

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 12-5017

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

ABDUL RAHIM ABDUL RAZAK AL JANKO,
Plaintiff-Appellant,

v.

ROBERT M. GATES, Former Secretary of Defense, et al.;
UNITED STATES OF AMERICA,
Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

1. Plaintiff in district court and appellant in this Court is Abdul Rahim Abdul Razak Al Janko.

2. Defendants in district court and appellees in this Court are: Robert M. Gates; Donald Rumsfeld; Paul Wolfowitz; Gordon England; James M. McGarrah; Geoffrey P. Miller; Jay Hood; Harry B. Harris, Jr.; Mark H. Buzby; David U. Thomas; Thomas H. Copeman III; Adolph McQueen; Nelson J. Cannon; Michael Bumgarner; Wade E. Dennis; Esteban Rodriguez; Paul Rester; Frank Wiercinski; John D. Ashcroft; Robert S. Mueller III; John Does 1-50; Jane Does 1-50, all sued in their individual capacities, and the United States of America.

Defendants in district court who were named in plaintiff's original complaint but were not named in plaintiff's first amended complaint and thus were terminated from the case are: Richard B. Myers; Peter Pace; Michael Glenn Mullen; Gary Speer; James T. Hill; Bantz Craddock; James G. Stavridis; Daniel McNeill; and Does 1-100, all sued in their individual capacities.

3. Amici curiae in this Court are "Scholars of State Law and International Law," consisting of William Aceves; Roger S. Clark; Anthony D'Amato; Constance de

la Vega; Johanna Kalb; Douglass Cassel; Linda Malone; Jordan Paust; Ralph Steinhardt; Beth Stephens; and Robert F. Williams.

B. Rulings Under Review

The rulings under review (issued by Judge Richard J. Leon) are the memorandum opinion and order entered on December 22, 2011, granting the defendants' motions to dismiss. The opinion appears in the Joint Appendix at JA 115-137; the order appears at JA 138-140. The official citation for the opinion is *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011); there is no official citation for the order.

C. Related Cases

In *Al Gincio v. Gates*, No. 07-1090 (D.C. Cir.), plaintiff filed a petition for review under the Detainee Treatment Act, which was dismissed on March 26, 2009, for lack of subject matter jurisdiction. In *Al Gincio v. Obama*, No. 05-cv-1310 (D.D.C.), the district court granted plaintiff's petition for a writ of habeas corpus. See *Al Gincio v. Obama*, 634 F. Supp. 2d 109 (D.D.C. 2009); *Al Gincio v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009). Counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/Sydney Foster
Sydney Foster

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GLOSSARY

ATS	Alien Tort Statute
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act
FTCA	Federal Tort Claims Act
MCA	Military Commissions Act of 2006

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STATEMENT OF JURISDICTION

Plaintiff sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331, 1332, 1346, 1350, and 2674. JA 16. As we discuss at pages 10-22, however, the district court lacked jurisdiction over plaintiff's claims under 28 U.S.C. § 2241(e)(2). On December 22, 2011, the district court entered an order dismissing plaintiff's complaint. JA 138-40. On January 17, 2012, plaintiff filed a timely notice of

appeal. *See* JA 141-43; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiff is a former military detainee who brought damages claims against twenty current and former high-ranking government officials, in their individual capacities, asserting violations of, *inter alia*, international law and the Fourth and Fifth Amendments to the U.S. Constitution. Plaintiff also brought damages claims under the FTCA against the United States for alleged violations of District of Columbia law.

The questions presented are as follows:

1. Whether the district court lacked subject-matter jurisdiction over plaintiff's claims under 28 U.S.C. § 2241(e)(2).

2. Whether the individual defendants are entitled to qualified immunity with respect to the *Bivens* claims.

3. Whether a *Bivens* cause of action should be recognized in this military-detention context.

4. Whether the United States properly substituted itself for the individual defendants under the Westfall Act on plaintiff's ATS claims alleging violations of international law.

5. Whether all of plaintiff's claims against the United States are barred because they arose in a "foreign country," 28 U.S.C. § 2680(k).

6. Whether plaintiff failed to exhaust his administrative remedies under the FTCA with respect to his ATS claims.

7. Whether all of plaintiff's international-law claims are barred by the FTCA because international law is not the "law of the place," 28 U.S.C. § 1346(b).

PERTINENT STATUTES

Pertinent statutes—28 U.S.C. §§ 1346(b)(1), 1350, 2241, 2679, and 2680(k), and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e), 119 Stat. 2680, 2742—are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Plaintiff is a former military detainee who brought damages claims against twenty current and former high-ranking government officials, in their individual capacities, and the United States. The district court dismissed plaintiff's complaint. JA 115-40. Plaintiff appeals.

STATEMENT OF FACTS

A. Plaintiff Abdul Rahim Abdul Razak Al Janko is a Syrian national whom the U.S. military took into custody in 2002. JA 37-39. The military detained plaintiff first in Afghanistan and then at Guantanamo Bay. JA 17-18. While at Guantanamo, a Combatant Status Review Tribunal ("CSRT") twice determined that plaintiff was an "enemy combatant." JA 46-47.

Plaintiff filed a habeas corpus petition, and on June 22, 2009, a district court granted the petition. *Al Gingo v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009). The court

held that although the government presented evidence to show that plaintiff, *inter alia*, stayed at a Taliban guesthouse and attended an al-Qaida training camp, subsequent events eviscerated any relationship plaintiff had with al-Qaida or the Taliban such that plaintiff was not part of al-Qaida or the Taliban at the time of his capture. *Id.* at 129-30. The court entered judgment on July 17, 2009. *Al Gincio v. Obama*, 634 F. Supp. 2d 109 (D.D.C. 2009); JA 49. As relief, the court ordered the government to “take all necessary and appropriate diplomatic steps to facilitate [plaintiff’s] release forthwith.” *Al Gincio*, 626 F. Supp. 2d at 130; *Al Gincio*, 634 F. Supp. 2d at 109-110. Plaintiff was transferred from Guantanamo on October 7, 2009. JA 16, 49.

B. In October 2010, plaintiff filed a damages action in district court seeking redress for his military detention. He claimed, *inter alia*, that abusive treatment occurred during his detention and argued that it was improper to use a CSRT to determine the propriety of his detention. JA 15, 17-18, 24-48, 117, 122 n.8. Plaintiff’s First Amended Complaint—the operative complaint here—was filed against (1) the United States; (2) then-Secretary of Defense Robert Gates and nineteen other high-ranking military or civilian officials; and (3) 100 unnamed “John Does” and “Jane Does.” JA 10-13, 18-26, 121-22. The individual defendants were sued in their individual capacities. JA 18-27.

Plaintiff asserted claims against the United States under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680, for alleged violations of the law of the District of Columbia (“D.C.”), and he asserted three sets of claims against

various subsets of the individual defendants: (1) *Bivens*¹ claims for alleged violations of the Fourth and Fifth Amendments to the U.S. Constitution; (2) claims under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, for alleged violations of international law; and (3) a claim under 42 U.S.C. § 1985. JA 61-97, 122-23 n.8.

The district court dismissed plaintiff’s complaint. First, the court held that all of plaintiff’s claims were “unequivocally bar[red]” by the plain language of 28 U.S.C. § 2241(e)(2). JA 128. In so ruling, the court explained that plaintiff had been “determined by the United States to have been properly detained as an enemy combatant” under § 2241(e)(2) because two CSRTs had determined that plaintiff was an “enemy combatant.” JA 126-27.

In addition to this dispositive jurisdictional ground, the district court held that plaintiff’s claims must be dismissed on several independent grounds. With respect to the constitutional and § 1985 claims against the individual defendants, the court held that the defendants were entitled to qualified immunity because the constitutional rights plaintiff claimed were not clearly established at the time of his detention. JA 129 n.13. As for the ATS claims asserted against the individual defendants, the court held that the United States properly substituted itself as the sole defendant under the “Westfall Act,” Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 2671,

¹ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

2674, 2679). JA 130-33. In reaching this conclusion, the court held that “the conduct plaintiff alleges—conduct related to both interrogation and detention—falls well within defendants’ scope of employment.” JA 132 n.15 (internal citation omitted).

The court dismissed all of plaintiff’s FTCA claims (including the ATS claims that were converted into FTCA claims) as barred by the exception to the FTCA’s waiver of sovereign immunity for “[a]ny claim arising in a foreign country,” 28 U.S.C. § 2680(k). JA 134-36, 135 n.21. Plaintiff did not dispute that his Afghanistan-related claims are barred by § 2680(k), and the court held that Guantanamo “fits well within the Supreme Court’s ‘foreign country’ definition for purposes of the FTCA [because] it is a ‘territory subject to the sovereignty of another nation.’” JA 135-36 (quoting *United States v. Spelar*, 338 U.S. 217, 219 (1949)). The court further held that plaintiff’s international-law claims must be dismissed for the independent reason that they do not assert violations of the “law of the place,” 28 U.S.C. § 1346(b), which means state tort law. JA 133-34.

SUMMARY OF ARGUMENT

Plaintiff filed a damages action against the United States and twenty current and former senior government officials, in their individual capacities, for harm allegedly stemming from his military detention. The district court’s dismissal of plaintiff’s action should be affirmed on one or more independent grounds.

I. The district court correctly held that it lacked subject-matter jurisdiction over all of plaintiff’s claims under 28 U.S.C. § 2241(e)(2). Plaintiff here was “determined by

the United States to have been properly detained as an enemy combatant” as required by § 2241(e)(2) because two CSRTs concluded that he was an “enemy combatant.” The subsequent grant by a district court of plaintiff’s habeas petition does not alter this conclusion because a habeas ruling is not a “determin[ation] by the United States” within the meaning of § 2241(e)(2) and, in any event, § 2241(e)(2) is triggered by *any* prior determination that an individual was properly detained as an enemy combatant.

Plaintiff argues that § 2241(e)(2) is unconstitutional because it deprives him of a damages remedy, but this Court rejected that argument in *Al-Zabrani v. Rodriguez*, 669 F.3d 315, 319-20 (D.C. Cir. 2012). Although plaintiff argues that § 2241(e)(2) violates due process because his CSRT determinations were assertedly erroneous and violative of due process, plaintiff’s arguments invoking due process are inconsistent with this Court’s precedent that aliens at Guantanamo have no due process rights. In any case, it was not irrational for Congress to conclude that CSRT determinations should trigger application of the statute.

II. The district court’s dismissal of plaintiff’s constitutional claims asserted against the individual defendants may be affirmed on two independent grounds.

A. First, the district court properly held that the individual defendants are entitled to qualified immunity because it was not clearly established during plaintiff’s detention (which ended in 2009) that aliens at Guantanamo possessed any Fourth and Fifth Amendment rights. *Boumediene v. Bush*, 553 U.S. 723 (2008), is not to the contrary because it was expressly limited to the constitutional privilege of habeas corpus. In

any event, the contours of any applicable Fourth and Fifth Amendment rights were not clearly established during plaintiff's detention. In addition, although this Court should not reach the question, the defendants are entitled to qualified immunity on the independent ground that controlling precedent holds that aliens detained at Guantanamo do not possess Fourth and Fifth Amendment rights.

B. Although the district court did not reach the issue, its dismissal of the constitutional claims should also be affirmed on the alternative ground that special factors bar the recognition of a damages action in the military-detention context, as this Court has held in *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) ("*Rasul IP*"), *Ali v. Rumsfeld*, 649 F.3d 762, 773-74 (D.C. Cir. 2011), and *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012). Plaintiff argues that his case does not implicate sensitive national security decisions because a district court has already determined on habeas review that he was not lawfully detained, but special factors bar the recognition of a *Bivens* action for the *category* of military-detention cases regardless of the specifics of a given plaintiff's case. In any event, plaintiff's action seeking to hold senior government officials liable for their roles in making decisions about plaintiff's detention, treatment, CSRTs, and transfer plainly implicates sensitive national security and military matters not addressed in the district court habeas decision. In addition, as in *Doe*, a judicially created damages remedy would be inappropriate here because Congress has devoted significant attention to military detainee matters but has declined to create a damages remedy.

III. The district court correctly held that the United States properly substituted itself under the Westfall Act for the individual defendants on plaintiff's international-law claims asserted under the ATS because the named defendants were acting within the "scope of their employment" at the time of the incidents alleged in the complaint. That holding is controlled by *Ali* and *Rasul v. Myers*, 512 F.3d 644, 654-63 (D.C. Cir. 2008) ("*Rasul I*"), *vacated*, 555 U.S. 1083, *reinstated in relevant part*, *Rasul II*, 563 F.3d at 528-29. Plaintiff's attempts to circumvent these rulings fail because the underlying conduct here—the management by senior Department of Defense officials of the detention and interrogation of an individual found by two CSRTs to have been an "enemy combatant"—is precisely the type of conduct that *Rasul I* and *Ali* held the defendants were employed to perform. In addition, plaintiff's argument that the defendants' purpose in engaging in the alleged conduct was not to serve their "master" is contradicted by his complaint, which levels no such allegations against any of the named defendants.

IV. The district court properly held that all of plaintiff's FTCA claims, including plaintiff's ATS claims that were converted into FTCA claims upon substitution by the United States, are barred because they "aris[e] in a foreign country," 28 U.S.C. § 2680(k). Plaintiff argues that Guantanamo Bay, Cuba, is not a "foreign country" under § 2680(k), but the Supreme Court and other courts have held that "de jure sovereignty" is the relevant touchstone, and Cuba retains de jure sovereignty over Guantanamo. Although the district court did not reach the issue,

plaintiff's international-law claims asserted under the ATS are also properly dismissed for the independent reason that plaintiff failed to exhaust his administrative remedies regarding those claims. In addition, the district court correctly held that plaintiff's international-law claims asserted under the ATS and FTCA were properly dismissed on the independent ground that they do not assert violations of the "law of the place," 28 U.S.C. § 1346(b), *i.e.*, state tort law. Although plaintiff argues that customary international law has been incorporated into D.C. law, any customary international law recognized by U.S. courts today as domestic law is federal law, which is not the "law of the place."

STANDARD OF REVIEW

The district court's grant of the motion to dismiss is subject to *de novo* review. *See, e.g., Ali v. Rumsfeld*, 649 F.3d 762, 769 (D.C. Cir. 2011).

ARGUMENT

I. ALL OF PLAINTIFF'S CLAIMS ARE JURISDICTIONALLY BARRED BY 28 U.S.C. § 2241(e)(2).²

A. Plaintiff's Claims Fall Within The Scope Of 28 U.S.C. § 2241(e)(2).

Under 28 U.S.C. § 2241(e)(2), "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

² This Court should affirm based on the jurisdictional bar in 28 U.S.C. § 2241(e)(2), but it need not reach this question of statutory jurisdiction if it affirms on the other threshold grounds discussed in Sections II-IV, *infra*. *See Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007).

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.” As this Court explained in *Kiyemba v. Obama*, the phrase “any other action” means all actions “other than a petition for a writ of habeas corpus, which is the subject of § 2241(e)(1).” 561 F.3d 509, 513 (D.C. Cir. 2009) (“*Kiyemba IP*”).

In *Al-Zabrani v. Rodriguez*, this Court held that a similar action asserting constitutional, ATS, and FTCA claims for damages against the United States and individual government officials relating to the alleged mistreatment and death of former Guantanamo detainees “rather plainly constitutes an action other than habeas corpus brought against the United States and its agents relating to ‘aspect[s] of the detention . . . treatment . . . [and] conditions of confinement’” of aliens who were detained by the United States. 669 F.3d 315, 319 (D.C. Cir. 2012) (quoting § 2241(e)(2)) (alterations in original). Because the detainees at issue there (who had been determined by CSRTs³ to be “enemy combatants,” *id.* at 317) were also aliens as described in the statute, the Court held that the action was “excluded from the jurisdiction of this court by the ‘plain language’” of § 2241(e)(2). *Id.* at 319.

³ The United States since has discontinued the CSRT process. Nevertheless, the CSRT process was the review mechanism in place at the time § 2241(e)(2) was enacted, and it was clearly the principal process Congress contemplated when crafting the statute.

The district court correctly held that plaintiff's action is likewise foreclosed by the statute. In reaching that holding, the district court concluded that plaintiff "has been determined by the United States to have been properly detained as an enemy combatant" under § 2241(e)(2) because two Department of Defense CSRTs concluded that plaintiff was an "enemy combatant," JA 46-47. JA 126-29. Contrary to plaintiff's argument (Br. 11-21), the fact that a district court subsequently granted plaintiff's habeas petition has no bearing on the district court's conclusion. As we explain below, a "determin[ation] by the United States" under § 2241(e)(2) is an Executive determination alone, and, in any event, the jurisdictional bar in § 2241(e)(2) is triggered by *any* determination of enemy-combatant status regardless of the conclusions reached in subsequent determinations.⁴

1. As the district court explained, the phrase "determin[ation] by the United States" in § 2241(e)(2) means an Executive Branch determination. JA 126-29.⁵ *See also*

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⁴ Plaintiff's assertion (Br. 16) that his habeas grant "vacated" his prior CSRT determinations is wrong. The habeas review that district courts have conducted in the wake of *Boumediene v. Bush*, 553 U.S. 723 (2008), has been a de novo review of the lawfulness of detention today, rather than review of the sufficiency of earlier CSRT or other military tribunal decisions. *See, e.g., Obaydullah v. Obama*, 688 F.3d 784, 791-92 (D.C. Cir. 2012). Accordingly, the district court did not review or address the CSRT designations. *See Al Gincio v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009).

⁵ Plaintiff's argument (Br. 13-15) that "determin[ations] by the United States" cannot be limited to CSRT determinations attacks a straw man. CSRT determinations are only one type of "determin[ation] by the United States," a term that also includes other Executive Branch determinations. *See, e.g.,* 152 Cong. Rec. 20,263, 20,319 (2006) (statement of Sen. Cornyn) (an Executive determination alone triggers § 2241(e)(2), even where no CSRT was held).

Bay, 700 F. Supp. 2d 119, 136 (D.D.C. 2010) (“the term ‘United States’ [in § 2241(e)(2)] unmistakably refers to the Executive Branch”), *aff’d sub nom. Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), *El-Mashad v. Obama*, 2012 WL 3797600, at *1 (D.C. Cir. 2012) (unpublished), and *Chaman v. Obama*, 2012 WL 3797596, at *1 (D.C. Cir. 2012) (unpublished).

The term “United States” in federal statutes sometimes refers to the Executive Branch alone and sometimes also encompasses the Judicial and Legislative Branches. Compare, e.g., *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1250 (D.C. Cir. 2004) (“United States” means Executive alone), with, e.g., *United States v. Providence Journal Co.*, 485 U.S. 693, 698-708 (1998) (“United States” includes judiciary). Determining the meaning of “United States” in a particular statute requires resort to the usual tools of statutory interpretation, including an examination of the relevant statutory context.⁶ In *Massachusetts v. Microsoft Corp.*, for example, this Court held that the phrase “any officer or employee of the United States” in 15 U.S.C. § 16(g) denoted only officers

⁶ Plaintiff’s citation (Br. 13 n.1) to a dictionary defining the term “United States Government” to include the judiciary has little weight because it is not a definition of “United States,” and most dictionary definitions of “United States” do not shed light on the question presented here. See, e.g., *Black’s Law Dictionary* 1672, 1675 (9th ed. 2009). In addition, plaintiff’s assertion (Br. 13) that “[i]t was established long before the passage of the MCA that ‘United States’ refers to any official or agency within the United States Government”—and the decision he cites for this proposition—do not address whether the term “United States” encompasses the judiciary in this or any other context. See *Margalli-Olvera v. INS*, 43 F.3d 345, 350-53 (8th Cir. 1994) (holding that “United States” in a plea agreement encompassed the Immigration and Naturalization Service).

and employees of the Executive Branch because all other references in the statute to “United States” denoted the Executive Branch. 373 F.3d at 1250.

Here, as in *Microsoft*, a “determin[ation] by the United States” under § 2241(e)(2) refers to an Executive determination because the very same sentence-long subsection uses “United States” two other times and denotes the Executive Branch each time. The statute limits its application to “alien[s] who [are] or w[ere] detained by the United States,” § 2241(e)(2), and plainly it is the Executive Branch alone that detains individuals at Guantanamo. In addition, the statute governs only “action[s] against the United States or its agents,” *id.*, which is yet another reference to the Executive Branch. As in *Microsoft*, this Court must give each of the three iterations of “United States” in the same one-sentence statutory subsection a uniform interpretation. *See Comm’r v. Lundy*, 516 U.S. 235, 249-50 (1996).

Furthermore, 28 U.S.C. § 2241(e)(1), which was enacted at the same time as the current version of § 2241(e)(2), Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36, supports this conclusion. Subsection 2241(e)(1) withdraws jurisdiction over habeas petitions filed by any “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.” 28 U.S.C. § 2241(e)(1) (emphasis added).⁷ The phrase “determin[ation] by the United States” in § 2241(e)(1),

⁷ Although this subsection withdrawing habeas jurisdiction was deemed unconstitutional as applied to Guantanamo detainees, *see Boumediene*, 553 U.S. 723, it

which addresses the withdrawal of habeas jurisdiction, is plainly not speaking to a “determination” by a habeas court, and thus neither is the identical phrase in § 2241(e)(2). Cf. *Al-Zabrani v. Rumsfeld*, 684 F. Supp. 2d 103, 110 (D.D.C. 2010), *aff’d*, 669 F.3d 315 (the enactment of § 2241(e)(2) alongside § 2241(e)(1) shows that “an enemy combatant determination for purposes of § 2241(e)(2) was intended as something far short of habeas review”).

Any doubt about the meaning of the statute’s language is resolved by the history of its enactment. The predecessor to the current version of § 2241(e)(2) was enacted as part of the Detainee Treatment Act of 2005 (“DTA”) and withdrew jurisdiction over non-habeas actions concerning aliens at Guantanamo who were in military custody or had been “determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the [DTA] to have been properly detained as an enemy combatant.” Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2680, 2742. In the MCA, Congress replaced the prior version of § 2241(e)(2) with the current version, which hinges the withdrawal of jurisdiction, in part, on a “determin[ation] by the United States.” Pub. L. No. 109-366, § 7(a), 120 Stat. at 2636.

This shift in language from “determin[at]ions] by the [D.C. Circuit]” to “determin[at]ions] by the United States” demonstrates that Congress sought to ensure

remains in effect elsewhere, *see Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), and, in any event, is relevant because it uses identical language and was enacted at the same time as § 2241(e)(2).

that the statute applied based on the Executive’s determination alone, and this understanding is reflected in the legislative history. As Senator Cornyn explained in a floor debate on the provision, “under the new language, the determination that is the precondition to the litigation bar [in § 2241(e)(2)] is purely an executive determination.” 152 Cong. Rec. 20,263, 20,319 (2006); *see also* 152 Cong. Rec. 19,928, 19,955 (2006) (statement of Sen. Levin) (application of § 2241(e)(1) and (e)(2) are triggered by a “Government determin[ation]” that cannot be challenged); 152 Cong. Rec. at 20,275 (statement of Sen. Feingold) (§ 2241(e)(1) is triggered by “the designation of the executive branch alone”). *Cf., e.g., King v. Russell*, 963 F.2d 1301, 1303-04 (9th Cir. 1992) (holding, based in part on legislative history, that the statutory reference in 28 U.S.C. § 1391(e) to “United States” encompasses only the Executive Branch).

Plaintiff argues (Br. 16-17) that it would be “absurd” for a CSRT “enemy combatant” determination to preclude a damages action where a habeas court subsequently concludes that the individual at issue was not lawfully detained. But a habeas court may be considering changed circumstances, including new or different evidence, that were not present at the time of the CSRT determination, and Congress could have concluded that the government and its employees should not be penalized for such changes where the CSRT determination was proper, based on the information available at the time. *Cf.* 152 Cong. Rec. at 20,319 (statement of Sen. Cornyn) (explaining that § 2241(e)(2) bars actions by individuals “who initially appear

to be enemy combatants but who, upon further inquiry, are found to be unconnected to the armed conflict” because “[t]he U.S. military should not be punished with litigation for the fact that they initially detained such a person”).⁸

2. Regardless of whether a court’s grant of an individual’s habeas petition constitutes a “determin[ation] by the United States,” plaintiff is still covered by § 2241(e)(2) because the statute is triggered when there is *any* prior “determin[ation] by the United States” that an individual was “properly detained as an enemy combatant,” even if a subsequent determination by “the United States” reaches the opposite conclusion. Here, two CSRTs—which plaintiff does not dispute fall within the definition of “United States”—determined that plaintiff was an “enemy combatant,” JA 46-47. Plaintiff thus “has been determined by the United States to have been properly detained as an enemy combatant,” § 2241(e)(2).

Plaintiff argues (Br. 15-16) that the language “has been determined” references a detainee’s most recent determination because, he contends, that is the meaning that must be attached to the words “has been determined” in another provision of the MCA defining “classified information” as certain information that “has been determined . . . to require protection.” *See* MCA, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. at 2601 (codified as amended at 10 U.S.C. § 948a(4)(A)). Plaintiff is correct that

⁸ Plaintiff argues (Br. 20-21) that the defendants’ interpretation is “inconsistent” with *Boumediene* because *Boumediene* stated that there is a “risk of error” in CSRT determinations, 553 U.S. at 785. *Boumediene*, however, held only that the CSRT process was not an adequate substitute for habeas, *id.* at 771-92, and did not address what Congress meant by the phrase “determin[ation] by the United States.”

the definition of classified information references the most recent relevant determination, but that interpretation follows not from the use of the words “has been determined” but from the use of the present-tense verb “require.” By contrast, the relevant parallel language in § 2241(e)(2) is retrospective, requiring that an alien “has been determined . . . *to have been* properly detained as an enemy combatant.” § 2241(e)(2) (emphasis added). In any event, the language plaintiff cites does not govern the interpretation here because it appears a full 35 pages before § 2241(e)(2) in a separate section governing military commissions that was codified in a different Title of the U.S. Code.

Plaintiff’s argument is also contradicted by the legislative history and purposes underlying § 2241(e)(2). As Senator Cornyn explained during the floor debate on the provision, “the language of [§ 2241](e)(2) focuses on the propriety of the initial detention.” 152 Cong. Rec. at 20,319. It does so based on Congress’s judgment that non-habeas actions should be barred when the government’s initial decision to take an individual into law-of-war custody was appropriate based on the evidence and circumstances present at the time, even if additional evidence or changed circumstances later established that further detention would be unlawful. As explained in the legislative history, the situation here is analogous to an arrest in the criminal justice context, which “might be entirely legal . . . , even if the arrestee is later conclusively found to be innocent of committing any crime.” *Id.* Just as “[t]he arresting officer cannot be sued and held liable for making that initial arrest” if the

arrest was proper, so too under § 2241(e)(2), “detainees will not be able to sue . . . if the United States determines that it was the right decision to take the individual into custody.” *Id.*⁹

B. Plaintiff’s Constitutional Attacks On 28 U.S.C. § 2241(e)(2) Are Meritless.

Plaintiff argues (Br. 22-32) that even if § 2241(e)(2) bars his action, it is unconstitutional as applied to him. Not so.

1. Plaintiff argues (Br. 25) that the Supreme Court’s decision in *Boumediene*, 553 U.S. 723, invalidated all of § 7 of the MCA, including 28 U.S.C. § 2241(e)(2). As plaintiff recognizes, however, this Court squarely rejected that argument in *Al-Zabrani*, and that ruling is binding here. *See Al-Zabrani*, 669 F.3d at 319; *see also Kiyemba II*, 561 F.3d at 512 n.1.

2. Plaintiff also contends (Br. 25-30) that § 2241(e)(2) violates the Due Process Clause and Article III of the Constitution because it deprives him of a damages action. That argument, too, is contradicted by this Court’s decision in *Al-Zabrani*,

⁹ The habeas court’s statement that plaintiff was not “lawfully detainable as an enemy combatant under the [Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001),] at the time he was taken into custody,” *Al Ginco*, 626 F. Supp. 2d at 130, does not mean that the district court concluded that the government’s initial decision to take plaintiff into custody, based on the evidence then available, was unlawful. As this Court has held, an individual is lawfully detained as being “part of” al-Qaida, the Taliban, or an associated force if he was “part of” such a force “at the time of capture.” *Salahi v. Obama*, 625 F.3d 745, 750 (D.C. Cir. 2010) (internal quotation marks and emphasis omitted). The district court thus properly focused on whether plaintiff was “part of” al-Qaida or the Taliban when he was captured. *See Al Ginco*, 626 F. Supp. 2d at 127-28, 130. The court did not, however, review the propriety of the government’s initial decision to take him into custody or the subsequent CSRT determinations. *See supra* note 4.

which rejected similar arguments. As *Al-Zabrani* explained, damages remedies for violations of constitutional rights are not constitutionally required, “even in cases . . . where damages are the sole remedy by which the rights of plaintiffs . . . might be vindicated.” 669 F.3d at 320. To the contrary, damages remedies may be “barred by common law or statutory immunities” or by “appl[ication] [of] ‘special factors’ analysis in preclusion of *Bivens* claims.” *Id.* at 319-20. *Al-Zabrani* thus held that the lack of a damages remedy offered “no basis” on which to invalidate § 2241(e)(2). *Id.*

3. Plaintiff next argues (Br. 22-25) that § 2241(e)(2) violates due process because the CSRT determinations triggering application of § 2241(e)(2) were erroneous and violated due process. This argument, however, is in tension with *Al-Zabrani* (which relied on CSRT determinations) and this Court’s controlling precedent that “the due process clause does not apply to aliens” detained at Guantanamo who have no “property or presence in the sovereign territory of the United States.” *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (“*Kiyemba P*”), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010).¹⁰

In any event, plaintiff’s attack on the underlying CSRT process does not mean that Congress acted unconstitutionally when it decided that CSRT determinations

¹⁰ In addition, plaintiff is wrong that the grant of his habeas petition meant that the two CSRTs necessarily erred in concluding, based on the evidence then available, that plaintiff was an “enemy combatant.” As explained *supra* in note 4, the habeas court was not reviewing the CSRT determinations, so the CSRT determinations simply were not at issue in plaintiff’s habeas case, and the habeas court’s determination was based on different (and updated) evidence.

should trigger application of § 2241(e)(2). It was plainly not irrational for Congress to make this choice, given that the CSRT system was modeled after Army Regulation 190-8, which the plurality in *Hamdi v. Rumsfeld* suggested would satisfy due process requirements applicable to a United States *citizen* detained as an “enemy combatant,” *see* 542 U.S. 507, 538 (2004); Department of Defense, *Combatant Status Review Tribunal (CSRT) Process At Guantanamo*, at 1.¹¹ In any case, plaintiff’s argument (Br. 24-25) that the CSRTs did not comport with the “due process . . . required by *Boumediene*” is meritless because *Boumediene* expressly “ma[de] no judgment whether the CSRTs, as currently constituted, satisfy due process standards,” 553 U.S. at 785.

4. Plaintiff’s final argument (Br. 30-31) is that § 2241(e)(2) violates the separation-of-powers principles embodied in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In that case, the Supreme Court struck down a jurisdiction-stripping statute where the withdrawal of jurisdiction impinged on the presidential pardon power and was “founded solely on the application of a rule of decision, in causes pending.” *Id.* at 146-48.

Here, plaintiff’s case was not pending when the current version of § 2241(e)(2) was enacted in 2006, JA 6, and thus *Klein* is inapplicable on that ground alone. In addition, a statute that “replace[s] the legal standards underlying [a case] . . . without directing particular applications under either old or new standards” is consistent with

¹¹ This document is available at available at <http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf>.

Klein because it merely “compel[s] changes in law, not findings or results under old law.” *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 437-38 (1992). In *National Coalition To Save Our Mall v. Norton*, for example, this Court held that even if “*Klein* can be read as saying that Congress may not direct the outcome in a pending case without amending the substantive law,” the statute at issue there—which provided that certain Executive decisions and actions “shall not be subject to judicial review”—merely “amend[ed] the applicable substantive law.” 269 F.3d 1092, 1094, 1097 (D.C. Cir. 2001) (quoting statute). Here, too, § 2241(e)(2) is consistent with *Klein* because it amends applicable law by withdrawing jurisdiction over a class of cases. *See also Wazir v. Gates*, 629 F. Supp. 2d 63, 65-68 (D.D.C. 2009) (parallel provision in 28 U.S.C. § 2241(e)(1) is consistent with *Klein*), *vacated as moot*, Order of May 17, 2010 (D.C. Cir. No. 09-5303) (unpublished) (attached).

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF’S CONSTITUTIONAL CLAIMS.¹²

As we explain below, the district court correctly dismissed plaintiff’s constitutional claims on the independent ground that the individual defendants are entitled to qualified immunity. In addition, although the district court did not reach the issue, the court’s dismissal of plaintiff’s constitutional claims should be affirmed

¹² On appeal, plaintiff has not challenged the district court’s dismissal of his claims asserted against the individual defendants under 42 U.S.C. § 1985, *see* JA 129 n.13. Plaintiff has thus waived any such challenge. *See, e.g., AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000).

on the ground that special factors bar the recognition of a *Bivens* remedy in the military-detention context.¹³

A. The Defendants Are Entitled To Qualified Immunity On Plaintiff's Constitutional Claims.

Qualified immunity shields a government official from civil liability if his conduct “does not violate clearly established statutory or constitutional rights.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To qualify as a “clearly established” right, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (“To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” (internal quotation marks and brackets omitted)). Under *Pearson v. Callahan*, 555 U.S. 223 (2009), courts have discretion to determine whether a particular constitutional right was “clearly established” without first determining whether there was a constitutional violation in the first place *See id.* at 233-43. Where, as here, the “clearly established” issue is “one that [this Court] can ‘rather quickly and easily decide,’” this Court has held that it should “follow the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.’”

¹³ Because the special-factors question is conceptually antecedent to the qualified immunity question and avoids the need to address the constitutional issues presented, this Court may wish to address the special factors issue prior to the qualified immunity issue.

Rasul v. Myers, 563 F.3d 527, 530 (D.C. Cir. 2009) (per curiam) (“*Rasul II*”) (quoting *Pearson*, 555 U.S. at 239, 241) (alteration in original).

1. The district court correctly held that the individual defendants are entitled to qualified immunity because the Fourth and Fifth Amendment rights plaintiff asserts were not clearly established during his detention, which ended in October 2009, JA 16, 49. *See* JA 129 n.13. That conclusion follows from the rationale of *Rasul II* and *Ali v. Rumsfeld*, which held that it was not clearly established that alien military detainees held at Guantanamo (*Rasul II*) and in Iraq and Afghanistan (*Ali*) had any Fifth or Eighth Amendment rights as of 2004, the year the detainees in those cases were released. *Rasul II*, 563 F.3d at 528, 530-32; *Ali v. Rumsfeld*, 649 F.3d 762, 770-73 (D.C. Cir. 2011).

Rasul II stated that “[*Johnson v. Eisentrager*], 339 U.S. 763 (1950), and [*United States v. Verdugo-Urquidez*], 494 U.S. 259 (1990),] were thought to be the controlling Supreme Court cases on the Constitution’s application to aliens abroad.” 563 F.3d at 531. As *Rasul II* further explained, *Eisentrager* held that German nationals imprisoned at a military base abroad did not possess any Fifth Amendment rights, 339 U.S. at 781-85, and *Verdugo-Urquidez* “concluded that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States.” *Rasul II*, 563 F.3d at 531. Moreover, as *Rasul II* emphasized, “the law of this circuit also holds that the Fifth Amendment does not

extend to aliens or foreign entities without presence or property in the United States.” 563 F.3d at 531 (collecting cases).

Applying this precedent to migrants at Guantanamo, the Eleventh Circuit ruled in *Cuban American Bar Ass’n v. Christopher* that aliens held at Guantanamo did not possess any Fifth Amendment rights. 43 F.3d 1412, 1428 (11th Cir. 1995). In *Al Odah v. United States*, this Court reached the same conclusion with respect to alien military detainees. 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev’d on other grounds sub nom. Rasul v. Bush*, 542 U.S. 466, 475-85 (2004).

Plaintiff contends (Br. 54-56) that the Supreme Court’s subsequent decision in *Boumediene v. Bush*, 553 U.S. 723, 771, 798 (2008), clearly established that aliens at Guantanamo possess Fourth and Fifth Amendment rights. By not arguing that his constitutional rights were clearly established prior to *Boumediene*, plaintiff has waived any challenge to the dismissal of his constitutional claims arising before *Boumediene* was decided. *See, e.g., AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000). By plaintiff’s own accounting (Br. 54-55), the only constitutional counts alleging violations taking place after the Supreme Court’s issuance of *Boumediene* are counts 1 and 2, JA 61-64. Plaintiff thus effectively concedes that counts 3 and 4 (challenging the CSRTs and the absence of a “name-clearing hearing”), JA 64-67, were properly dismissed.

Plaintiff’s argument that *Boumediene* clearly established that aliens at Guantanamo possess Fourth and Fifth Amendment rights is meritless because the

only constitutional question presented in *Boumediene* was “whether [Guantanamo detainees] have the constitutional privilege of habeas corpus” under the Suspension Clause, 553 U.S. at 732, and the Court limited its holding to that constitutional right. *See, e.g., id.* at 771, 792, 795, 798. The Court noted that it had “never [previously] held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution,” *id.* at 770, and it stated that “our opinion does not address the content of the law that governs [an individual’s] detention,” *id.* at 798. This Court stated in *Rasul II* that *Boumediene* “disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause.” *Rasul II*, 563 F.3d at 529.

Furthermore, it is binding precedent in this Court that “the due process clause does not apply to aliens” detained at Guantanamo who have no “property or presence in the sovereign territory of the United States.” *Kiyemba I*, 555 F.3d at 1026; *see also Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011). *Kiyemba I* was decided *after Boumediene* and approximately eight months before plaintiff was transferred, JA 16, 49. As a result, it is beyond doubt that a government official reasonably could have believed during the period of plaintiff’s detention that plaintiff had no applicable Fourth or Fifth Amendment rights. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Moreover, even if one could argue that it was clearly established that plaintiff possessed some form of Fourth and Fifth Amendment rights after *Boumediene*, the contours of those rights were not clearly established. *See Padilla v. Yoo*, 678 F.3d 748, 762 (9th Cir. 2012) (it was not clearly established between 2001 and 2003 that a U.S. citizen possessing constitutional rights and detained as an “enemy combatant” was “entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal”); *cf. Hamdi*, 542 U.S. at 535 (although citizens detained as “enemy combatants” retain their due-process rights, “the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting”). Therefore, the district court correctly held that the defendants are entitled to dismissal of the constitutional claims based on qualified immunity.

2. As explained *supra* on pages 23-24, this Court should not reach the question whether plaintiff’s complaint asserts violations of the Fourth and Fifth Amendments because this Court has held that it should avoid passing on such constitutional questions where, as here, the qualified-immunity issue can be resolved based on the “clearly established” analysis alone. *See Ali*, 649 F.3d at 772-73; *Rasul II*, 563 F.3d at 530. If this Court were to reach the constitutional issue, however, the law of the Circuit is clear. After the Supreme Court’s decision in *Boumediene*, this Court held that the binding law of the Circuit remains that nonresident aliens detained outside of the United States have no constitutional due process rights. *See supra* p. 26; *see also Verdugo-*

Urquidez, 494 U.S. at 274-75 (rejecting the extraterritorial application of the Fourth Amendment). Plaintiff’s Fourth and Fifth Amendment *Bivens* claims were therefore properly dismissed based on qualified immunity.¹⁴

B. A *Bivens* Action Should Not Be Recognized In This Military-Detention Context.¹⁵

1. A *Bivens* action is a judicially created cause of action, and because the power to imply a new constitutional action for damages is “not expressly authorized by statute,” *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001), “[t]he implication of a *Bivens* action . . . is not something to be undertaken lightly,” *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). Where for a category of cases “special factors counsel[] hesitation in the absence of affirmative action by Congress’ or if Congress affirmatively has declared that injured persons must seek another remedy, courts should not imply a cause of action where none exists.” *Id.* at 393 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

¹⁴ A number of the individual defendants argued in district court that they were also entitled to qualified immunity on the independent ground that plaintiff’s complaint failed to allege that they personally participated in any constitutional violation, as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The remaining defendants asserted the same argument with respect to a subset of plaintiff’s claims. The district court did not reach these arguments in light of its ruling for the individual defendants on other grounds. In the event that this Court reverses the dismissal of plaintiff’s *Bivens* claims, the district court should consider the defendants’ personal-participation arguments in the first instance.

¹⁵ The district court did not reach the question whether a *Bivens* remedy is precluded in this context, but this Court may affirm the district court’s judgment on any ground that supports it. *See, e.g., Nattah v. Bush*, 605 F.3d 1052, 1058 (D.C. Cir. 2010).

The “special factors” counseling hesitation in recognizing a common-law damage action “relate not to the merits of the particular remedy, but ‘to the question of who should decide whether such a remedy should be provided.’” *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). Where an issue “involves a host of considerations that must be weighed and appraised,’ its resolution ‘is more appropriately for those who write the laws, rather than for those who interpret them.’” *Id.* (quoting *Bush*, 462 U.S. at 380). In any such legislation, Congress could “tailor any remedy” and take steps to reduce the possible harmful effects of such civil damages claims. *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

In *Rasul II* and *Ali*, this Court addressed the category of military-detainee claims and held that special factors barred recognition of a *Bivens* action brought by foreign nationals alleging that they were illegally detained and mistreated by the military at Guantanamo (*Rasul II*) and in Afghanistan and Iraq (*Ali*). *Rasul II*, 563 F.3d at 528, 532 n.5; *Ali*, 649 F.3d at 764-66, 773-74. Subsequently, in *Doe v. Rumsfeld*, this Court held that special factors precluded a *Bivens* action by a U.S. citizen who was formerly detained by the U.S. military in Iraq. 683 F.3d at 393-97. Among the “special factors” the Court identified were that the case would (1) “require a court to delve into the military’s policies regarding the designation of detainees as ‘security internees’ or ‘enemy combatants,’ as well as policies governing interrogation techniques”; (2) “implicate the military chain of command” because it would require consideration of,

inter alia, a former Secretary of Defense’s “control over the treatment and release of specific detainees”; and (3) “hinder our troops from acting decisively in our nation’s interest for fear of judicial review of every detention and interrogation.” *Id.* at 395-96.

Doe also held that “evidence of congressional inaction” in the context of military detention “support[ed] [the Court’s] conclusion that this is not a proper case for the implication of a *Bivens* remedy.” *Id.* at 397. As *Doe* explained, Congress has legislated on military detainee matters by enacting, *inter alia*, the DTA, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. at 2739-2744. But “[n]either in that Act nor any other has Congress extended a cause of action for detainees to sue federal military and government officials in federal court for their treatment while in detention.” *Doe*, 683 F.3d at 397. The Court thus concluded that “[i]t would be inappropriate for this Court to presume to supplant Congress’s judgment in a field so decidedly entrusted to its purview.” *Id.*

The Fourth and Seventh Circuits have likewise held that courts must look to Congress and cannot on their own provide a damage action in the military-detention context. *See Vance v. Rumsfeld*, 701 F.3d 193, 197-203 (7th Cir. 2012) (en banc), *cert. petition filed*; *Lebron v. Rumsfeld*, 670 F.3d 540, 547-56 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

2. a. Under *Rasul II*, *Ali*, and *Doe*, special factors plainly preclude a court, acting alone, from recognizing a damages remedy for claims relating to military detention. Plaintiff attempts (Br. 56-58) to distinguish these cases by asserting that a court

entertaining his damages action “need not make any sensitive determination about the validity of the underlying detention, as the habeas court has already ruled that [p]laintiff was not properly detained from the very first decision to take him into custody.”

The “special factors” counseling against recognition of a *Bivens* remedy in the military-detention context do not, however, concern the specifics of any given plaintiff’s case. Instead, as the en banc Seventh Circuit has explained, special factors bar a damages action in the category of military-detention claims because “Congress and the Commander-in-Chief (the President), rather than civilian judges, ought to make the essential tradeoffs” implicated by an action in this unique context, “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.” *Vance*, 701 F.3d at 200. If Congress wishes to provide a civil money damage remedy for claims relating to military detention during an armed conflict and to subject the government officers performing delicate military and national security functions to a damages action, it could attempt to carefully craft such legislation while taking steps to reduce the possible harmful effects of such civil damages claims. But, by its nature, this is an area where it is inappropriate for the judiciary to create money-damage remedies against government officials on its own. *See Wilkie*, 551 U.S. at 562.

In any event, plaintiff is wrong that the district court’s grant of his habeas petition means that his damages action does not implicate sensitive national security

and military decisions. Plaintiff seeks to hold senior government officials personally liable for the treatment he received while in military detention, for how his military CSRTs were conducted, and for detaining him when his military detention was twice affirmed by a CSRT based on the evidence then available. JA 61-67. Those are the very types of claims addressed in *Rasul II*, *Ali*, and *Doe* that implicate the conduct of sensitive military and national security functions during an ongoing military conflict.¹⁶ And the district court's decision granting plaintiff's habeas petition did not address plaintiff's treatment during detention, the propriety of the CSRT process, whether plaintiff's detention was unlawful at any point prior to the habeas grant, or the role that individual defendants played in making sensitive decisions about plaintiff's detention. *See Al Gincio v. Obama*, 626 F. Supp. 2d 123, 126-30 (D.D.C. 2009). Furthermore, plaintiff's challenges to the speed of his transfer after his habeas petition was granted and the failure to transfer him earlier, JA 49, plainly implicate sensitive matters concerning deliberations over the country to which plaintiff should be transferred and any diplomatic discussions with foreign countries that occurred. *Cf. Kiyemba II*, 561 F.3d at 515.

Just as in *Rasul II*, *Ali*, and *Doe*, it would be inappropriate for a court to create a damage action here as a matter of common law. In the context of military detention,

¹⁶ Plaintiff contends (Br. 57) that “the possibility of *Bivens* claims alleging mistreatment in the prosecution of the ‘war on terror’ has been recognized.” But *Rasul II*, *Ali*, and *Doe* all involved mistreatment claims. *See Rasul II*, 563 F.3d at 528; *Ali*, 649 F.3d at 769; *Doe*, 683 F.3d at 392, 396. Plaintiff offers no basis for distinguishing these controlling decisions.

whether a plaintiff was released prior to a habeas adjudication (as in *Rasul II*, *Ali*, and *Doe*) or after a habeas grant (as here) has no bearing on whether to grant the former detainee a damage remedy for matters relating to the prior military detention. *Cf. Vance*, 701 F.3d at 196, 198-203 (special factors bar damages action by military detainees who were eventually deemed “innocent” by a “Detainee Status Board”). “Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public’s behalf.” *Wilkie*, 551 U.S. at 562 (internal quotation marks omitted).

b. As in *Doe*, the conclusion that a judicially created damages remedy would be inappropriate here is also supported by Congress’s failure to provide a damages remedy to military detainees in its extensive legislation on detainee matters. *See Doe*, 683 F.3d at 396-97; *see also Vance*, 701 F.3d at 200-02; *Lebron*, 670 F.3d at 551-52. Indeed, the case against the judicial recognition of a damages remedy is even stronger here than in *Doe* because Congress has expressly barred actions brought by alien military detainees like plaintiff in 28 U.S.C. § 2241(e)(2). *See supra* Section I.

In addition, “any alternative, existing process for protecting’ the plaintiff’s interests” raises the inference that “Congress ‘expected the Judiciary to stay its *Bivens* hand.’” *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009) (quoting *Wilkie*, 551 U.S. at 550, 554). Congress has addressed the remedies alien military detainees should be afforded in the Foreign Claims Act, which permits inhabitants of foreign countries held by the U.S. military to seek monetary redress for

claimed injuries through a discretionary administrative claim process. *See* 10 U.S.C. § 2734. As the Seventh Circuit explained in *Vance*, Congress’s enactment of the Foreign Claims Act establishes that “Congress has decided that compensation [for injuries caused by the military] should come from the Treasury rather than from the pockets of federal employees” and that former detainees like plaintiff “do not need a common-law damages remedy in order to achieve some recompense for wrongs done them.” 701 F.3d at 201.

III. THE UNITED STATES PROPERLY SUBSTITUTED ITSELF FOR THE INDIVIDUAL DEFENDANTS ON PLAINTIFF’S INTERNATIONAL-LAW CLAIMS ASSERTED UNDER THE ATS.

Plaintiff’s ATS claims alleged that two former Secretaries of Defense and sixteen other senior Department of Defense officials subjected plaintiff to “prolonged arbitrary detention” and “[t]orture and [c]ruel, [i]nhuman, or [d]egrading [t]reatment” in violation of customary international law and the Geneva Conventions. JA 67-72.¹⁷ The district court held that the United States properly substituted itself for the individual defendants under the Westfall Act on these claims because the defendants were acting within the scope of their employment at the time of the incidents alleged in the complaint. JA 132 n.15. That ruling was correct and must be affirmed under *Ali* and *Rasul v. Myers*, 512 F.3d 644, 654-60, 663 (D.C. Cir. 2008) (“*Rasul I*”), *vacated*, 555 U.S. 1083, *reinstated in relevant part*, *Rasul II*, 563 F.3d at 528-29.

¹⁷ Plaintiff’s ATS claims were not asserted against former Attorney General John Ashcroft and FBI Director Robert Mueller. JA 67-72.

A. Under the Westfall Act, the FTCA remedy against the United States is generally “exclusive of any other civil action or proceeding for money damages” for any tort committed by a federal official or employee “while acting within the scope of his office or employment.” 28 U.S.C. § 2679(b)(1). Where, as here, the Attorney General or his designee certifies that an employee was acting within the scope of employment at the time of the relevant alleged incident, the employee is “dismissed from the action and the United States is substituted as defendant.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); see 28 U.S.C. § 2679(d)(1); JA 106. The Attorney General’s certification is entitled to “prima facie effect,” and it is the plaintiff’s burden to show that the defendant was not acting within the scope of his employment. *Kimbrow v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994) (internal quotation marks omitted); *Rasul I*, 512 F.3d at 655.

In *Rasul I*, former Guantanamo detainees brought an action against a number of high-ranking Department of Defense officials. See 512 F.2d at 650-51. The plaintiffs asserted (1) ATS claims alleging “prolonged arbitrary detention, torture, and cruel, inhuman or degrading treatment” in violation of customary international law, and (2) Geneva Conventions claims alleging that they were “held arbitrarily, tortured and otherwise mistreated during their detention,” *id.* at 654, 662 (internal quotation marks and citations omitted). The Court applied D.C. respondeat superior law, which looks to the Restatement (Second) of Agency (1958) (“Restatement”). *Id.* at 655. Under the Restatement, the “[c]onduct of a servant is within the scope of

employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master[;] and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.” *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) (quoting Restatement § 228(1)).

Rasul I held that the conduct alleged there satisfied the first Restatement factor because “the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in.” 512 F.3d at 658. In *Ali*, this Court followed *Rasul I*, holding that similar defendants against whom former military detainees asserted similar international-law claims were acting within the scope of their employment. *See Ali*, 649 F.3d at 766, 774.

B. Plaintiff does not dispute that the fourth Restatement factor is satisfied here but contends (Br. 47-50) that the first three Restatement factors are not satisfied. Plaintiff’s arguments are meritless.

1. *First Restatement Factor*. Under *Rasul I* and *Ali*, the district court’s scope-of-employment ruling regarding the first Restatement factor must be affirmed. The defendants against whom plaintiff asserted his ATS claims are, like the defendants in *Rasul I* and *Ali*, high-ranking Department of Defense officials, and plaintiff’s ATS claims are indistinguishable from the claims at issue in *Rasul I* and *Ali*. As in *Rasul I*

and *Ali*, “the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in.” *Rasul I*, 512 F.3d at 658.

Plaintiff argues (Br. 50) that *Rasul I* is distinguishable because the plaintiffs there “concede[d] that the ‘torture, threats, physical and psychological abuse inflicted on them, which were allegedly approved, implemented, supervised and condoned by the defendants, were ‘intended as interrogation techniques to be used on detainees,’” *id.* at 658 (quoting complaint). But plaintiff’s complaint made a similar concession, asserting that the alleged mistreatment here was committed “for the purposes of obtaining information or a confession from Plaintiff” and achieving two other goals.¹⁸ JA 69; *see also, e.g.*, JA 50 (alleging that particular “*interrogation* techniques” were unlawful (emphasis added)); JA 51-54 (similar).

In any event, *Ali* makes clear that the express concession in *Rasul I* was not critical, as there was no such concession in *Ali* and yet the Court held that the defendants were acting within the scope of their employment. *See Ali*, 649 F.3d at 766, 774. An express concession here was likewise unnecessary because plaintiff’s specific allegations against the named defendants, JA 18-60, clearly target conduct that was,

¹⁸ Plaintiff contends (Br. 44-46) that the mistreatment could have been solely for one or both of the other two listed purposes, but plaintiff’s argument is contradicted by his complaint, which joined the purposes with the word “and,” not “or.” *See* JA 69 (alleging that the mistreatment was “for the purposes of obtaining information or a confession from [p]laintiff, punishing him . . . , *and* intimidating and coercing him” (emphasis added)).

under the binding precedent applicable here, incidental to their roles managing detention and interrogation at Guantanamo and in Afghanistan. For example, plaintiff seeks to hold former Secretary of Defense Donald Rumsfeld liable for exercising command and control over the military and for developing detention and interrogation policies, JA 18-19, 49-51, and he seeks to hold three other defendants liable for creating and overseeing the CSRT process, JA 19-20, 56-57. Plaintiff does not point to any allegations against a named defendant that do not stem from that defendant's duties managing detention and interrogation at Guantanamo or in Afghanistan. Under *Rasul I*, the first Restatement factor is therefore fully satisfied.

Plaintiff also appears to contend (Br. 44, 47-50) that the defendants' conduct was not "of the kind [they were] employed to perform," Restatement § 228(1)(a), because a habeas court granted his petition and ordered him released. Of course, the grant of a habeas petition does not render the earlier detention unlawful, but, as this Court held in *Rasul I*, the illegality of alleged conduct does not render it beyond the scope of employment. *Rasul I*, 512 F.3d at 659 (even allegedly criminal conduct may be within the scope of employment). Moreover, in *Rasul I* and *Ali*, this Court held that the "detention and interrogation of *suspected* enemy combatants" was within the scope of the defendants' employment. *Id.* at 658 (emphasis added); *Ali*, 649 F.3d at 774. *A fortiori*, managing the detention and interrogation of plaintiff, who was determined by two CSRTs to be an "enemy combatant," JA 46-47, was within the scope of the defendants' employment. Even after plaintiff's habeas petition was

granted, managing plaintiff's detention was the type of work the defendants were employed to do while the government implemented the district court's command that they "take all necessary and appropriate diplomatic steps to facilitate [plaintiff's] release forthwith." *Al Gincó*, 626 F. Supp. 2d at 130.¹⁹ The district court thus correctly concluded that, as in *Rasul I* and *Ali*, the first Restatement factor was satisfied here.

2. *Second Restatement Factor*. Plaintiff argues (Br. 48) that because he was not lawfully detained, his interrogations did not "occur[] substantially within the authorized time and space limits," as required by the Restatement's second factor. Restatement § 228(1)(b). Plaintiff's complaint does not, however, allege that any of the defendants' conduct managing his detention occurred outside of usual working hours or locations, and thus the "time and space" factor is plainly satisfied. *See, e.g., Myvett v. Williams*, 638 F. Supp. 2d 59, 67 (D.D.C. 2009); *Wilson v. Libby*, 535 F.3d 697, 712 n.2 (D.C. Cir. 2008). In any event, the interrogation of a military detainee during the period in which two CSRTs determined that he was an "enemy combatant" was authorized by military policies.

3. *Third Restatement Factor*. Finally, plaintiff contends (Br. 48-49) that the individual defendants' conduct does not satisfy the third Restatement factor, which requires that the conduct be "actuated, at least in part, by a purpose to serve the

¹⁹ Plaintiff contends (Br. 44) that mistreatment following a habeas grant is not within the scope of employment, but plaintiff's complaint does not allege any mistreatment following his habeas grant. *See* JA 49 (stating as the sole allegation concerning this period that plaintiff was detained "in the same detention conditions").

master.” Restatement § 228(1)(c). To support this argument, plaintiff points to a number of allegations that unnamed officials falsified reports and mistreated him in specified ways without any “purpose for legal interrogation or detention.” Br. 48 (citing JA 40-42). These allegations, however, do not pertain to the named defendants here. *See* JA 40-42.

The named defendants were high-ranking Department of Defense officials, and at no point does plaintiff allege that they were actuated by any purpose other than to serve their master. To the contrary, the allegations in plaintiff’s complaint—that these defendants engaged in conduct like “approv[ing] . . . interrogation techniques,” JA 50, “overs[eeing] both military intelligence and military police functions” at Guantanamo, JA 51, and “presid[ing] over” the CSRT system, JA 57, make clear that the defendants’ purpose in engaging in the alleged conduct was, at least in part, to serve their “master.” *See Ballenger*, 444 F.3d at 665 (“even a *partial* desire to serve the master is sufficient”).

* * *

The district court thus correctly concluded that the defendants in plaintiff’s ATS claims were acting within the scope of their employment at the time of the incidents alleged in the complaint. Although plaintiff contends (Br. 51) that the scope-of-employment issue cannot be decided without discovery, the district court here decided the issue based on the facts alleged in plaintiff’s complaint. Thus, here, as in *Rasul I*, “nothing would be gained by an evidentiary hearing,” and the district court

properly decided the scope-of-employment issue “as a matter of law.” 512 F.3d at 659-60.²⁰

Because the United States properly substituted itself for the individual defendants in the ATS claim, those claims were correctly “restyled as [claims] against the United States that [are] governed by the [FTCA].” *Id.* at 660 (alterations in original) (quoting *Ballenger*, 444 F.3d at 662). As explained in Section IV, those restyled claims—and plaintiff’s claims asserted directly under the FTCA—were properly dismissed.

IV. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF’S FTCA CLAIMS.

This Court may affirm the district court’s dismissal of plaintiff’s FTCA claims (including the ATS claims that were converted into FTCA claims upon the substitution of the United States) on multiple grounds. First, all of the claims were properly dismissed as barred by the FTCA’s foreign-country exception, 28 U.S.C. § 2680(k). In addition, the dismissal of plaintiff’s three claims asserted under the ATS may be affirmed on the independent ground that plaintiff failed to exhaust his administrative remedies regarding those claims. Finally, the district court correctly

²⁰ To the extent that plaintiff contends (Br. 53) that discovery is necessary to identify unnamed defendants in the complaint, that argument is waived because plaintiff did not assert it in district court. *See District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984). In any event, plaintiff’s ATS claims were asserted against named defendants only, JA 67-72, and discovery concerning the unnamed defendants would not resolve any disputed issues of fact concerning the named defendants.

dismissed plaintiff's three ATS claims—and two of plaintiff's claims asserted directly under the FTCA—on the independent ground that they asserted violations of international law, not the “law of the place,” *id.* § 1346(b).

A. All Of Plaintiff's FTCA Claims Are Barred By The Foreign-Country Exception To The FTCA.

The district court correctly concluded that all of plaintiff's FTCA claims—the claims asserted directly under the FTCA, JA 73-96, and the ATS claims that were converted into FTCA claims upon the substitution of the United States, JA 67-72—must be dismissed because they are “claim[s] arising in a foreign country” excepted from the FTCA's waiver of sovereign immunity under 28 U.S.C. § 2680(k). Plaintiff's allegations arose in Afghanistan and Guantanamo Bay, Cuba, and the district court correctly held that both locations are “foreign countr[ies]” for purposes of § 2680(k). *See* JA 135-36.

Plaintiff argues (Br. 32-41) that the allegations concerning Guantanamo are not subject to the FTCA's foreign-country exception, but the district court properly rejected this argument. *See* JA 135-36.²¹ In *United States v. Spelar*, the Supreme Court considered a case very similar to this one, addressing whether a U.S. air base in Newfoundland leased to the United States by Great Britain was a “foreign country” for purposes of § 2680(k). 338 U.S. 217, 218 (1949). The Court explained that the answer “lies in the express words of the statute,” holding that “[w]e know of no more

²¹ By not contesting the district court's conclusion that his claims arising in Afghanistan are barred, plaintiff has waived any such argument.

accurate phrase in common English usage than ‘foreign country’ to denote territory subject to the sovereignty of another nation.” *Id.* at 219. Because the Newfoundland lease “did not and w[as] not intended to transfer sovereignty over the leased areas from Great Britain to the United States,” the Court held that the foreign-country exception applied to the base. *Id.* (internal quotation marks omitted).²²

Spelar is dispositive of this case. The lease agreements governing Guantanamo provide that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas].” Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (“February 1903 Lease”). As the Supreme Court recognized in *Boumediene*, “Guantanamo Bay is not formally part of the United States,” and “Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay.” 553 U.S. at 753-54. As in *Spelar*, Guantanamo is therefore a “foreign country” for purposes of the FTCA. *Cf. Broadnax v. United States*, 710 F.2d 865, 867 (D.C. Cir. 1983).

1. Plaintiff argues (Br. 32-38) that Guantanamo Bay is not “subject to the sovereignty of another nation” as required by *Spelar*, 338 U.S. at 219, because the Supreme Court concluded in *Boumediene* that the United States has “de facto

²² *Spelar* also observed that its conclusion was supported by the fact that foreign tort law would have governed in that case. 338 U.S. at 219-21. As explained *infra* on pages 46-48, however, the Supreme Court has subsequently clarified that the applicability of the foreign-country exception does not turn on whether foreign law applies.

sovereignty” over Guantanamo, 553 U.S. at 755. Plaintiff’s argument is contradicted by *Spelar*, which conducted its sovereignty analysis by examining whether the relevant lease agreements there “transfer[red] sovereignty” to the United States without analyzing whether the United States maintained jurisdiction or control over the air base. 338 U.S. at 219. Moreover, because *Spelar* held that “sovereignty” was the touchstone in the context of defining the statutory term “foreign country,” *id.*, there can be no doubt that the Court was referring to sovereignty “in the legal and technical sense of the term,” or “de jure sovereignty,” *Boumediene*, 553 U.S. at 754-55.

Decisions interpreting § 2680(k) and *Spelar* have, accordingly, rejected arguments that have sought to define “sovereignty” in terms other than “de jure sovereignty.” In *Heller v. United States*, for example, the Third Circuit rejected an argument that because Philippine sovereignty over a military base was “merely formal,” the base was not a “foreign country,” explaining that there is a distinction between “sovereignty, or the legal personhood of the nation, and jurisdiction, or the rights and powers of the nation over its inhabitants.” 776 F.2d 92, 95-97 (3d Cir. 1985); *see also Burna v. United States*, 240 F.2d 720, 721-23 (4th Cir. 1957). In addition, every decision addressing whether Guantanamo is a “foreign country” under § 2680(k) has held that it is, explaining that “de jure sovereignty” is the touchstone. *See Hamad v. Gates*, 2011 WL 6130413, at *11 (W.D. Wash. 2011), *appeals pending on other grounds*; *Al-Zabrani v. Rumsfeld*, 684 F. Supp. 2d 103, 116-19 (D.D.C. 2010), *aff’d on other grounds*, 669 F.3d 315; *Bird v. United States*, 923 F. Supp. 338, 340-43 (D. Conn.

1996); *Colon v. United States*, 1982 U.S. Dist. LEXIS 16071, at *1-6 (S.D.N.Y. 1982) (unpublished), *abrogated on other grounds*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700-12 (2004).

At bottom, plaintiff's argument that *Boumediene's* "de facto sovereignty" test should be extended to the FTCA is fundamentally flawed because it "conflate[s] the constitutional right to bring a habeas action with the right to bring an action against the United States under the FTCA." *Al-Zabrani*, 684 F. Supp. 2d at 117. Whereas "de facto sovereignty" was a touchstone for determining the extraterritorial reach of the constitutional privilege of habeas corpus, which *Boumediene* explained was "central[]" to the Constitution and a "vital instrument to secure [the] freedom [from unlawful restraint]," 553 U.S. at 739, the question here is the appropriate touchstone for determining whether Guantanamo satisfies the statutory definition of "foreign country" in the FTCA's limited waiver of sovereign immunity. As explained above, the answer to that question is dictated by the plain meaning of the term "foreign country" and the Supreme Court's decision in *Spelar*. Moreover, because a "waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign," any doubt on the question must be resolved in favor of the government. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). *See also Al-Zabrani*, 684 F. Supp. 2d at 116-18; *Hamad*, 2011 WL 6130413, at *11.²³

²³ Even if this Court were to consider factors beyond Cuba's "de jure sovereignty" in making the "foreign country" determination, it should still conclude

2. Plaintiff also contends (Br. 34-35, 38-41) that *Spelar*'s sovereignty analysis should not control because United States law would govern his substantive tort claims. Plaintiff's argument is based on *Spelar*'s observations that foreign tort law would have applied in that case, and the foreign-country exception was enacted, in part, to avoid the application of foreign tort law. *See* 338 U.S. at 219-21. Plaintiff's argument is premised on two errors.

First, *Spelar* made clear that the test for determining whether a military base abroad is a "foreign country" turns on whether the United States exercises de jure sovereignty over that base. *See id.* at 219. That the Court's holding was supported in that case by the applicability of foreign substantive tort law did not transform the test there into one concerning whether foreign law applies.²⁴ The Supreme Court resolved

that Guantanamo is a "foreign country" under § 2680(k) because the terms in the Guantanamo agreements are similar in relevant part to the terms of the lease in *Spelar*. Although plaintiff emphasizes (Br. 33) that the Guantanamo lease provides the United States with "complete jurisdiction and control" over the Guantanamo base, February 1903 Lease art. III, the *Spelar* agreement similarly granted the United States generally with "all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control." Agreement And Exchanges Of Notes Between The United States Of America And Great Britain, Mar. 27, 1941, 55 Stat. 1560, 1560, art. I(1). In addition, although plaintiff asserts (Br. 35-36) that, "unlike all the other previous military base cases, Cuba has no power to unilaterally terminate the lease or to exclude anyone or anything," the agreement in *Spelar* shared similar characteristics. *See id.* at 1570, art. XXVIII (modifications to the agreement "shall be by mutual consent" during 99-year term of lease); *id.* at 1565, art. XIII (immigration laws of the territory may not be applied in certain circumstances).

²⁴ Other courts have observed that the foreign-country exception serves purposes beyond ensuring that cases involving foreign law are precluded. *See Meredith v. United States*, 330 F.2d 9, 10-11 (9th Cir. 1964). These additional purposes

any doubt on this question in *Sosa v. Alvarez-Machain*, which rejected the “headquarters doctrine,” under which “the foreign country exception d[id] not exempt the United States from suit for acts or omissions occurring [in the United States] which have their operative effect in another country.” 542 U.S. 692, 701 (2004) (internal quotation marks omitted). The plaintiff in that case argued that “headquarters” claims should be permitted when domestic rather than foreign law applies, but the Court rejected the argument, explaining that “[t]he point would be well taken . . . if Congress had written the exception to apply when foreign law would be applied,” “[b]ut that is not what Congress said.” *Id.* at 711. Thus, under *Spelar* and *Sosa*, the applicability of the foreign-country exception turns on sovereignty, not the applicability of foreign law. *See Al-Zabirani*, 684 F. Supp. 2d at 119.²⁵

Second, even if the applicability of domestic or foreign tort law were relevant, plaintiff erroneously assumes that U.S. tort law would govern in an FTCA case arising in Guantanamo. As explained more fully *infra* in Section IV(C), the substantive tort law that governs FTCA claims is “the law of the place where the act or omission occurred,” 28 U.S.C. § 1346(b)(1), and “law of the place” means U.S. state tort law, *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (“law of the place” means state law and does

underscore the conclusion that the applicability of the exception should not be determined solely based on whether foreign law applies.

²⁵ To the extent that older lower court decisions interpreting *Spelar* have concluded that the applicability of foreign law is relevant to whether the foreign-country exception applies, *see, e.g., Heller*, 776 F.2d at 95-96, those decisions are no longer good law on that point after *Sosa*.

not include federal law). Plaintiff offers no basis, however, for the assumption that any U.S. state has extended its tort law to acts and omissions taking place at Guantanamo.²⁶ The agreements with Cuba were silent as to what tort law would govern,²⁷ and plaintiff cites no decisions applying U.S. state tort law to acts or omissions at Guantanamo.²⁸ To the extent that no state tort law applies at Guantanamo, that fact supports the government’s argument that Guantanamo is a “foreign country” under § 2680(k). *See Smith v. United States*, 507 U.S. 197, 201-05 (1993) (holding that Antarctica’s lack of applicable law reinforces the conclusion that Antarctica is a “foreign country” under § 2680(k)).

²⁶ State tort law may govern some of the alleged acts or omissions taking place in the U.S. (and causing harm at Guantanamo). Under *Sosa*, however, that fact alone is not enough to render the foreign-country exception inapplicable. *See Sosa*, 542 U.S. at 700-12 (rejecting the “headquarters doctrine”).

²⁷ *See* February 1903 Lease; Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (“July 1903 Lease”); Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682, T.S. No. 866. Only the July 1903 lease addresses the law governing at Guantanamo Bay, but none of its provisions address tort law. *See* July 1903 Lease arts. IV-VI.

²⁸ Instead, plaintiff relies primarily upon inapposite decisions concerning the applicability of federal statutes, including criminal statutes, to Guantanamo, *see* Br. 34 n.5; Br. 39-41. The only tort cases plaintiff cites (Br. 40-41) are not on point because they were product-liability actions concerning products made outside of Guantanamo. *See Marshall v. Celotex Corp.*, 651 F. Supp. 389, 391 (E.D. Mich. 1987); *Lee v. Walworth Valve Co.*, 482 F.2d 297, 298 (4th Cir. 1973). Moreover, *Lee* addressed personal jurisdiction alone, not the applicable substantive tort law. *See* 482 F.2d at 298-301.

B. Plaintiff Has Not Exhausted His Administrative Remedies Regarding His ATS Claims.²⁹

The FTCA provides that “[a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing.” 28 U.S.C. § 2675(a). In both *Rasul I* and *Ali*, this Court applied § 2675(a) to affirm the dismissal of ATS claims that had been converted into claims against the United States as a result of a Westfall Act substitution, explaining that dismissal was warranted because “[t]he record [wa]s devoid . . . of any suggestion that [the plaintiffs] complied with any of the procedures governing the filing of an administrative claim.” *Rasul I*, 512 F.3d at 661; *Ali*, 649 F.3d at 775.

Here, as in *Rasul I* and *Ali*, there is no indication in the record that plaintiff exhausted his administrative remedies regarding his three international-law claims asserted under the ATS, JA 67-72. Under *Rasul I* and *Ali*, this Court should therefore affirm the dismissal of plaintiff’s ATS claims on the ground that plaintiff failed to exhaust administrative remedies.

²⁹ The district court did not reach the question whether plaintiff’s ATS claims may be dismissed for lack of exhaustion, but, as explained *supra* in note 15, this Court may affirm the district court’s judgment on any ground that supports it.

C. Plaintiff's International-Law Claims Do Not Arise Under The "Law Of The Place."

The FTCA waives the government's sovereign immunity only where, *inter alia*, "the United States, if a private person, would be liable to the claimant in accordance with the *law of the place* where the act or omission occurred," 28 U.S.C. § 1346(b)(1) (emphasis added); *Meyer*, 510 U.S. at 479. In *Meyer*, the Supreme Court explained that it "ha[s] consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA." 510 U.S. at 478 (holding that federal law is not the "law of the place"). As the Seventh Circuit has explained, "[t]he Court's reasoning in *Meyer* applies with equal force to claims brought pursuant to international treaty." *Sobitan v. Glud*, 589 F.3d 379, 389 (7th Cir. 2009).

In accordance with this precedent, the district court correctly dismissed plaintiff's five claims alleging violations of international law—(1) one ATS claim alleging a violation of the Geneva Conventions, JA 70-72; (2) two ATS claims alleging violations of customary international law, JA 67-70 ("Prolonged Arbitrary Detention" and "Torture and Cruel, Inhuman, or Degrading Treatment"); and (3) two FTCA claims for prolonged arbitrary detention and cruel, inhuman, or degrading treatment "in violation of the laws of the District of Columbia, which follows the English common law recognizing customary international law as a source of law," JA 78-80, 91-92. *See* JA 133-34 & n.20.

Plaintiff does not dispute that his Geneva Conventions claim, JA 70-72, was properly dismissed. Plaintiff contends (Br. 41-43), however, that his two ATS claims asserting violations of customary international law, JA 67-70, and his two FTCA claims asserting violations of customary international law as assertedly incorporated into D.C. law, JA 78-80, 91-92, allege violations of the “law of the place.” Plaintiff’s argument (and the argument advanced in an amicus brief) is that D.C. common law incorporates customary international law and thus the four claims in question assert violations of D.C. law. As the district court held, plaintiff’s argument is “unsupported by law.” JA 134 n.20.

As an initial matter, plaintiff’s argument fails with respect to the ATS claims because they do not even allege violations of D.C. common law and thus present no occasion to address plaintiff’s incorporation theory. *See* JA 67-72. Moreover, under the ATS, courts may recognize torts in violation of the law of nations in certain circumstances, but only as a matter of federal common law. *See Sosa*, 542 U.S. at 712, 720-26; *see also, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 21 (D.C. Cir. 2011). Thus, at best, plaintiff’s ATS claims assert violations of federal common law, which does not qualify as the “law of the place.” *Meyer*, 510 U.S. at 478 (federal law not “law of the place” under the FTCA).

Plaintiff’s argument fails even with respect to his two claims that expressly allege violations of customary international law as assertedly incorporated into D.C. common law, JA 78-80, 91-92. Neither plaintiff nor amici cite any D.C. decisions

holding that D.C. law incorporates all of present-day customary international law or even the specific customary international law invoked here. The decisions cited suggest instead that D.C. common law simply “encompasses all common law in force in Maryland *in 1801*” and the “common law of England *as it . . . existed*” in 1776. *United States v. Jackson*, 528 A.2d 1211, 1215 (D.C. 1987) (emphases added).

Moreover, even if D.C. courts at one time viewed then-current customary international law as part of D.C.’s common law, any customary international law that courts in the United States recognize today as domestic law is federal law. *See, e.g.*, Restatement (Third) Of Foreign Relations Law § 112(2) (1987) (“The determination and interpretation of international law present federal questions.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (holding that the “act of state” doctrine “must be treated exclusively as an aspect of federal law” and suggesting that “rules of international law should not be left to divergent and perhaps parochial state interpretations”). *See generally, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1827-41 (1998) (describing the development of the settled view that customary international law is not state law). Moreover, to the extent that D.C. law provides a remedy to a plaintiff for violations of customary international law, the source of a defendant’s potential liability is international law, not state law. D.C. courts thus may *apply* international law, but the courts’ application of

international law does not transform that international law into state law. Plaintiff's international-law claims were thus properly dismissed.³⁰

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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[MARCH 2013]

³⁰ In district court, the United States also argued that all of plaintiff's FTCA claims (including his ATS claims that were converted into FTCA claims) were barred in part by the relevant statute of limitations, and it argued that plaintiff's negligent supervision and hiring claim under the FTCA, JA 92-96, was barred by the FTCA's discretionary function exception. The district court did not reach these issues in light of its ruling dismissing plaintiff's FTCA claims on other grounds. In the event that this Court does not affirm the dismissal of all of plaintiff's FTCA claims, the district court should consider these arguments in the first instance.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 13,874 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2010 in a proportionally spaced typeface, 14-point Garamond font.

s/Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. On or before March 4, 2013, I will cause eight paper copies to be delivered to the Court via hand delivery. I also hereby certify that the participants in the case, Paul L. Hoffman, Terrence Collingsworth, and Janis H. Brennan, are registered CM/ECF users and will be served via the CM/ECF system.

s/Sydney Foster
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ADDENDUM

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28 U.S.C. § 1346. United States as defendant

* * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 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.

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee 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 him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in

a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim 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 for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim

pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * *

(k) Any claim arising in a foreign country.

* * *

Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005, 119 Stat. 2680, 2742.

* * *

(e) Judicial Review of Detention Of Enemy Combatants.—

(1) In General.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.”.

(2) Review of Decisions of Combatant Status Review Tribunals of Propriety of Detention.—

(A) In General.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) Limitation On Claims.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) Scope of Review.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) Termination On Release From Custody.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

* * *

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5303**September Term 2009****1:06-cv-01697-JDB****Filed On: May 17, 2010**

Haji Wazir, Detainee, and Mohammad Sharif,
as Next Friend of Haji Wazir,

Appellants

v.

Robert M. Gates, Secretary, United States
Department of Defense, et al.,

Appellees

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges**ORDER**

Upon consideration of appellees' unopposed motion to dismiss as moot and appellants' unopposed motion for vacatur, it is

ORDERED that the motion to dismiss be granted and the appeal be dismissed as moot. It is

FURTHER ORDERED that the motion for vacatur be granted. The district court's memorandum opinion and order filed June 29, 2009, granting respondents' motion to dismiss the habeas corpus petition, is hereby vacated, Wazir v. Gates, 629 F. Supp. 2d 63 (D.D.C. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam