[ORAL ARGUMENT SCHEDULED FOR OCTOBER 6, 2011]

No. 10-5393

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

TALAL AL-ZAHRANI AND NASHWAN ALI
ABDULLAH AL-SALAMI, et al.,
Plaintiffs-Appellants,
v.
ESTEBAN RODRIGUEZ, DIRECTOR,
JOINT INTELLIGENCE GROUP, et al.,
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

A. Parties and Amici.

Plaintiffs in the district court and appellants in this Court are: Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami, in their individual capacities and as the representatives of the estates of Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami.

Defendants in the district court and appellees in this Court are the United States of America and numerous federal officials and former federal officials all sued in their individual capacities. The individual-capacity defendants-appellees are: Donald H. Rumsfeld; Gen. Richard Myers; Gen. Peter Pace; Gen. James T. Hill; Gen. Bantz Craddock; Maj. Gen. Michael Lehnert; Brig. Gen. Michael E. Dunlavey; Maj. Gen. Geoffrey Miller; Brig. Gen. Jay Hood; Rear Adm. Harry B. Harris, Jr.; Col. Terry Carrico; Col. Adolph McQueen; Brig. Gen. Nelson J. Cannon; Col. Mike Bumgarner; Col. Wade Dennis; Esteban Rodriguez, William Winkenwerder, Jr., M.D.; David Tornberg, M.D.; Vice Adm. Michael Cowan, M.D.; Vice Adm. Donald Arthur, M.D.; Captain John Edmondson, M.D.; Captain Ronald L. Sollock, M.D.; Rear Adm. Thomas K. Burkhard, M.D.; Rear Adm. Thomas R. Cullison, M.D., and John Does 1-100.

On June 26, 2009, defendants filed a notice of the death of individual-defendant Captain Ronald L. Sollock, M.D. Plaintiffs never filed a motion to substitute a successor or representative of the estate. *See* Fed. R. Civ. P. 25(a)(1).

B. Rulings Under Review.

On November 29, 2010, plaintiffs filed a notice of appeal from the February 16, 2010 order of the district court (Judge Huvelle) dismissing all of plaintiffs' claims (reported at 684 F.Supp.2d 10), and from the same district court's September 29, 2010 order, denying plaintiffs' motions for reconsideration and for leave to amend.

C. Related Cases.

The undersigned counsel is aware of no other cases involving substantially the same parties and the same or similar issues, pending before this Court or any other court.

_/s/________________________
Robert M. Loeb

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GLOSSARY

ATS. . . . . Alien Tort Statute, 28 U.S.C. § 1350

CSRT. . . . . Combatant Status Review Tribunals

FTCA. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

MCA. . . . . Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)

NCIS. . . . . Naval Criminal Investigative Service

Westfall Act. . . . . Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR DEFENDANTS-APPELLEES

STATEMENT OF JURISDICTION

Plaintiffs sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1350. As the district court recognized (App. 15-17) and as we discuss further at pages 50-54, the plain language of Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), which amends 28 U.S.C. § 2241(e), bars jurisdiction over plaintiffs' claims.

On February 16, 2010, the district court dismissed all of plaintiffs' claims, and, on September 29, 2010, the district court denied plaintiffs' reconsideration motion. On November 29, 2010, plaintiffs filed a timely notice of appeal. *See* Fed.

R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion in denying plaintiffs' Rule 59(e) reconsideration motion, where the claims are clearly barred by Circuit precedent.

A. Whether the district court abused its discretion in denying plaintiffs' request to reconsider its holding that it would be improper to recognize a common-law *Bivens* damage action in the context military detention related to an ongoing armed conflict.

B. Whether the court abused its discretion in denying plaintiffs' request to reconsider its holding that plaintiffs' *Bivens* claims are also barred by qualified immunity.

C. Whether the court abused its discretion in denying plaintiffs' request to reconsider its holding that plaintiffs' international law claims are subject to substitution under the Westfall Act.

II. Whether the district court erred in denying plaintiffs' motion to amend their complaint after their case had been dismissed with prejudice.

III. Whether Section 7(a) of the MCA, 28 U.S.C. § 2241(e), bars jurisdiction over plaintiffs' claims.

STATEMENT OF THE CASE

Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami, in their individual capacities and as the representatives of the estates of their sons, brought this action against the United States, 24 named current or former federal officials and 100 unnamed "John Doe" federal officials, seeking money damages relating to the deaths of Guantanamo Bay military detainees Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami. The district court granted defendants' motions for substitution and for dismissal of the claims. Plaintiffs filed a reconsideration motion. On September 29, 2010, the district court denied the motion. Plaintiffs appealed, and have limited their appeal to the denial of their reconsideration motion as to their claims against the federal officials in their individual capacities.[1]

STATUTORY PROVISIONS AT ISSUE

A. Section 7(a) of the MCA, which amends 28 U.S.C. § 2241(e), bars federal court review of any claim that relates "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

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[1] The opening brief filed by appellants does not challenge the dismissal of the claims against the United States. Accordingly, those claims have been forfeited.

been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(2).

C. As relevant here, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, better known as the "Westfall Act," provides absolute immunity from tort claims for federal employees acting within the scope of their employment, as follows:

> The remedy against the United States [under the Federal Tort Claims Act] 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.

28 U.S.C. § 2679(b)(1).

STATEMENT OF FACTS

A. This appeal involves claims brought by plaintiffs[2] seeking money damages relating to the deaths of Guantanamo Bay military detainees Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami on June 10, 2006. Plaintiffs asserted claims against the United States and 24 named current or former federal officials and 100

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[2] Plaintiffs are Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami, in their individual capacities and as the representatives of the estates of their respective sons, Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami.

unnamed "John Doe" federal officials[3] in their individual capacities. The claims against the United States were asserted under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. The individual capacity money damage claims against the federal officials were brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 and as *Bivens*[4] constitutional tort claims, asserting violations of rights under the Fifth and Eighth Amendments to the United States Constitution.

Plaintiffs alleged that Yasser Al-Zahrani, Jr., a citizen of Saudi Arabia, and Salah Ali Abdullah Ahmed Al-Salami, Jr., a citizen of Yemen, were determined to be "enemy combatants" by the United States and transferred to U.S. military base at Guantanamo Bay, Cuba, in January 2002. App. 13. In 2004, Combatant Status Review Tribunals ("CSRTs") were convened to review the detentions of Al-Zahrani and Al-Salami. The CSRTs confirmed earlier determinations that both detainees were "enemy combatants." *Ibid.*

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[3] The amended complaint names as defendants Donald Rumsfeld, General Richard Myers, General Peter Pace, General James T. Hill, General Bantz Craddock, various military personnel stationed or formerly stationed at Guantanamo, and numerous medical professionals allegedly involved in the treatment of detainees at Guantanamo and/or the creation of policies and procedures used at the base. The amended complaint also includes unnamed military, medical, and civilian personnel, who are identified as John Does 1-100. App. 14.

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

Plaintiffs further alleged that during the years in which Al-Zahrani and Al-Salami were detained at Guantanamo, they endured inhumane and degrading conditions of confinement and violent acts of abuse, including sleep deprivation, exposure to prolonged temperature extremes, invasive body searches, beatings, threats, inadequate medical treatment and withholding of necessary medication, and religious abuse, such as forced shaving. The complaint averred that defendants specifically instituted these practices in order to "break" detainees and thereby gain intelligence from them. App. 13-14.

In their amended complaint, plaintiffs also alleged that Al-Zahrani and Al-Salami participated in hunger strikes for weeks or months at a time. They claimed that, as a result of these hunger strikes, Al-Zahrani and Al-Salami were strapped into "restraint chairs" and force-fed formula using painful, humiliating, and unsanitary procedures. App. 13.

Plaintiffs claimed that the conditions endured by Al-Zahrani and Al-Salami over four years had damaging effects on their physical and psychological health. They assert that, after months of hunger strikes and, for Al-Salami, multiple medical evaluations evidencing depression and suicidal thoughts, Al-Zahrani and Al-Salami were found dead on June 10, 2006. App. 13-14.

The final report from the Naval Criminal Investigative Service ("NCIS") issued in 2008 concluded that the deaths were suicides by hanging. App. 14. The summary of the report stated:

> On June 10, 2006 the Naval Criminal Investigative Service (NCIS) was notified that three detainees being held in Camp Delta at Guantanamo Bay Cuba had been found unresponsive in their cells at approximately 12:30 a.m., apparently having taken their own lives by hanging themselves with braided rope made from bed sheets and tee shirts.
>
> Five block guards were on duty at the time of the deaths. Blankets and sheets had been used to obstruct the guards' views and to create the appearance that the detainees were asleep in their cells.
>
> Two of the detainees-- Ali Abdulla Ahmed, from Yemen, (DOB August 1, 1979) and Mana Shaman Allabard al Tabi of Saudi Arabia (DOB Jan 1, 1976) were determined to be dead at the scene.
>
> Lifesaving attempts were begun on the third detainee--Yasser Talal al Zahrani of Saudi Arabia (DOB Dec 26, 1983) who was transported to Naval Hospital Guantanamo where he was pronounced dead a short time later.
>
> The detainees had last been seen alive at approximately 10:00 pm on June 9, 2006.
>
> * * *. Autopsies were performed by physicians from the Armed Forces Institute of Pathology at Naval Hospital Guantanamo on June 10 and 11. The manner of death for all detainees was determined to be suicide and the cause

> of death was determined to be by hanging, the medical term being "mechanical asphyxia."
>
> A short written statement declaring their intent to be martyrs was found in the pockets of each of the detainees.
>
> Lengthier written statements were also found in each of their cells.
>
> Due to similarities in the wording of the statements and the manner of suicides, as well as statements made by other detainees interviewed, there was growing concern that someone within the Camp Delta population was directing detainees to commit suicide and that additional suicides might be imminent. Representatives of other law enforcement agencies involved in the investigation were later told that on the night in question, another detainee (who did not later commit suicide) had walked through the cell block telling people "tonight's the night."
>
> * * *.

Naval Criminal Investigative Service, Statement (2008) (http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/NCISstatement_suicide_investigation.pdf).

2. The government filed a motion to substitute itself for the individual defendants with respect to plaintiffs' ATS claims. In support of that motion, the United States submitted the certification of Phyllis J. Pyles, Director, Torts Branch, United States Department of Justice. Director Pyles certified that "at the time of the conduct alleged in the amended complaint, the * * * individual defendants were

acting within the scope of their employment as employees of the United States." Motion of Substitution, Exh. A.

The government and the individual defendants also filed motions to dismiss the amended complaint.

B. On February 16, 2010, the district court dismissed plaintiffs' amended complaint for failure to state a claim. App. 12-14.

1. As an initial matter, the court held that § 7 of the Military Commissions Act of 2006 removes "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 detained and determined to be an enemy combatant by the United States, and that this jurisdictional bar was applicable to plaintiffs' claims. App. 15-17. The court noted that plaintiffs had conceded that, in 2004, CSRTs were convened and determined that each detainee was an "enemy combatant." App. 16. The court held that plaintiffs' attempt to avoid the statute's plain language, precluding jurisdiction over claims by aliens "determined" by the United States to be "enemy combatants," by criticizing the CSRT process was "baseless." *Ibid*. The court further rejected plaintiffs' argument that the Supreme Court in *Boumediene v. Bush,* 553 U.S. 723 (2008), invalidated § 7 in its entirety. *Ibid*. ("This Court joins the chorus in concluding that *Boumediene*

did not invalidate § 2241(e)(2)"). The district court noted that this "very argument has been addressed by many courts in this jurisdiction and it has been uniformly rejected." *Ibid.*

The court, thus, held that because here, "Al-Zahrani and Al-Salami were determined by properly constituted CSRTs to be enemy combatants, * * * the plain language of § 2241(e)(2) precludes this Court from hearing their claims." App. 16. The court, however, did not rely on this jurisdictional ground in dismissing plaintiffs' claims. In response to defendants' motion to dismiss, plaintiffs argued that, if § 2241(e)(2) barred their money damage claims, that provision would be unconstitutional. The district court said it "need not reach" that constitutional challenge to § 2241(e)(2) because, even assuming *arguendo* that the Court has statutory jurisdiction, plaintiffs' "claims cannot survive defendants' 12(b)(6) motion to dismiss." App. 16.

2. a. The district court held that it would not be proper to recognize a *Bivens* remedy in this context. App. 17. The court explained, the "D.C. Circuit's conclusion [in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.) ("*Rasul II*"), *cert. denied*, 130 S.Ct. 1013 (2009)"] that special factors counsel against the judiciary's involvement in the treatment of detainees held at Guantanamo binds this Court and forecloses it from creating a *Bivens* remedy for plaintiffs here." App. 18.

b. The court further held that, even "if plaintiffs' claims were not foreclosed under the *Bivens* special factors analysis, their claims would fail because under *Rasul II*, defendants would be entitled to qualified immunity." App. 18 n.5. The district court ruled that, "[a]t the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights-under the Fifth Amendment, the Eighth Amendment, or otherwise." *Ibid*. (quoting *Rasul II*, 563 F.3d at 530).

c. The district court held that the United States was properly substituted for the individual officials, pursuant to the Westfall Act, as to plaintiffs' ATS claims. The court explained, "[a]s was the case with the *Bivens* special factors analysis, plaintiffs' attempt to defeat defendants' motion to substitute is foreclosed by binding precedent in this Circuit." App. 19. The court also concluded that all of plaintiffs' non-constitutional claims under the FTCA are barred by that statute's exception to its waiver of sovereign immunity for "any claim arising in a foreign country." App. 21-24.

C. On March 16, 2010, plaintiffs filed a reconsideration motion challenging the availability of a remedy for plaintiffs' *Bivens* claims, the applicability of qualified immunity to individual defendants, and the appropriateness of the government's substitution as defendant. App. 30. Plaintiffs argued that a January

18, 2010 HARPER'S MAGAZINE article written by Scott Horton (App. 43) supported reconsideration of those rulings. App. 26-28. The article purported to relate the accounts from four soldiers who were stationed at Guantanamo at the time of the deaths – Staff Sergeant Joe Hickman, Specialist Tony Davila, Specialist Christopher Penvose, and Specialist David Carroll. Plaintiffs argued that the accounts of the soldiers suggested that Al-Zahrani and Al-Salami did not die in their cells of suicide, but "were transported from their cells to an undisclosed, unofficial 'black site' nicknamed 'Camp No' that was outside the perimeter of the main prison camp, and died there or from events that transpired there." App. 26-27.

In light of the HARPER'S MAGAZINE article, plaintiffs sought to amend their complaint for a second time to include allegations that Al-Zahrani and Al-Salami were "the victims of homicide at the hands of Defendants and their agents." App. 27. Plaintiffs sought to include, *inter alia*, allegations that Al-Zahrani, Al-Salami, and a third prisoner were removed from their cells and taken to "Camp No," where they "were killed or caused severe injury highly likely to cause death and that did indeed soon result in their deaths, including by having rags stuffed down their throats by U.S. officials." App. 27.

D. On September 29, 2010, the district court denied the reconsideration motion. App. 25-42.

1. The district court noted that the "new" material supporting reconsideration was available prior to the court's ruling: "plaintiffs, by their own admission, became aware of the 'new' evidence they now proffer on January 18, 2010, nearly a month prior to the Court's release of its February 16, 2010 Memorandum Opinion." App. 38 n.6. The district court agreed that a Rule 59(e) motion is not intended to be a vehicle for the introduction of evidence that was available earlier. The court, however, said it did not need decide whether the availability of the material earlier was grounds by itself for rejecting the motion, because in any event the motion was "insufficient to warrant reconsideration of its earlier decision." *Ibid.*

2. In rejecting plaintiffs' reconsideration motion, the court noted that plaintiffs' proposed amendments are not evidence—rather, they are allegations based on the HARPER'S MAGAZINE article. App. 34 n.4. The court rejected plaintiffs' assertion that it "must at this procedural stage" accept plaintiffs' "new factual allegations" as true. App. 39. The court explained that the issue presented at this stage was whether the article "'compel[s]' a change in the court's" previous ruling. *Ibid.* The court noted that plaintiffs' new submission at best consists of recollections by individuals who were present at Guantanamo Bay on June 9-10, 2006, but who did not at any time see or interact with Al-Zahrani or Al-Salami or

have any knowledge, first-hand or otherwise, of Al-Zahrani or Al-Salami's treatment. App. 39-40 & n.8.

3. The court went on to explain that, in any event, the new material did not warrant reconsideration of any of the three legal rulings identified by plaintiffs.

a. The court found "that the new evidence and allegations presented by plaintiffs do not change the application of *Rasul II* to this case nor do they compel reconsideration of the Court's dismissal of plaintiffs' constitutional claims." App. 34 "[E]ven if every allegation of 'shocking conduct' in plaintiffs' proposed amended complaint and the HARPER'S MAGAZINE article is true * * *," the court held, "the highly disturbing nature of allegations in a complaint cannot be a sufficient basis in law for the creation of a *Bivens* remedy where special factors counsel hesitation." App. 36. (footnote omitted). The court added:

> The question before the Court is not whether homicide "exceeds the bounds of permissible official conduct in the treatment of detainees in U.S. custody and demands accountability" or whether the families * * * deserve a remedy * * *. Rather, the question is "who should decide whether such a remedy should be provided." The D.C. Circuit unequivocally answered that question when it found that courts "must leave to Congress the judgment whether a damage remedy should exist" in cases involving national security and foreign policy concerns * * *.

Ibid.

b. Likewise, as to qualified immunity, the district court noted "that nothing presented by plaintiffs alters its earlier conclusion that the Circuit's decision in *Rasul II* compels it to find that the individual defendants are protected by the doctrine of qualified immunity. App. 36 n.5.

c. The district court also held there was no basis to reconsider the application of the Westfall Act to plaintiffs' ATS claims. App. 37-41. "Having reviewed these accounts, as well as the rest of the HARPER'S MAGAZINE article," the district court concluded, "nothing therein compels it to reconsider its earlier holding that the individually named defendants were acting within the scope of their employment." App. 39. The court explained, "[p]laintiffs' speculations aside, nothing witnessed by these soldiers or recounted in the article demonstrates that the individually named defendants were not 'on the job' when committing the alleged conduct." App. 40.

4. Finally, the court denied plaintiffs' motion for leave to file an amended complaint. The court explained that in this context – after dismissal of the claims with prejudice – a court "does not evaluate plaintiffs' motion for leave to file an amended complaint separately from plaintiffs' motion for reconsideration." App. 41.

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion in rejecting plaintiffs' Rule 59 reconsideration motion. As the district court explained, the magazine article submitted by plaintiffs did not compel a change in the court's prior ruling dismissing plaintiffs' claims.

A. In granting the motions to dismiss, the district court ruled that special factors counseled against recognition of a common-law damage action in this context of military detention related to an ongoing armed conflict. That ruling was correct and fully supported by binding Circuit precedent. This Court has repeatedly held that if money damage claims are to be allowed by aliens detained by the U.S. military as part of an ongoing military conflict, such a cause of action must be legislated by Congress, and not created by the judiciary. *See Ali v. Rumsfeld*, __ F.3d __, 2011 WL 2462851 *6-*7 (D.C. Cir. June 21, 2011); *Rasul II*, 563 F.3d at 532 n.5.

Moreover, Congress has, by statute, provided a mechanism for persons held by the U.S. military, claiming personal injury or injury to property, to seek monetary redress, but only through a discretionary administrative claim process. Congress has not, however, provided a statutory cause of action, which would allow a person detained by the U.S. military during a war to sue the United States or military

officials for monetary compensation. To the contrary, it has enacted a statute barring such claims, 28 U.S.C. § 2241(e)(2). In this context, thus, it would be wholly inappropriate for a court to recognize a *Bivens* action.

Plaintiffs argue that the district court should have reconsidered its ruling because they claim the new material suggests that all of the defendants were somehow complicit in causing the deaths of Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami. The district court correctly held that this Court's rulings, also addressing allegations of extreme abuse, were not distinguishable. The question here is not how extreme the allegations asserted are. Rather, it is who should decide whether such a damages remedy should be provided in this context.

B. The district court also correctly held, in the alternative, that the *Bivens* claims are barred by qualified immunity. Like the special factors ruling, this issue is controlled by *Rasul II* and *Ali*. This Court held that was not established in 2003 that plaintiffs possessed constitutional Fifth and Eighth Amendment rights. The same is true as to 2006. The Supreme Court's 2008 decision and this Court's rulings confirm that fact.

C. As to plaintiffs' international law claims asserted under the Alien Tort Statute, the district court properly held that the claims were subject to substitution pursuant to the Westfall Act. That holding is also fully supported by *Rasul* and *Ali.*

As in *Rasul* and *Ali*, plaintiffs here contend that the alleged conduct should be exempted from Westfall Act immunity because the Act was not intended to cover violations of *jus cogens* norms or "seriously criminal" conduct. This Court rejected the same argument in *Rasul* and again in *Ali*.

As to plaintiffs' new allegations seeking to implicate all of the defendants in causing the deaths of the decedents, the district court found that plaintiffs new allegations were not adequately supported and did not provide compelling grounds for reconsideration of the Westfall Act ruling. That decision was correct and, plainly, does not amount to an abuse of discretion.

II. The district court did not err in refusing to allow plaintiffs to amend their complaint post dismissal. Where the complaint has been dismissed with prejudice, no amendment is allowed unless the district court finds that the Rule 59(e) reconsideration motion should be granted.

III. The rejection of the reconsideration motion can be affirmed on the alternative ground that the district court lacked jurisdiction over plaintiffs' claims. As the district court found, under the plain terms of 28 U.S.C. § 2241(e)(2), the claims are beyond the subject-matter jurisdiction of the courts. The district court did not dismiss the claim on the basis of these jurisdictional statutes because plaintiffs argued that such a withdrawal of jurisdiction would be unconstitutional and the court determined that it could dismiss all of the claims on other grounds

without addressing that constitutional challenge to the statutes. This Court can likewise affirm without reaching that constitutional challenge, but we respectfully submit that plaintiffs' constitutional arguments are insubstantial and the claims could also be dismissed for want of jurisdiction.

STANDARD OF REVIEW

This Court reviews the district court's denial of plaintiffs' Rule 59(e) reconsideration motion for an "abuse of discretion." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' RECONSIDERATION MOTION.

This appeal challenges the district court's denial of a Rule 59(e) reconsideration motion. As a general rule, Rule 59(e) motions "are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Max S. Baucus*, 153 F.Supp.2d 23, 28 (D.D.C.2001). *See also Lurie v. Mid Atlantic Permanente Medical Group, P.C.*, ___ F.Supp.2d ___, 2011 WL 2120813 (D.D.C. May 31, 2011) ("Rule 59(e) motions are generally granted only in extraordinary circumstances"); *S.E.C. v. Bilzerian*, 729 F.Supp.2d 9, 13, 17 (D.D.C. 2010) (Rule 59(e) is "a rarely used and disfavored remedy"; such motions "are disfavored and

should only be granted in extraordinary circumstances"). As this Court has held, a Rule 59(e) motion "is discretionary" and "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). This Court, therefore, will not disturb the district court's ruling on such a motion, unless it amounts to an abuse of discretion. *Ibid.*

As we detail below, the district court here did not abuse its discretion in finding that the new material submitted by plaintiffs did not warrant reconsideration of the dismissal order.

At the outset, we note that in ruling upon the motion, the court expressly rejected plaintiffs' assertion that it "must at this procedural stage" accept plaintiffs' "new factual allegations" as true. App. 39. The court explained that the issue presented by a reconsideration motion is whether the article "'compel[s]' a change in the court's" previous ruling. *Ibid*. As this Court has held, "reconsideration is only appropriate when 'the moving party shows new facts or clear errors of law which compel the court to change its prior position.'" *Carter v. WMATA*, 503 F.3d 143, 145 n.2 (D.C. Cir. 2007) (quoting *Nat'l Ctr. for Mfg. Sci. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000)).

Here, the district court did not abuse its discretion in ruling that plaintiffs did not meet that standard as a legal or factual matter. Plaintiffs' new submission was not itself admissible evidence. Rather, it was, at best, a reporter's version of the recollections of individuals who were allegedly present at Guantanamo Bay on June 9-10, 2006, but "who did not at any time see or interact with Al-Zahrani or Al-Salami or have any knowledge, first-hand or otherwise, of Al-Zahrani or Al-Salami's treatment." App. 39. The hearsay accounts in the article of van movements, second-hand reports, baseless speculation about a secret "Camp No," and frenzied reactions at Guantanamo in reaction to the deaths hardly amount to compelling evidence warranting reconsideration of the district court's dismissal of plaintiffs' claims.[5]

The district court, in any event, did not abuse its discretion in holding that, as a legal matter, the new material and allegations did not warrant reconsidering the

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[5] The Department of Defense and the Department of Justice both took the allegations in the article seriously, investigated the matter throughly, and found no evidence of any wrongdoing. *See* CBS News, "Questions Raised Over Gitmo Deaths," http://www.cbsnews.com/stories/2010/01/18/politics/main6111811.shtml (Jan. 18, 2010) (quoting Justice Department spokesperson Laura Sweeney, "[a] number of department attorneys extensively and thoroughly reviewed the allegations and found no evidence of wrongdoing"). There have been numerous articles addressing serious flaws with the HARPER'S MAGAZINE story, *see e.g.*, Alex Koppelman, *The National Magazine Award and Guantánamo: A Tall Tale Gets the Prize*, Adweek.com (May 23, 2011) (http://www.adweek.com/print/131768), which are collected in this internet posting: Benjamin Wittes, *Speechless*, Lawfare (May 23, 2011) (http://www.lawfareblog.com/2011/05/speechless/).

dismissal of plaintiffs' claims. As the court explained, each of its prior legal rulings was controlled by Circuit precedent, and the new material would not alter that fact.

A. The District Court Did Not Abuse its Discretion in Refusing to Reconsider its Ruling That it Would Be Improper to Recognize a *Bivens* Damages Action in the Context of Military Detention Related to an Ongoing Armed Conflict.

The district court dismissed plaintiffs' *Bivens* claims on the ground that a court should not, on its own, recognize a private damages action in this context. App. 17-18. That ruling was correct and is fully supported by controlling Circuit precedent. The court clearly did not abuse its discretion in rejecting plaintiffs' request to reconsider this ruling.

1. This Court has repeatedly held that if money damage claims are to be allowed by aliens held by the U.S. military abroad as part of an ongoing military conflict, such a cause of action must be legislated by Congress, and not created by the judiciary. *See Ali v. Rumsfeld*, __ F.3d __, 2011 WL 2462851 *6-*7 (D.C. Cir. June 21, 2011); *Rasul II*, 563 F.3d at 532 n.5. Where, as here, there are special considerations or sensitivities raised by a particular context, "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 v. Robbins*, 551 U.S. 537, 562 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)). In any such legislation, Congress could "tailor any remedy," and take steps to reduce the possible harmful

effects of such civil damage claims. *Wilkie*, 551 U.S. at 562. But in the absence of such legislation, courts may not extend private rights for damage actions against federal officials in this context. *Cf. Arar v. Ashcroft*, 585 F.3d 559, 581 (2d Cir. 2009) (*en banc*) ("if Congress wishes to create a remedy for individuals * * *, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded"), *cert. denied*, 130 S.Ct. 3409 (2010).

As the district court explained, the question here "is not whether homicide 'exceeds the bounds of permissible official conduct in the treatment of detainees in U.S. custody and demands accountability' or whether the families * * * deserve a remedy." App. 36. Rather, the question in this civil action is "who should decide whether such a remedy should be provided." *Ibid.* This Court has "unequivocally answered that question" – holding that courts "must leave to Congress the judgment whether a damage remedy should exist" in this context. App. 36 (quoting *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985)); *see also Sanchez–Espinoza*, 770 F.2d at 208 ("special factors" counseling such hesitation "relate not to the merits of the particular remedy, but 'to the question of who should decide whether such a remedy should be provided'") (quoting *Bush*, 462 U.S. at 380).

Of course, where there is "'any alternative, existing process for protecting' the plaintiff's interests, such an alternative remedy would raise the inference that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and freestanding remedy in damages.'" *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1120 (9th Cir. 2009) (quoting *Wilkie*, 551 U.S. at 550, 554). Congress has in fact, by statute, provided a mechanism for persons held by the U.S. military, claiming personal injury or injury to property, to seek monetary redress, but only through a discretionary administrative claim process.[6] Congress has not, however, provided a statutory cause of action, which would allow a person detained by the U.S. military during a war to sue the United States or military officials for monetary compensation for alleged injuries.

To the contrary, Congress has expressly barred such claims under the facts alleged by plaintiffs here. As we discuss further below (pp. 50-54), Section 7 of the MCA, 28 U.S.C. § 2241(e)(2), removes "jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention,

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[6] *See* Military Claims Act, 10 U.S.C. § 2733; Foreign Claims Act, 10 U.S.C. § 2734. *See also* 32 C.F.R. 536.76(g) and 536.138(h) (claims should not be paid where it is not in the best interests of the United States, is contrary to public policy, or is otherwise contrary to the basic intent of the governing statute (10 U.S.C. §§ 2733, 2734)); 32 C.F.R. 536.76(g) and 536.138(i) (a prisoner of war or an interned enemy alien is not excluded as to a claim for damage, loss, or destruction of personal property in the custody of the Government otherwise payable).

transfer, treatment, trial, or conditions of confinement" of an alien detained and "determined by the United States to have been properly detained as an enemy combatant." As the district court recognized, this jurisdictional bar, by its plain terms, is applicable to plaintiffs' claims.[7] App. 15-16.

In *Bivens* itself, the Supreme Court noted that a damage remedy was only appropriate in that case because there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-97. Here, we not only have special factors counseling hesitation; we also have a clear "affirmative action by Congress" – an action that plainly bars a judicially-created damage remedy. That legislative bar should be dispositive both as to jurisdiction (*see* pp. 50-54, *infra*) and as to the question of whether the courts should on their own recognize a common-law damage action in this miliary detention context.

2. Even if 28 U.S.C. § 2241(e)(2) is put to the side, the district court here still correctly held, and did not abuse its discretion in refusing to reconsider its holding, that it would be inappropriate to recognize a *Bivens* damage action in the context of military detention related to an ongoing armed conflict.

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[7] The district court found that plaintiffs conceded that in 2004, the government, through the CSRTs, determined that Al-Zahrani and Al-Salami each were properly detained as an "enemy combatant." App. 15.

a. In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009). The *Bivens* Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a domestic warrantless search of the plaintiff's home. In creating that common law action, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-97.

Subsequent to *Bivens*, the Supreme Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). *See Western Radio Services Co.*, 578 F.3d at 1119-20. Indeed, in "the 38 years since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson* [*v. Green*, 446 U.S. 14 (1980)]." *Arar*, 585 F.3d at 571. *See also Wilson v. Libby*, 535 F.3d 697, 705 (D.C. Cir. 2008). In most instances, however, the Court has "found a *Bivens* remedy unjustified." *Wilson*, 535 F.3d at 705 (quoting *Wilkie*, 551U.S. at 550). Indeed, "the Supreme Court has 'consistently

refused to extend *Bivens* liability to any new context or new category of defendants.'" *Western Radio Services Co.*, 578 F.3d at 1119 (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). "The [Supreme] Court has focused increased scrutiny on whether Congress intended the courts to devise a new *Bivens* remedy, and in every decision since *Carlson*, across a variety of factual and legal contexts, the answer has been 'no.'" *Western Radio Services Co.*, 578 F.3d at 1119.

The Supreme Court has explained that, because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," if it is to be exercised at all, it must be undertaken with great caution. *Malesko*, 534 U.S. at 67-70. In *Malesko*, the Supreme Court observed that, in *Bivens*, the Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes," decisions from which the Court has since "retreated" and that reflect an understanding of private rights of action that the Court has since "abandoned." 534 U.S. at 67 & n.3. "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly v. Scott*, 434 F.3d 287, 220 (4th Cir. 2006) (internal quotation marks omitted). *See also Iqbal*, 129 S.Ct. at 1948 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"); *Sosa v.*

Alvarez Machain, 542 U.S. 692, 727 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"). The Eighth Circuit has described the Supreme Court's recent decisions as erecting a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees." *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (internal quotation marks omitted).

In *Wilkie v. Robbins*, the Supreme Court made clear that courts should hesitate to fashion a *Bivens* remedy, even in the absence of an "alternative, existing process." 551 U.S. at 550. The Supreme Court explained that, in deciding whether to permit a *Bivens* action, courts still must make an assessment "appropriate for a common-law tribunal" and should "pay[] particular heed * * * to any special factors counseling hesitation." *Ibid*. And where there are special considerations and sensitivities raised by the particular context, a court must refrain from, on its own, creating a money damage remedy. In such a context, "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," and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Id.* at 562.

b. The district court did not abuse its discretion in rejecting plaintiffs' request for it to reconsider its ruling that special factors counsel against recognition of a common-law damage action in this context of military detention related to an ongoing armed conflict. Even outside the context of implied *Bivens* actions, the courts generally recognize that matters intimately related to war and "national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (court cannot adjudicate claims brought by Turkish sailors alleging injuries and wrongful death suffered as a result of missiles fired by a United States Navy vessel during North Atlantic Treaty Organization training exercises).

In some exceptional instances not applicable here, the courts are required, by constitutional necessity or by a clear grant of authority by Congress, to adjudicate matters directly pertaining to war and national security. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The general rule, however, as stated by the Supreme Court in *Dep't of Navy v. Egan*,

484 U.S. 518, 530 (1988), is that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[8]

Given this well-established general rule, and given the strong presumption, discussed above (pp. 27-29), against extending *Bivens* actions to new and sensitive contexts, it is hardly surprising that courts have deemed it inappropriate to fashion a common-law *Bivens* money-damages remedy in contexts directly implicating separation of powers, armed conflict and/or national security. *See United States v. Stanley*, 483 U.S. 669, 682 (1987) ("the Constitution confers authority over the Army, Navy, and militia upon the political branches. All this counsels hesitation in our creation of damages remedies in this field"); *id.* at 683 ("where a claim raises

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[8] Refusal of a court to, on its own, create a damage-remedy cause of action directly implicating matters of war and national security, however, "does not leave the executive power unbounded." *Schneider v. Kissinger*, 412 F. 3d 190, 200 (D.C. Cir. 2005). As noted above, in this context Congress, while barring a court damage action here, has provided an administrative review process that can provide compensation, on a discretionary basis, to persons detained by the U.S. military. And even if the aggrieved party may have no remedy for damages, "[i]f the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Ibid.* Moreover, Executive Branch officials face the prospect of court martial and/or federal criminal charges if they are involved in torture, murder or obstruction of justice. Here, after an extensive criminal investigation, it was determined that such charges were not warranted. We note that in cases of detainee abuse, such as in the circumstances of the Abu Ghraib prison in Iraq, there have been numerous charges and court martial convictions.

separation of powers concerns, "it is irrelevant to a special factors analysis whether the laws currently on the books afford * * * an adequate federal remedy"); *Arar*, 585 F.3d at 574-75 ("[i]t is a substantial understatement to say that one must hesitate before extending *Bivens* into such a context"); *Wilson v. Libby*, 535 F.3d at 710 ("if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994) ("The unreviewability of the security clearance decision is a 'special factor counselling hesitation,' which precludes our recognizing a *Bivens* claim"); *Sanchez Espinoza*, 770 F.2d at 205 (refusing to recognize a *Bivens* action against "military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.").

And, as to specific issue of whether a court should provide a damage action to former military detainees or their estates suing military officials regarding their treatment in military detention related to an ongoing armed conflict, this Court's rulings could not be more clear. This Court has repeatedly held that if such a damage action is to be allowed in that military detention context, it must come from Congress and not from the courts acting on their own. *See Ali*, 2011 WL 2462851 at *6-*7; *Rasul II*, 563 F.3d at 532 n.5.

In *Rasul v. Meyers*, this Court held that it would be improper to recognize a *Bivens* action to adjudicate money damages claims asserted by former military detainees, claiming, *inter alia*, torture and abuse caused by federal officials. *Rasul II*, 563 F.3d at 532 n.5 ("federal courts cannot fashion a *Bivens* action when 'special factors' counsel against doing so * * *. The danger of obstructing U.S. national security policy is one such factor."). Recently, in *Ali v. Rumsfeld*, 2011 WL 2462851, this Court reaffirmed and explained the *Rasul II* special factors ruling.

The *Ali* plaintiffs were Afghan and Iraqi citizens formerly detained by the U.S. military in Afghanistan and Iraq. They asserted *Bivens* claims against the former Secretary of Defense and other military officials, seeking redress for alleged torture, death threats, mock executions, rape, sexual assaults and other abuse. *Ali* at *3-*5. This Court, adhering to *Rasul II*, held it would be improper for the courts on their own to recognize "a *Bivens* action to be brought [by military detainees] against American military officials engaged in war." *Ali at* *18. This Court quoted the Supreme Court's reasoning from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that permitting such trials would "hamper the war effort and bring aid and comfort to the enemy." *Ali* at *19 (quoting *Johnson*, 339 U.S. at 779). The *Ali* Court further quoted *Johnson:* "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from

the military offensive abroad to the legal defensive at home." *Ibid.* (quoting *Johnson*, 339 U.S. at 779).

This Court in *Ali* also relied upon *Sanchez–Espinoza v. Reagan*, where this Court refused to recognize "damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Ali* at *19 (quoting *Sanchez–Espinoza*, 770 F.2d at 209). The Court noted that the claims in *Sanchez–Espinoza* were likewise of an extreme nature, including allegations that U.S. officials "authorized, financed, trained, directed and knowingly" supported "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities." *Ali* at *19 (quoting *Sanchez–Espinoza*, 770 F.2d at 205).

Ali noted that, in *Sanchez–Espinoza*, this Court, notwithstanding the extreme allegations of torture and murder, concluded that "we must leave to Congress the judgment whether a damage remedy should exist." 770 F.2d at 209. *Ali* held that there was "no basis" for reaching a different result in regard to claims of extreme abuse alleged by military detainees against U.S. officials. *Ali* at *19. Thus, this Court has consistently declined "to sanction a *Bivens* cause of action" brought by military detainees against military officials because "special factors counsel against doing so." *Ali* at *20.

c. Given *Rasul II* and *Ali*, the district court ruling dismissing the *Bivens* claims here based on special factors is plainly correct and is, indeed, mandated by Circuit precedent. In their brief on appeal, plaintiffs provide no legitimate basis for avoiding the force of these controlling Circuit precedents. They argue that *Rasul II*'s special factors holding should be read in a limited fashion because it was only in a "brief footnote." Pl. Br. 19-22. That is, of course, not a basis for ignoring Circuit precedent. In any event, *Ali* has reiterated and expanded upon *Rasul II*'s special factors holding and made clear that it was not limited to the precise circumstances of that case. *Ali* establishes that a court may not on its own furnish a damage action for alien military detainees held overseas during an ongoing armed conflict to sue military officials for money damages. *Ali* at *18-*20. Given the national security considerations involved, including the concerns raised in *Johnson v. Eisentrager* quoted by this Court in *Ali*, if a judicial damage action is to be afforded it must come from Congress, and not from the courts acting on their own.

Thus, under binding Circuit precedent, the district court correctly held that context of military detention in an ongoing armed conflict presents special factors (relating to national security, separation of powers, and foreign affairs) that preclude a court from, on its own, authorizing a *Bivens* money damage action. Moreover, here, as discussed above (pp. 24-25 & n.6), we do not simply have Congressional inaction. Rather, we have Congress examining the issue and deciding to provide

only a limited discretionary administrative claim process. Furthermore, Congress expressly barred just this type of damage action brought on behalf of those who were determined by the United States to be properly detained as "enemy combatants." 28 U.S.C. § 2241(e)(2). In the face of those legislative actions, plaintiffs' arguments in favor of a court-created damage action in this context ring hollow.

Finally, plaintiffs argue that the district court should have reconsidered its ruling because they claim the new material suggests that all of the defendants were somehow complicit in causing the deaths of Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami. The district court correctly held that this Court's rulings, which have addressed allegations of extreme abuse, including torture, were not distinguishable. Notably, in *Ali*, this Court (faced with allegations of torture, rape, and mock executions) cited and relied upon the special factors holding of *Sanchez–Espinoza*, where the claims included allegations that U.S. officials "authorized, financed, trained, directed and knowingly" supported "summary execution" and "murder." Thus, the question here is not how extreme the allegations are. Rather, the question is, in the context of an ongoing armed conflict, "'who should decide whether such a remedy should be provided.'" *Sanchez–Espinoza*, 770 F.2d at 208 (quoting *Bush*, 462 U.S. at 380). This Court has correctly held that as to claims by aliens held by the military as belligerents

overseas during an armed conflict, courts must look to Congress before providing a damage action. Plaintiffs' arguments in favor of ignoring both that binding precedent and Congress' clear intent to bar such actions are without merit. Accordingly, the district court's ruling was not an abuse of discretion and should be affirmed.

B. The District Court Did Not Abuse its Discretion in Denying Plaintiffs' Request to Reconsider its Qualified Immunity Holding.

The district court also held, in the alternative, that plaintiffs' *Bivens* claims are barred by qualified immunity.[9] Like the special factors ruling, this issue is controlled by *Rasul II* and *Ali*. *Rasul* held that, even if plaintiffs could assert constitutional rights, the military official defendants were entitled to qualified immunity because it was not clearly established in 2003 that nonresident aliens detained by the military at Guantanamo held the Fifth and Eighth Amendment rights claimed by the plaintiffs. *Rasul v. Myers*, 512 F.3d 644, 665-67 (D.C. Cir. 2008) (*Rasul I*);[10] *Rasul II*, 563 F.3d at 530-32. Likewise, *Ali* held that qualified

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[9] Plaintiffs call this legal ruling dicta, Pl. Br. 23, but it was plainly an alternative holding of the court. App. 18-19 n.5, 36.

[10] *Rasul I* was vacated and remanded by the Supreme Court (*Rasul v. Myers*, 129 S.Ct. 763 (2008)). This Court in *Rasul II*, however, thereafter adopted this aspect of the *Rasul I* opinion. *See Rasul II*, 560 F.3d 530 ("Our vacated opinion explained why qualified immunity insulates the defendants from plaintiffs' *Bivens* claims. *Rasul I*, 512 F.3d at 665–67. *Boumediene* does not affect what we wrote.")

immunity barred any *Bivens* clams as it was "not clearly established in 2004 that the Fifth and Eighth Amendments app[ied] to aliens held in Iraq and Afghanistan." *Ali* at *4.

As the district court held, that same rationale applies to the acts allegedly undertaken here in 2006. App. 18-19 n.5. While plaintiffs point to *Boumediene v. Bush*, 553 U.S. 723 (2008), as supporting their argument, that case was decided <u>two years after</u> the events underlying this case. Moreover, in that 2008 ruling, the Supreme Court stated it was not addressing whether the detainees possess other constitutional rights, other than the habeas right. *Id.* at 798. *See also Kiyemba v. Obama*, 555 F.3d 1022, 1032 (D.C. Cir. 2009) ("as the [Supreme] Court recognized, it had never extended any constitutional rights to aliens detained outside the United States; *Boumediene* therefore specifically limited its holding to the Suspension Clause"), *vacated and remanded,* 130 S.Ct. 1235, *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010). While the Supreme Court treated Guantanamo as *de facto* sovereign territory, the B*oumedien*e Court also squarely recognized that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have *any rights* under our Constitution." 553 U.S. at 770 (emphasis added). *See United States of America v. Hamdan*, No. 09-002, slip op. at 80 (USCMCR June 24, 2011) (*en*

banc). Thus, B*oumedien*e confirms that the plaintiffs' constitutional rights asserted here were not clearly established in 2006.

Plaintiffs argue here that a reasonable person would have been on notice that "torture and arbitrary killing * * * was unconstitutional." Br. 28. In *Rasul,* this Court emphasized that "[t]he issue we must decide * * * is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established at the time." 512 F.3d at 666 (emphasis in original). This Court stated that no legal authority could "support a conclusion that military officials would have been aware, in light of the state of the law at the time [2003], that detainees [in Cuba] should be afforded the [constitutional] rights they now claim." *Ibid.* (quotation marks omitted). That holding controls here as well.

As evidence that the law was clearly established, plaintiffs cite (Br. 31 n.15) to one district court judge's ruling from 2005 recognizing a Fifth Amendment right in a Guantanamo case *(In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005)). Yet plaintiffs ignore the fact that, the very same year, Judge Leon reached the opposite result. *See Khalid v. Bush*, 355 F.Supp.2d 311, 320 (D.D.C. 2005). Judge Leon stated that, under both *Eisentrager* and "Circuit Court" precedent, an alien, without property or presence in this country, had "no constitutional rights, under the due process clause or otherwise." *Id.* at 320-323. Judge Leon specifically addressed *Rasul v. Bush*, 542 U.S. 466 (2004), cited by

plaintiffs here, which held that the Guantanamo detainees had a statutory habeas right:

> Nothing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny. The Supreme Court majority in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to a judicial review of the legality of their detention under the habeas statute * * * and, therefore, did not concern itself with whether the petitioners had any independent constitutional rights.

Khalid, 355 F.Supp.2d at 322-323. This Court thereafter *affirmed* Judge Leon's ruling. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *reversed* (limited to constitutional habeas jurisdiction ruling), 553 U.S. 723 (U.S. 2008). Thus, whatever one's view of the merits question, it was hardly "clearly established" in 2006 that the alien detainees at Guantanamo had Fifth Amendment and Eighth Amendment rights under the U.S. Constitution.

Indeed, it remains binding Circuit precedent today that the Guantanamo detainees do not have constitutional due process rights. *See Kiyemba*, 555 F.3d at 1026-27 (D.C. Cir. 2009), *vacated and remand,* 130 S.Ct. 1235, *reinstated*, 605 F.3d 1046 (D.C. Cir.), *cert. denied*, 130 S.Ct. 1880 (2010). *See also Al Madhwani v. Obama*, __ F.3d __, 2011 WL 2083932, *5 (D.C. Cir. May 27, 2011). While plaintiffs argue that this Court's more recent decisions are wrong and should be reconsidered, there is no legitimate argument that it was clearly established in 2006

that plaintiffs possessed Fifth and Eighth Amendment rights. Given that the constitutional rights asserted here were not clearly established in 2006, the district court correctly held that the constitutional claims here are bared by qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question," reasonable officials could also disagree and immunity bars the damage claim). *See also Ashcroft v. al Kidd,* 131 S.Ct. 2074, 2085 (2011) (the defendant "deserves qualified immunity not least because eight Court of Appeals judges agreed with his judgment in a case of first impression").

B. The district court properly employed the discretion permitted by *Pearson v. Callahan*, 129 S.Ct. 808 (2009), and decided the qualified immunity issue without reaching the question of whether plaintiffs here possess constitutional Fifth and Eighth Amendment rights, and this Court should do likewise. Indeed, that was the approach adopted by this Court in *Rasul II* and again recently in *Ali*. This Court in *Ali* explained that reaching the underlying constitutional issue, when deciding the right to qualified immunity, "is not appropriate in most cases." *Ali* at *6. Resolving the *Bivens* claims without unnecessarily deciding the constitutional issue is consistent with the well-established rule that courts should avoid deciding difficult or novel constitutional claims where the issues can be more easily resolved on non-constitutional grounds. *See Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J.,

concurring). *See also Pearson v. Callahan*, 129 S.Ct. at 821 (citing the avoidance principle in recognizing that a court ruling on a claim of qualified immunity may decide the case without resolving the constitutional issue). As the Supreme Court recently explained, "our usual adjudicatory rules suggest that a court should forbear resolving this issue" because a "'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Camreta v. Greene*, 131 S.Ct. 2020, 2031 (2011). *See also Pearson*, 129 S.Ct. at 820 (concerns about unnecessarily addressing constitutional issues when doing so "may have a serious prospective effect on [the affected party's] operations").

Given that, under like circumstances as those presented here, this Court in *Rasul II* and *Ali* held that it would not be appropriate to reach the merits of whether plaintiffs possessed Fifth and Eighth Amendment rights and whether those rights were violated, plainly the district court did not abuse its discretion in adhering to that same approach. If this Court were to reach the constitutional issue, however, the law of the Circuit is clear. After *Boumediene v. Bush*, *supra*, this Court reaffirmed that the binding law of the Circuit remains that nonresident aliens detained outside of the United States have no constitutional due process rights. *See* p. 39, *supra.*

C. The District Court Did Not Abuse its Discretion in Denying Plaintiffs' Request to Reconsider its Holding That Plaintiffs' International Law Claims Are Subject to Substitution under the Westfall Act.

As to plaintiffs' international law claims asserted under the Alien Tort Statute, the district court properly held that the claims were subject to substitution pursuant to the Westfall Act, 28 U.S.C. § 2679. That holding is fully supported by *Rasul* and *Ali.* Clearly, the court's rejection of plaintiffs' reconsideration motion in regard to this claim was not an abuse of discretion.

A. Under the Westfall Act, the Federal Tort Claims Act is "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." *See Rasul I*, 512 F.3d at 655 (quoting 28 U.S.C. § 2679(b)(1)).[11] If the Attorney General, or his designee, certifies that an employee was acting within the scope of federal employment at the time of the relevant alleged incident, by operation of law, 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). The Attorney General's certification is entitled to "'prima facie effect," and it is the plaintiff's burden to show that the defendant

[11] *See also Rasul II*, 563 F.3d at 528-29 (reinstating *Rasul I*'s ruling on the customary international law and treaty claims).

was not acting within the scope of his employment. *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). Unless the court determines that the plaintiff has carried this burden, "the employee becomes absolutely immune from actions for money damages arising from the same incident; plaintiff's only recourse is to proceed against the federal government under the Federal Tort Claims Act." *Haddon v. United States*, 68 F.3d 1420, 1422-23 (D.C. Cir. 1995). That is true whether or not defenses under the FTCA would preclude judgment against the United States. *United States v. Smith*, 499 U.S. 160, 166 (1991); *see* 28 U.S.C. § 2679(d)(4).

Applying District of Columbia law,[12] and based on plaintiffs' own allegations in their first amended complaint that defendants' alleged abusive treatment of the detainees was undertaken "pursuant to standard operating procedures" and was "use[d] in connection with interrogations at Guantanamo," App. 20 (quoting Amended Compl. ¶¶ 57, 61), the district court here held that plaintiffs failed to overcome the scope of employment certification. The court held that, under plaintiffs' allegations, defendants' alleged conduct was "incidental to the

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[12] Under the Westfall Act, the scope "of office or employment" issue is determined by reference to local *respondeat superior* law, *see Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003), which the district court held (and which plaintiffs do not contest) is District of Columbia law in this case.

defendants' positions as military, medical, or civilian personnel in connection with Guantanamo and accordingly falls within the scope of their employment." App. 20.

That holding is correct. Indeed, it is mandated by and fully supported by this Court's *Rasul* and *Ali* decisions.

In *Rasul*, this Court held that the Westfall Act applies to customary international law claims, asserted under the Alien Tort Statute, of torture and abuse brought by nonresident alien detainees against military officers because the alleged wrongful acts were "tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein." 512 F.3d at 658 (internal quotation marks omitted). The alleged torts therefore were, for the purposes of the Westfall Act, "incidental to the defendants' legitimate employment duties" in detaining and interrogating suspected enemy combatants. *Id.* at 659.[13] This Court held that "the underlying conduct — here, the detention and interrogation of suspected enemy combatants — is the type of conduct the defendants were employed to engage in." *Id.* at 658.

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[13] As this Court subsequently explained in *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), this aspect of the *Rasul* decision rested in large part "on several D.C. cases holding that seriously criminal and violent conduct can still fall within the scope of a defendant's employment under D.C. law-including sexual harassment, a shooting, armed assault, and rape." *Harbury*, 522 F.3d at 422. *See also id.* at 422 n.4 ("The scope-of-employment test often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort").

Even more recently, this Court in *Ali* likewise held that claims of torture and abuse brought by military detainees against Defense Department officials were subject to substitution under the Westfall Act. This Court discussed *Rasul* and held that, although plaintiffs "plainly alleged 'seriously criminal' conduct," it was nonetheless covered "wrongful" conduct that was "incidental to authorized conduct." *Ali* at *7.

This Court's rulings in *Rasul and Ali* fully support the district court's Westfall Act holding here. As this Court held in *Rasul*: "[T]he underlying conduct-here, the detention and interrogation of suspected enemy combatants-is the type of conduct the defendants were employed to engage in * * *. [T]he detention and interrogation of suspected enemy combatants is a central part of the defendants' duties as military officers charged with winning the war on terror * * *. While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who [acted] * * * for reasons unrelated to the gathering of intelligence." 512 F.3d at 658-59. Likewise here, in their amended complaint, plaintiffs alleged that:

> Decisions and acts by Defendants ordering, authorizing, implementing, facilitating, encouraging, condoning, turning a blind eye to, acquiescing in, and/or committing the alleged acts reached from the highest levels of the government down the military chain of command. On information and belief, approval for prolonged arbitrary detention, acts of torture, cruel, inhuman or degrading

> treatment, deprivations of due process, and denial of adequate medical care emanated under color of law from orders, approvals, and omissions occurring in the Pentagon, numerous government agencies * * *.

Amended Compl. ¶ 193. Based on these allegations, which are very similar to those in *Rasul* and *Ali*, the district court correctly found this matter controlled by D.C. Circuit precedent.

In their reconsideration motion, plaintiffs attempted to plead their way around this Court's precedents by adding a new allegation that defendants "acted outside of official policies and standard procedures in the infliction of th[e] abuses." App. 122. They also assert that the deaths were not the result of suicide, that defendants were responsible for causing the deaths, and that defendants were complicit in a massive cover-up. The district court did not abuse its discretion in concluding that these new allegations were not adequately supported and did not in any event warrant reopening the case.

Even under the new allegations, plaintiffs assert that the "acts described herein were carried out under the actual or apparent authority or color of law." App. 121. Moreover, as the district court found, the sole new item relied upon by plaintiffs, the magazine article, did not amount to compelling evidence supporting the new allegations:

> Plaintiffs' new evidence consists of recollections by individuals who were present at Guantanamo Bay * * *,

> but who did not at any time see or interact with Al-Zahrani or Al-Salami or have any knowledge, first-hand or otherwise, of Al-Zahrani or Al-Salami's treatment.

App. 39. "Having reviewed these accounts, as well as the rest of the HARPER'S MAGAZINE article," the district court concluded, "nothing therein compels it to reconsider its earlier holding that the individually named defendants were acting within the scope of their employment in their dealings with Al-Zahrani and Al-Salami." *Ibid.* "Specifically," the court determined, "nothing presented in the article rebuts the certification submitted by AUSA Pyles or materially disputes her certification, as none of the observations by Hickman, Penvose, Davila, and Carroll are inconsistent with the conclusion that defendants were acting within the scope of their duties in connection with their 'positions as military, medical, and civilian personnel in connection with Guantanamo.'" App. 40 (footnote omitted).

This considered assessment of the new material is owed substantial deference and should be affirmed.

B. As in *Rasul* and *Ali*, plaintiffs here contend that the alleged conduct should be exempted from Westfall Act immunity because the Act was not intended to cover violations of *jus cogens* norms (such as the prohibition against torture) or "seriously criminal" conduct. This Court rejected this same argument in *Rasul*. *See* 512 F.3d at 658-60. That decision is correct and controlling here.

As an initial matter, plaintiffs' argument runs directly counter to the language of the Westfall Act itself. That statute applies to any action "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." 28 U.S.C. § 2679(b)(1). Under this plain language, "wrongful" conduct is covered by the Act. "[E]gregious or seriously criminal acts" are, of course, "wrongful" conduct by any definition, and therefore fall within the ambit of the statute. Indeed, as this Court has recognized, "if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be completely abrogate[d].'" *Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (internal quotations omitted). *Cf. Duffy v. United States*, 966 F.2d 307, 313 (7th Cir. 1992) ("We are unwilling to accept that intentional torts do not fall under the rubric of wrongful acts."). Congress could have added an exception to the Westfall Act for all seriously criminal or egregious torts. It did not do so, and this Court must apply the statutory language enacted, not the language that plaintiffs or the amicus wish had been enacted.

In any event, plaintiffs' argument is foreclosed by *Rasul* and *Ali*. The *Rasul* Court explained that, under the relevant standard, if the alleged serious criminal conduct was triggered or motivated or occasioned by the conduct of the employer's

business, it is covered by Westfall Act immunity. *See Rasul I*, 512 F.3d at 660. Because the conduct alleged in *Rasul* was not wholly "personal" and was related to the defendants' official duties, this Court held that "the allegations of serious criminality do not alter our conclusion that the defendants' conduct was incidental to authorized conduct," and therefore subject to Westfall Act immunity. *Ibid*.[14] Moreover, *Rasul*'s holding that Westfall immunity is not foreclosed by allegations of torture or other serious criminal conduct, was thereafter reaffirmed in *Harbury v. Hayden*, 522 F.3d at 421-22, and *Ali*. Accordingly, plaintiffs' arguments are without merit, and the district court's refusal to reopen the claims upon plaintiffs' reconsideration motion was not an abuse of discretion.

II. THE DISTRICT COURT PROPERLY REJECTED THE MOTION TO AMEND THE COMPLAINT POST-DISMISSAL WITH PREJUDICE.

Plaintiffs contend that the district court erred in failing to allow them to amend their complaint. They argue that, as a general rule, a plaintiff should freely be granted leave to amend. Br. 50. Here, of course, not only were plaintiffs seeking to

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[14] *See also Bancoult v. McNamara*, 445 F.3d 427, 429, 431, 437 (D.C. Cir. 2006) (where the Court had "little trouble rejecting the claim that Appellees' acts fell outside the scope of their employment," despite "serious allegations" of criminal and international law violations); *Gonzalez Vera v. Kissinger*, 449 F.3d 1260, 1261, 1264 (D.C. Cir. 2006) (where the Court specifically rejected the contention that the defendant acted "outside the scope of his employment" notwithstanding allegations of *jus cogens* international law violations).

amend their complaint for the second time, they were doing so one month after their amended complaint had been dismissed with prejudice. It is firmly established that the Rule 15(a) standard (that leave to amend "shall be freely given when justice so requires") does not apply after the complaint is dismissed with prejudice. *See Firestone*, 76 F.3d at 1208. In the present context, where the complaint has been dismissed with prejudice, no amendment is even allowed unless the district court finds that the Rule 59(e) reconsideration motion should be granted. *Ibid.* ("Appellants must first satisfy Rule 59(e)'s more stringent standard"). Thus, the only relevant issue on appeal is whether "the district court abused its discretion in failing to vacate the original dismissal with prejudice." *Ibid.* For all of the reasons set forth above, there was no abuse of discretion.

III. THERE IS NO SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

The rejection of the reconsideration motion can be affirmed on the alternative ground that the district court lacked jurisdiction over plaintiffs' claims.

Section 7 of the MCA, codified at 28 U.S.C. § 2241(e), bars statutory jurisdiction over plaintiffs' claims.

Under 28 U.S.C. § 2241(e)(2),

> no court * * * shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, * * * treatment * * *, 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.

Plaintiffs' claims fall plainly within the terms of this statute. Their claims relate to the detention, treatment, and conditions of confinement of Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami. As plaintiffs' complaint states, Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami were aliens detained by the United States, and the United States determined through CSRTs that they were properly detained as "enemy combatants."[15] App. 16. Thus, as the district court found (App. 16), under the plain terms of the statute, plaintiffs' claims are beyond the subject matter jurisdiction of the courts.[16]

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[15] The United States no longer relies on CSRTs as the process under which detainees at Guantanamo may challenge the lawfulness of their detention. Since the Supreme Court's decision in *Boumediene v. Bush,* 553 U.S. 723 (2008), all military detainees at Guantanamo may challenge their detention in habeas proceedings in federal court. The CSRT process, however, was the process in place at the time Congress enacted the MCA and clearly was a process Congress contemplated when crafting § 7. As the district court held, individuals found to be "enemy combatants" through the CSRT process are plainly among the individuals for whom Congress intended to bar such claims.

[16] As the district court held, this portion of the MCA remains intact, even after *Boumediene* struck down the habeas-stripping portion of the MCA. *See Khadr v. Bush*, 587 F.Supp.2d 225, 235-36 (D.D.C. 2008) ("*Boumediene* invalidated only section 2241(e)(1), but not section 2241(e)(2)"); *In re Guantanamo Bay Detainee Litig*., 577 F.Supp.2d 312, 314 (D.D.C. 2008) ("Cognizant of the long-standing rule of severability, this Court, therefore, holds that [§ 2241(e)(2)] remains valid"). As the district court here stated, "[p]laintiffs' response that *Boumediene* struck down MCA § 7 in its entirety has been rejected not only by judges of this Court, but also by the D.C. Circuit." App. 15. In *Kiyemba*, this Court explained, *Boumediene* "referred to

As to eight defendants, yet another statute bars jurisdiction over plaintiffs' claims. The Gonzalez Act, 10 U.S.C. § 1089, bars the claims against defendants Winkenwerder, Tornberg, Cowan, Arthur, Edmondson, Sollock, Burkhard, and Cullison, all of whom under plaintiffs' own allegations were acting as military medical personnel (Amended Comp. ¶¶ 31-38). Under the Gonzalez Act, a suit against the United States under the Federal Tort Claims Act is the exclusive remedy for any negligent or wrongful acts by military physicians committed within the scope of their federal employment. *See* 10 U.S.C. § 1089(a). As the Supreme Court recently unanimously held, the Gonzalez Act bars *Bivens* claims as well as ordinary tort claims. *See Hui v. Castaneda*, 130 S.Ct. 1845 (2010). Thus, as to these eight defendants, there are two separate federal statutes barring jurisdiction over all of plaintiffs' claims.

The district court did not dismiss the claim on the basis of these jurisdictional statutes because plaintiffs argued that such a withdrawal of jurisdiction would be unconstitutional, and the court determined that it could dismiss all of the claims on other grounds without addressing that constitutional challenge to the statutes. App. 16. This Court can likewise affirm without reaching that constitutional challenge,

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§ 7 without specifying a particular subsection of § 2241(e) but its discussion of the Suspension Clause *clearly indicates* it was referring only to that part of § 7 codified at § 2241(e)(1)." 561 F.3d at 512 n.1.

but we respectfully submit that plaintiffs' constitutional arguments are insubstantial and should not thwart application of these dispositive jurisdictional statutes to this case.

Plaintiffs contended that it would be a bill of attainder, violate separation of powers, the constitutional right of access to the courts, and their Fifth Amendment due process rights to bar jurisdiction over their claims. *See* Opp. to Individual Defendants' and United States' Motions to Dismiss and United States' Motion to Substitute, 10-22. All of these arguments presuppose the right to a constitutional money damage remedy in this context. Money damage claims are, however, often barred by common law or statutory immunities. *See Hui v. Castaneda*, 130 S.Ct. at 1852. For example, damage claims are barred against judges and prosecutors acting within their respective functions. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Constitutional money damage claims are also barred against other officials, if the constitutional right and violation at issue were not clearly established at the time. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816-817 (1982). There is also immunity from common law tort claims as well under the Westfall Act. Moreover, as discussed at length above, *Bivens* damage claims are barred where there are "special factors" counseling hesitation. As the Supreme Court recently explained in *Wilkie v. Robbins*, a *Bivens* money damage remedy "is not an automatic entitlement

no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." 551 U.S. at 550.

Furthermore, as the Supreme Court unanimously held in *Hui v. Castaneda*, Congress may bar a *Bivens* remedy whenever it deems appropriate. 130 S.Ct. at 1851-52. Thus, plaintiffs' premise that there is a constitutional right to a damage remedy here is without merit, and their constitutional arguments based on that flawed theory[17] provide no basis to avoid the straightforward application of both § 2214(e)(2) and the Gonzalez Act to bar all of plaintiffs' claims.

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[17] The bill of attainder argument, asserted by plaintiffs in the district court, is likewise without any merit. The Bill of Attainder Clause applies only to legislative punishment. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). These jurisdictional statutes are not punitive in any sense. *See Kiyemba*, 605 F.3d at 1048 ("The statutory restrictions, which apply to all Guantanamo detainees, are not legislative punishments; they deprive petitioners of no right they already possessed"); *Nagac v. Derwinski*, 933 F.2d 990, 991 (Fed. Cir. 1991) (a "jurisdictional limitation * * * does not impose a punishment traditionally adjudged to be prohibited by the Bill of Attainder Clause").

CONCLUSION

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

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 12,722 words (which does not exceed the applicable 14,000 word limit).

_/s/____________________
Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2011, I filed and served the foregoing brief with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that on July 14, 2011, I will cause eight copies of the brief to be delivered to the Court via hand delivery. I also hereby certify that all participants in the case are registered CM/ECF users and are being served via the CM/ECF system. Copies of the brief are also being sent be sent to the following counsel by first-class mail:

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