk of "multifarious pronouncements by various departments on one question" because of the perceived line-drawing difficulty with torture is also plainly not applicable here, where Plaintiffs allege arbitrary killing. *Id.* at 20.

Defendants argue that the Court's recent decision in *Ali v. Rumsfeld*, __ F.3d __, 2011 U.S. App. LEXIS 12483 (D.C. Cir. June 21, 2011), "reiterated and expanded upon *Rasul II*'s special factors holding and made clear that it was not limited to the precise circumstances of that case." Defs.' Br. at 34. But the plaintiffs in *Ali*, as in *Rasul*, alleged that the defendants were "involved in establishing the interrogation procedures that authorized abusive techniques and that foreseeably caused [the plaintiffs'] torture and abuse." *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 91 (D.D.C. 2007) (internal quotations omitted), *compare with Rasul I*, 512 F.3d at 658. The district court in *Ali* rejected "a general inquiry into the legality of the defendants' conduct" and "caution[ed] against the myopic approach advocated by the plaintiffs … which essentially frames the issue as whether torture is universally prohibited." *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 105 & 105 n.21. It was in relation to that "general inquiry" that the district court identified national security implications counseling against allowing a *Bivens* action, which this Court agreed should bar a remedy. *Ali*, 2011 U.S. App. LEXIS 12483, at *29 (citing *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 105).[3] In contrast, Plaintiffs'

[3] Defendants note that the Court referenced the reasoning of *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950), in support of its special factors holding in *Ali*. Defs.' Br. at 32-33. *Cf. Rasul v. Bush*, 542 U.S. 466, 484

claims present a specific inquiry into conduct that went beyond authorized policies, the implications of which are not the same.

Defendants continue to misrepresent Plaintiffs' argument about how the new allegations distinguish their claims from this Court's precedent, citing allegations of mock execution and summary execution in *Ali* and *Sanchez-Espinoza* and asserting that "the question here is not how extreme the allegations are," but "who should decide whether such a remedy should be provided." Defs.' Br. at 35. While true, that is not a distinct inquiry. The determination whether it is the courts or Congress who should decide is simply the end result of any *Bivens* inquiry, after the weighing of factors for and against allowing a cause of action. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In *Sanchez-Espinoza*, *Rasul* and *Ali*, the perceived national security implications of allowing an inquiry into claims involving a direct challenge to executive policies ultimately led to a determination that the decision should be left to Congress. The claims and implications here are different and should be treated differently in the *Bivens* analysis.

Defendants turn to arguing broadly for a general rule against judicial review of national security-related cases, but fail to reconcile their argument

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(2004) ("[N]othing in *Eisentrager* or in any of [the Supreme Court's] other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts.") (citation omitted).

with the Supreme Court's repeated admonitions in the past decade making clear that the courts have a critical role to play alongside the political branches in such cases. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). Defendants also cite cases that fail to support their sweeping proposition. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 11-12 (1973) (emphasizing that "it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief"); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (declining to infer a *Bivens* remedy because of particular concerns about interfering with "the unique disciplinary structure of the Military Establishment"); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (reaffirming the case-specific weighing analysis required in determining whether to create a *Bivens* remedy). Defendants also cite a series of cases involving broad challenges to official policies or policy decisions of the political branches that can be distinguished from Plaintiffs' claims. *See Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc) (challenging transfer to torture pursuant to "extraordinary rendition" policy);

Aktepe v. United States, 105 F.3d 1400, 1404 (11th Cir. 1997) (challenging U.S. Navy training exercise and Navy practices resulting in death and personal injury of sailors); *Beattie v. Boeing Co.*, 43 F.3d 559, 566 n.15 (10th Cir. 1994) (challenging Air Force decision to deny security clearance as violation of First Amendment).

Defendants also argue generally about the caution of the courts in extending *Bivens* liability into "new contexts." Defs.' Br. at 26-28. There is nothing new, however, about suing individual federal officials, or about claims for physical abuse of persons in custody. *Carlson v. Green*, 446 U.S. 14 (1980). The United States itself has affirmatively represented that a *Bivens* action is available to hold federal officials accountable for torture.[4] That the deceased were tortured and killed on a U.S. military base that is "in every practical respect a United States territory" does not change that fundamental principle. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

Defendants also suggest that the Military Claims Act, 10 U.S.C. § 2733, and the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734, constitute a remedial scheme indicating Congressional intent to preclude other remedies—an argument they failed to make below. *See infra*, 28-29.

[4] U.S. Dep't of State, United States Written Response to Questions Asked by the United Nations Committee Against Torture 10 (bullet-point 5) (April 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf.

Nevertheless, their suggestion is contrary to relevant regulations, and the courts have uniformly held that these statutes do not provide an exclusive remedy. *See* 32 C.F.R. § 842.65(p) (providing that an FCA claim is not payable if subject to litigation); *see also*, *e.g.*, *Paalan v. United States*, 51 Fed. Cl. 738, 750 (Fed. Cl. 2002) (stating that courts "universally have held that the [Military Claims Act] is not an exclusive remedy" and collecting cases), *aff'd*, 120 Fed. Appx. 817 (Fed. Cir. 2005).

As to Defendants' assertion that Section 7 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), is evidence that Congress intended to foreclose a *Bivens* remedy for detainees like the deceased, who were designated by the now-defunct Combatant Status Review Tribunals ("CSRTs") as "enemy combatants," the district court erred in concluding that Section 7 applies to Plaintiffs' *Bivens* claims. App. at 16. The CSRT process that designated the deceased "enemy combatants" lacked the most rudimentary elements of due process and cannot form the basis for application of Section 7. *See Boumediene*, 553 U.S. at 779-86. To rely on the conclusions of these discredited tribunals as a basis to preclude all further claims in federal courts would violate the Due Process Clause. *See infra*, Part IV. Moreover, Congress did not specify that CSRT determinations would be conclusive for purposes of triggering

Section 7, and even assuming *arguendo* that was Congress' intent,[5] it is evident that Congress did not know or intend that the CSRT process would be found to be so inadequate.[6] Nor, it is clear, did Congress anticipate that no federal court review of CSRT proceedings would be available.[7] This Court must assume that Congress did not intend to violate the Due Process Clause in interpreting Section 7, and thus cannot accept the CSRT panel decisions as the trigger for application of that provision. Section 7 therefore does not evince Congressional intent to foreclose a remedy for Plaintiffs' *Bivens* claims.

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[5] Such intent would be problematic. Fundamental to our system of justice is the principle that courts decide their own jurisdiction. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75, 177 (1803). Closely related is the power to determine "jurisdictional facts." The Supreme Court has held that due process and separation of powers principles mandate that courts make their own determinations of jurisdictional facts. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 56, 64 (1932); *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). The determination of a fact—"enemy combatant" status—which itself determines the right of access to the courts cannot be delegated to an administrative body like a CSRT.

[6] *Cf. Bismullah v. Gates*, 551 F.3d 1068, 1072 (D.C. Cir. 2009) ("Congress would not in the [Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005)] have given this court jurisdiction to review CSRT determinations had it known" that would not constitute an adequate substitute for habeas); 152 Cong. Rec. S.10,354, 10,405 (2006) (Statement of Sen. Sessions) ("most of the guarantees embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants").

[7] *Id.* at S.10,404 (statement of Sen. Sessions) ("The Government has provided a CSRT hearing to every detainee held at Guantanamo ... all of those detainees will now be allowed to seek DTA review in the DC Circuit.").

To the extent the special factors holding in *Rasul II* can be read to foreclose all *Bivens* claims by foreign citizens detained at Guantanamo, Plaintiffs maintain that it should be reconsidered by the *en banc* court.[8]

As the Supreme Court stated in its most recent *Bivens* opinion, the decision whether to create a *Bivens* remedy requires a careful weighing of reasons for and against allowing a remedy in the particular circumstances of a case. *Wilkie*, 551 U.S. at 554; *see also Wilson*, 535 F.3d at 710. While national security concerns are valid considerations that may weigh against creating a remedy in a given case, they have never categorically barred relief. Even in times of war, the Supreme Court has approved of the use of *Bivens* remedies for civilian plaintiffs, including foreign plaintiffs, seeking redress for injuries caused by military personnel. Pls.' Br. at 15 n.4-5 (citing cases).

Plaintiffs seek to amend their *Bivens* claims with allegations of conduct that went beyond the bounds of authorized policies governing their relatives' military detention at Guantanamo—a rare case relative to most documented cases of detainee abuse, and one with far different national security implications. The Executive in fact agrees that at a minimum

[8] Plaintiffs are aware that the plaintiffs in *Ali* intend to petition for rehearing *en banc* with respect to the Court's special factors, qualified immunity and Westfall Act holdings in *Ali*, all of which relied on *Rasul II*. *See Ali*, 2011 U.S. App. LEXIS 12483, at * 18, 31.

conduct occurring outside the scope of official guidance concerning detainee treatment should be investigated. Office of Pub. Affairs, Dep't of Justice, *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees*, June 30, 2011, *available at* http://www.justice.gov/opa/pr/2011/June/11-ag-861.html. Any national security concerns raised by the distinct violation Plaintiffs allege cannot weigh so heavily as to bar adjudication at the threshold.

On the other side of the scale, Plaintiffs have described egregious unconstitutional conduct resulting in irreparable harm. *See Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death … is unique in its total irrevocability."). They have no effective remedy other than this suit for the grave harm they allege. *See David v. Passman*, 442 US 228, 242 (1979). Permitting their claims to proceed would also serve one of the predominant justifications for *Bivens* actions, which is deterring unconstitutional conduct—in this case, conduct that went beyond even the Executive's own policies. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

II. QUALIFIED IMMUNITY DOES NOT PROTECT DEFENDANTS AGAINST THE ALLEGED KILLING OF PLAINTIFFS' RELATIVES IN 2006

The district court erred in holding that *Rasul II* controls the question whether Defendants are entitled to qualified immunity against Plaintiffs' *Bivens* claims and, in turn, in disregarding the question whether Plaintiffs have alleged a Fifth Amendment violation at all.[9]

A. Defendants argue that the district court's failure to address the question whether Defendants' alleged conduct violates the Fifth Amendment was proper because that was the approach "under like circumstances" in *Rasul II* and in *Ali*. Defs.' Br. at 40-41.[10] But *Rasul II* considered the qualified immunity question with respect to alleged conduct between 2002 and 2004, and *Ali* concerned circumstances even further from the instant case—alleged conduct in 2003 and 2004 against detainees in Afghanistan and Iraq. The district court's disregard of the constitutional question was

[9] Defendants assert that the district court's footnote concluding that qualified immunity bars Plaintiffs' *Bivens* claims was a "holding." Defs.' Br. at 36 n.9. That conclusion was unnecessary to the court's original dismissal of Plaintiffs' claims and its denial of Plaintiffs' motion for reconsideration, however, and thus dicta. *See Gersman v. Group Health Ass'n Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992).

[10] As Plaintiffs made clear in their opening brief, they do not pursue their Eighth Amendment claim on appeal, which Defendants continue to reference in their brief. Defs.' Br. at 36-41.

thus not an act of discretion, but the result of a mechanical application of *Rasul II*. *See Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979) ("Failure to exercise choice in a situation calling for choice us an abuse of discretion … because it assumes the existence of a rule that admits of but one answer to the question presented."). This is not a case where it is "plain that a constitutional right is not clearly established, *Pearson v. Callahan*, 555 U.S. 232, 237 (2009), but one where it would be "difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Id*. at 236. In such circumstances, this Court has recognized that "the *Saucier* approach is 'often beneficial' and helps 'promote[] the development of constitutional precedent.'" *See Ali*, 2011 U.S. App. LEXIS 12483, at *27 n.15.

Further, while the constitutional avoidance doctrine underlying *Pearson* allows courts to leave unnecessary constitutional questions for another day, "this day may never come—[and] our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011).[11]

[11] The concerns the Supreme Court expressed in *Camreta* are present here:

If the district court had addressed the constitutional question, it would have been clear that application of the Fifth Amendment to Guantanamo detainees is compelled by the Supreme Court's functional test for determining the extraterritorial reach of constitutional provisions, as reaffirmed in *Boumediene*. Pls.' Br. at 26-27. This is true even if *Boumediene*'s ultimate holding is limited to the Suspension Clause. *Id*. at 28 n.14; *see also Ali*, 2011 U.S. App. LEXIS 12483, at *24 (noting that the Court in *Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010), observed that "the Supreme Court's *Boumediene* decision 'explored the more general question of extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens'") (citation omitted). The constitutional due process rights Plaintiffs assert are just as fundamental as the Suspension Clause, and their extension to Guantanamo is no more impractical. *See Ali*, 2011 U.S. App. LEXIS 12483, at *16 (discussing the Court's application in

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> The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. … Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.

131 S. Ct. at 2031 (footnote and internal citations omitted).

Al Maqaleh of the "impracticable and anomalous" test applied in *Boumediene* and contrasting Guantanamo, where "the United States has *de facto* sovereignty," with Bagram, where "the United States has not demonstrated an intent to exercise sovereignty … 'with permanence'") (citations omitted). To the extent *Kiyemba* maintains a categorical rule that Guantanamo detainees do not have due process rights because they have no property or presence in the United States, it is fundamentally in conflict with Supreme Court precedent and should be reconsidered.

B. The district court additionally erred in holding that Defendants are entitled to qualified immunity under *Rasul II*, which addressed the state of "clearly-established" law in relation to Guantanamo detainees between 2002 and 2004—before, as this Court noted, even *Rasul v. Bush* had been decided,[12] and two years before the alleged killing of Plaintiffs' relatives in June 2006.

As an initial matter, Defendants misrepresent Plaintiffs' argument about the relevance of *Boumediene* in the qualified immunity analysis here. Defs.' Br. at 37. While *Boumediene* was indeed decided two years after the alleged conduct at issue, Plaintiffs rely on the Court's reaffirmation of its functional approach to questions of extraterritoriality, which was

[12] *Rasul II*, 563 F.3d at 530 n.2.

established in its precedent well before 2008. Pls.' Br. at 26-28.

Moreover, Plaintiffs cite multiple sources in their opening brief, including key developments post-*Rasul II* that would have provided additional notice to Defendants of the unconstitutionality of their conduct by 2006, only one of which Defendants address. Defs.' Br. at 38 ("plaintiffs cite ... to one district court judge's ruling from 2005"). In responding to Judge Green's opinion in thirteen consolidated habeas cases, Defendants point to a contemporaneous district court decision by Judge Leon in two consolidated habeas cases, which relied on the bright-line extraterritoriality analysis expressly rejected by the Supreme Court in *Rasul v. Bush*, 542 U.S. at 482, and again in *Boumediene*, 553 U.S. at 775-64. Defendants make the insupportable claim that because the two district judges reached different conclusions, it was not clearly established that men detained in Guantanamo had Fifth Amendment rights. Defs.' Br. at 39. But one decision contradicting clearly-established law does not render the law unclear. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009); *Inouye v. Kemna*, 504 F.3d 705, 716 (9th Cir. 2007). Judge Leon diverged from the Supreme Court's decades-long insistence on a functional approach to the extraterritorial application of constitutional provisions, and the Court has since made clear that the categorical rule he upheld is inconsistent with

clearly established law. *See Boumediene*, 553 U.S. at 755, 758-760, 764.

To the extent *Rasul II* can be read to shield government officials against all *Bivens* claims by Guantanamo detainees alleging mistreatment before (and perhaps still after) the Court's ruling in *Boumediene*, it should be reconsidered by the *en banc* court. While the Supreme Court in *Boumediene*, 553 U.S. at 770, stated that it had not before decided the particular question before it—whether "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution"—and ultimately determined only the reach of the Suspension Clause to Guantanamo, the absence of a Supreme Court decision on point is not dispositive for the purposes of defeating an assertion of qualified immunity. Pls.' Br. at 29. Sources other than case law can also render a right "clearly established." *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 564 & 564 n.7 (2004) (considering internal police guidelines); *Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002) (citing state correctional regulations); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (discussing state regulations); *Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (citing a police manual that incorporated constitutional principles); *Austin v. Dist. of Columbia*, 2007 U.S. Dist. LEXIS 34793, at *30-31 (May 11, 2007) (considering standing

general orders of the metropolitan police).

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING RECONSIDERATION OF ITS WESTFALL ACT HOLDING BECAUSE IT APPLIED AN INCOMPLETE TEST

In their request for reconsideration, Plaintiffs invoked the full framework of the Restatement (Second) of Agency § 228 (1958), arguing that the new evidence of killing at an unauthorized off-site location and a subsequent cover-up raises a material question about whether Defendants were acting pursuant to their authorized duties, within authorized space limits, in their employer's interest, and using a permissible degree of force—a material dispute about any of which would be sufficient to warrant reconsideration. In a single paragraph, the district court concluded that the new evidence did not demonstrate that Defendants were not acting "in connection with their positions" or were not "on the job" when committing the alleged conduct. App. at 39-41. On appeal, Plaintiffs argue that the court's failure to address the multiple Restatement factors at issue was an abuse of discretion; if it had, it would have been clear that the new evidence is sufficient to rebut the government's scope of employment certification and compel reconsideration.

Defendants avoid this argument entirely. Indeed, only a fraction of their response concerning Plaintiffs' Alien Tort Statute ("ATS") claims deals

with the district court's denial of reconsideration, and that fraction is limited to attempting to reduce the significance of the new evidence and proposed amendments without addressing Plaintiffs' arguments about how they raise a material question about the scope issue, and making conclusory assertions that the district court did not abuse its discretion in concluding that the new evidence did not warrant reconsideration. Defs.' Br. at 46-47. While Defendants assert that the district court's conclusion "is owed substantial deference," *id*. at 47, the court's failure to consider factors required by the Restatement test, and the effect of that error in terminating this suit, was an abuse of discretion. *See Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) ("An appellate court, in reviewing for abuse of discretion, must consider 'whether the decision maker failed to consider a relevant factor … and whether the reasons given reasonably support the conclusion.' … If the exercise of discretion was in error and the prejudicial impact of that error requires reversal … the district court has abused its discretion.") (citing *Johnson*, 398 A.2d at 365); *Johnson*, 398 A.2d at 365 ("We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.'") (citations omitted).

If the district court had applied the proper Restatement test, it would

have been clear that the new evidence creates a material dispute about the scope issue and warrants reconsideration, and that Plaintiffs' amended ATS claims would not be controlled by *Rasul II* or other precedent of this Court. Pls.' Br. at 37-48. The holding in *Rasul* was dependent upon finding that the alleged torture "was intended as interrogation techniques to be used on detainees" and was "tied exclusively" to their military detention and interrogations, as the plaintiffs themselves alleged. The conduct alleged in *Ali* similarly arose from official policies issued by the defendants. *See supra*, 4. Plaintiffs' proposed amendments do not include this predicate allegation. Pls.' Br. at 40 (citing Proposed Second Am. Compl.). Plaintiffs allege, rather, that their relatives died in a context beyond that authorized for their military detention and interrogations. *Id*. As they argued in their motions for reconsideration and for leave to amend, their proposed amendments also implicate each of the Restatement § 228 factors, and several factors under § 229 pertaining to unauthorized conduct. *Rasul* and *Ali* considered only whether conduct that is "seriously criminal" could be "of the kind" the defendants were employed to perform under the first prong of § 228 and one prong of § 229. *See Rasul I*, 512 F.3d at 656, 660.

Plaintiffs also continue to maintain that grave violations of the law of nations cannot be within the scope of employment of U.S. officials, and that

this Court's holding to the contrary in *Rasul* should be reconsidered for the reasons stated in Plaintiffs' opening brief. Pls.' Br. at 49.

IV. THERE IS NO VALID BAR TO SUBJECT MATTER JURISDICTION

Defendants argue that Section 7 of the MCA "bars statutory jurisdiction over Plaintiffs' claims." Defs.' Br. at 50. (It appears that Defendants make this argument as to Plaintiffs' *Bivens* claims only; in the district court Defendants similarly argued only that MCA Section 7 should bar Plaintiffs' "constitutional" claims. *See* Doc. 13, Individual Defendants' Motion to Dismiss Plaintiffs' Constitutional Claims, at 3-4.[13]) In response to that argument in Defendants' motion to dismiss below, Plaintiffs argued—at great length—that a jurisdictional strip of such breadth would be unconstitutional. *See* Doc. 21, Mem. in Opp. at 4-22. Defendants raised only one argument in reply—that *Boumediene* did not decide the issue[14]—and otherwise entirely failed to respond to Plaintiffs' arguments below. Here, on appeal, they claim that Plaintiffs' arguments as to the unconstitutionality of such a jurisdictional provision are "insubstantial," alluding to a selective list of the arguments raised by Plaintiffs below: that Section 7's jurisdictional

[13] Plaintiffs' ATS, treaty, international law and FTCA claims were subject to a separate motion to dismiss, Doc. 15, which made no reference to MCA § 7.

[14] *See* Reply, Doc. 22 at 1-4; *see also* Mot. to Dismiss, Doc. 13 at 4.

strip would be a bill of attainder, and would violate separation of powers, the right of access to the courts, and the due process clause.[15] *See* Defs.' Br. at 53. Notably, that list excludes the most significant of Plaintiffs' arguments below: that Congress lacks the power to eliminate both appellate and original jurisdiction over federal question claims.

Section 7 of the MCA purports to eliminate all jurisdiction (both original and appellate) in all courts (both federal and state) over various types of claims relating to abuse of "enemy combatants." Even assuming *arguendo* that Section 7 is properly applied to the deceased here, the Constitution forbids such a broad elimination of all federal jurisdiction over federal question claims like those at issue here.

The text of Article III states:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. …
>
> **Section 2.** The judicial Power shall extend to all Cases, [arising under federal law];—to all Cases affecting [foreign officials];—to all Cases of admiralty and maritime Jurisdiction;—to

[15] The district court obviously did not find these arguments "insubstantial," since after a preliminary discussion, App. at 15-16, it stopped well short of deciding the issue, noting that the question was complex, not briefed by defendants, and of potentially broad constitutional significance, and that ultimately the court was within its purview to dismiss by reaching other questions (*e.g.* qualified immunity) first so as to "forego analysis of these vexing issues." App. at 16-17.

> Controversies [between six sets of governmental and/or diverse parties].
>
> In all Cases affecting [foreign officials and states], the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const., Art. III, §§ 1-2. Section 2 uses imperative language ("shall extend") to make clear that the "judicial Power" must include "all Cases" involving federal questions (those "arising under this Constitution, the Laws of the United States, and Treaties made … under their Authority").[16] And the first sentence of Section 1 ensures that some federal court—whether the Supreme Court or some lower federal courts created by Congress—will exercise this judicial power, again using imperative language ("shall be vested").

The clause in Section 1 giving Congress discretion over the structure of the lower federal courts and the clause in Paragraph 2 of Section 2 allowing Congress to make exceptions to the Supreme Court's appellate jurisdiction cannot be read in isolation from the sections mandating that

[16] The "judicial Power" must also extend to "all Cases" in the other two mandatory categories of Section 2—Ambassadors and Admiralty. But out of the nine categories of "Cases" and "Controversies" set forth in section 2, only in the three sets of "Cases" *must* some form of federal jurisdiction lie. *See* Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. Rev. 205, 261-62 (1985).

"[t]he judicial Power … shall be vested" in federal courts and "shall extend to all cases… arising under" federal law. Congress does not have the option to eliminate all lower federal courts and simultaneously restrict the Supreme Court's appellate jurisdiction without limitation. Instead, read together, the first three paragraphs of Article III mandate that some federal court must have some form of jurisdiction (whether appellate or original) over "all Cases … arising under" federal law. This requirement can be satisfied by vesting original federal-question jurisdiction in the district courts (as has existed consistently since 1875); or, if original jurisdiction is left to state courts, by allowing an avenue for appeal to some federal court at some point in the life of the case (as has existed consistently since the founding, *see, e.g.*, § 25 of the first Judiciary Act, which expressly authorized appellate review of federal questions in the Supreme Court).[17] The history of the drafting of Article III and the confirmation debates confirms this view.[18]

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[17] *See* Mem. in Opp. at 11-12 n.13 (citing statutes back to founding conveying federal jurisdiction).

[18] The first drafts of the "Virginia Plan," from which the final text of Article III was ultimately derived, mandated federal jurisdiction over issues implicating national concerns. The first draft of the Committee on Detail mandated federal jurisdiction over only issues arising from acts of Congress, with Congress controlling jurisdiction over other cases, but the next draft made all such federal question jurisdiction mandatory in the federal courts, with Congress having discretion to assign original jurisdiction from the Supreme Court to lower federal tribunals. And in one of the final major debates over what would become Article III, the delegates rejected by a vote

The Supreme Court has never upheld a complete preclusion of all federal judicial fora for constitutional claims, and has applied the strongest of presumptions against preclusion of such claims.[19] Article III demands some federal court review—whether original or appellate—over all federal-question claims. Because MCA Section 7 purports to eliminate all such review, it is unconstitutional and void, regardless of whether it is even validly applied to the two detainees in question. *See supra*, 8-9 (The latter question is barely addressed in Defendants' brief, with argument confined to a footnote, see Defs.' Br. at 51 n.15.)

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of six states to two a provision that would have allowed Congress to make exceptions not to the appellate power of the Supreme Court, but rather to the "judicial power" itself. 2 FARRAND 173, 431; *see also* Mem. in Opp. at 12-13 n.16.)

The subsequent ratification debates in the several states "produced almost no suggestions by [the Constitution's advocates] that Congress could delimit the sphere of federal court jurisdiction," Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 810-40 (1984), *see also* Mem. in Opp. at 13 n.16 (quoting Federalist 81; Federalist 82; 1 ANNALS OF CONGRESS 831-32 (J. Gales ed. 1789)).

[19] *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding provisions depriving district courts of jurisdiction over "second or successive" habeas petition because Supreme Court retained original jurisdiction); *Reno v. AADC*, 525 U.S. 471 (1999) (upholding severe but not complete restriction of federal judicial review).

These are novel and complex questions.[20] The question of Section 7's constitutionality was not at all briefed by Defendants below (where they made the absurd assertion that the invalidity of a selective jurisdictional provision had to be pled in the complaint, *see* Doc. 22 at 4-5). Accordingly the court below also made no effort to resolve the issue. App. 16. On appeal, Defendants have chosen to avoid addressing it as well. This Court should not address the question for the first time on appeal.[21]

Perhaps recognizing the constitutional infirmity of such a broad jurisdictional strip, removing all judicial review of federal questions, Defendants primarily argue that this Court should read Section 7 as a

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[20] *Cf. Bartlett v. Bowen*, 816 F.2d. 695, 719-20 (D.C. Cir.) *reconsideration en banc denied*, 824 F.2d 1240 (1987) (Bork, J., dissenting) (as to "the much-debated question of the scope of Congress' power to remove the jurisdiction of inferior federal courts and of the Supreme Court to hear constitutional issues in any and all contexts," "[this] suit does not provide an appropriate occasion to enter upon an investigation of that hotly debated and surpassingly important question").

[21] We note that the district court was well within its discretion in addressing other non-jurisdictional issues prior to reaching the putative issue of subject matter jurisdiction created by Defendants' undeveloped reference to Section 7. The Supreme Court has made clear that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits'" and thus may dismiss on "'threshold questions'" without first deciding that "the parties present an Article III case or controversy" by establishing subject matter and personal jurisdiction. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999), and *Tenet v. Doe*, 544 U.S. 1, 7 n.4 (2005), and distinguishing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998)).

"special factor" evincing a specific Congressional intent to deny *Bivens* relief in cases relating to "enemy combatants." Contrary to Defendants' claims, *Hui v. Castaneda*, 130 S. Ct. 1845 (2010), does not stand for the proposition that "Congress may bar a *Bivens* remedy whenever it deems appropriate." Defs.' Br. at 54. *Castaneda* concerned whether a specific immunity to suit could be invoked to defeat *Bivens* claims, or whether instead the immunity provision (which was passed prior to *Bivens*, *see* 130 S. Ct. at 1851) should be read in light of the exception in the Federal Tort Claims Act, 28 U.S.C. § 1346, for *Bivens* claims to similarly exempt such claims. In contrast to the narrowly-drawn immunity provision in *Castaneda*, here Defendants rely on a broadly-drawn jurisdictional statute. As Plaintiffs noted below,[22] however, an unconstitutional jurisdictional statute "must be disregarded as 'void,'" Mem. in Opp. at 13 (citing *Marbury*, 5 U.S. (1 Cranch) at 177, 180; *see also United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871) (disregarding unconstitutional statute that divested court of jurisdiction and reinstating judgment obtained under prior statutory scheme); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1871) (same). Consistent with these many pronouncements from the Supreme Court, this Court has similarly voided (as to constitutional claims) a provision in the

[22] *See* Mem. in Opp. at 13 & 13 n.17.

Medicare Act that denied the right to judicial review of benefits decisions where the amount in controversy was below $1000. *Bartlett*, 816 F.2d. at 707-11. It did so in the face of a dissenting opinion arguing that Congress' jurisdictional provision should be viewed as modifying the sovereign immunity waiver allowing any such monetary claims to proceed in the first place. *See id*. at 711-13, 717-30 (Bork, J. dissenting). Similarly, here Defendants argue that a broad, constitutionally-invalid jurisdictional provision should nonetheless be salvaged by reading it as an expression of Congressional intent to surgically excise one otherwise presumptively available form of *Bivens* action. Consistent with *Marbury*, *Klein* and *Bartlett*, Defendants' argument should be rejected.

Defendants also argue that the Gonzalez Act, 10 U.S.C. § 1089, conveys immunity over claims against eight Defendants it now asserts were military physicians acting within the scope of their employment. Defendants only included reference to the Gonzalez Act in a footnote below, Doc. 13 at 4-5 n.5, and that entire brief contains no argument that the relevant Defendants were acting within the scope of employment.[23] Consequently, Plaintiffs argued below that as an "argument … raised cursorily in a footnote the Court may consider it waived," Mem. in Opp. at 54, and that, moreover,

[23] On appeal, Defendants cite to Plaintiffs' complaint for this point. *See* Defs.' Br. at 52.

Defendants failed to adequately develop a coherent argument for why the Act should bar *Bivens* claims.[24] Consequently, the district court in fact did not consider Defendants' argument, making no reference to Section 1089 in its decision. This Court should do the same. (Defendants *entirely* failed to raise the argument that the Military Claims Act or Foreign Claims Act should be considered in deciding whether Congress has provided an adequate alternative remedial pathway for *Bivens* purposes, *see* Defs.' Br. at 24 n.6, and those arguments should be deemed waived as well since they are raised for the first time on appeal. *See Artis v. Bernanke*, 630 F.3d 1031, 1038 (D.C. Cir. 2011).

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO AMEND

The district court abused its discretion in denying Plaintiffs' motion for reconsideration and, in turn, in denying leave to amend their complaint. The court denied the request to amend without any explanation beyond its finding that the new evidence did not warrant reconsideration, despite Plaintiffs' detailed arguments that their proposed claims, some of which were new and the court had not had the opportunity to consider, survive the futility standard of Fed. R. Civ. P. 15(a). Pls. Br. at 50-53. The

[24] *See* Mem. in Opp. at 54-55 ("Defendants cite no relevant (or conclusive) authority, and do not further develop their footnoted argument, leav[ing] Plaintiffs unable to determine what line of reasoning to respond to.").

court's "outright refusal to grant [] leave without any justifying reason" separate from its denial of reconsideration was thus an abuse of discretion in itself. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (citing *Foman v. Davis*, 371 U.S. 178 (1962)). Defendants fail to address this point, or any of Plaintiffs' arguments that their proposed new and amended claims would not clearly be barred by this Court's rulings or other precedent.

CONCLUSION

For the reasons stated herein and in Plaintiffs' opening brief, the judgment of the district court should be reversed and the case remanded for further proceedings.

Dated: July 27, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32. It contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Dated: July 27, 2011

/ Pardiss Kebriaei
Pardiss Kebriaei

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2011, I electronically filed the REPLY BRIEF OF APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that I will send eight copies of the REPLY BRIEF OF APPELLANTS by First Class U.S. Mail to the Clerk of the Court within two business days of the electronic filing.

I certify that all participants in the case are registered CM/ECF users and that service to the following party will be accomplished by the CM/ECF system.

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I declare under penalty of perjury that the above is true and correct.

Dated: July 27, 2011
New York, New York

/s/ Pardiss Kebriaei
Pardiss Kebriaei

ADDENDUM: STATUTES

1. 10 U.S.C. § 1089 (Gonzalez Act)
2. 28 U.S.C. § 2241(e)(2) (Military Commissions Act of 2006)

ADDENDUM 1

*** CURRENT THROUGH PL 112-23, APPROVED 6/29/2011 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 55. MEDICAL AND DENTAL CARE

Go to the United States Code Service Archive Directory

10 USCS § 1089

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title [10 USCS § 1091].

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 [28 USCS §§ 1 et seq.] and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28 [28 USCS § 2677], and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 [28 USCS § 2680(h)] shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) (1) The head of the agency concerned may to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28 [28 USCS § 1346(b)], for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means--

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) The Armed Forces Retirement Home Board, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

ADDENDUM 2

*** CURRENT THROUGH PL 112-23, APPROVED 6/29/2011 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

Go to the United States Code Service Archive Directory

28 USCS § 2241

Review expert commentary from The National Institute for Trial Advocacy preceding 28 USCS § 2241.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.