IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 02-CV-0299 (CKK)
FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.,* Defendants.	Civil Action No. 02-CV-0828 (CKK)
MAMDOUH HABIB, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 02-CV-1130 (CKK)

MURAT KURNAZ, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 04-CV-1135 (ESH)
O.K., *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 04-CV-1136 (JDB)
RIDOUANE KHALID, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 04-CV-1142 (RJL)

JAMIL EL-BANNA, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	)	Civil Action No. 04-CV-1144 (RWR)
LAKHDAR BOUMEDIENE, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.,* Respondents.	)	Civil Action No. 04-CV-1166 (RJL)
ISA ALI ABDULLA ALMURBATI, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.,* Respondents.	)	Civil Action No. 04-CV-1227 (RBW)

SUHAIL ABDUL ANAM, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	)	Civil Action No. 04-CV-1194 (HHK)
MAHMOAD ABDAH, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	)	Civil Action No. 04-CV-1254 (HHK)

INDIVIDUAL RESPONDENTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM

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Respondents hereby move the Court to dismiss all claims against them in their individual capacities for the reasons explained below. Further, with respect to claims subject to 28 U.S.C. § 2679, including nonconstitutional and nonstatutory claims, the United States should be substituted in the place of individual respondents, and all such claims against the United States should be dismissed.

INTRODUCTION

Petitioners' attempt to single out various Executive officials and hold them personally liable for military and foreign policy decisions of the United States government must fail in connection with their request for both equitable relief and damages. Petitioners' claims for equitable relief in the form of release from confinement are misguided. The detentions at issue in this matter emanated from the President's authority as Commander in Chief, and from his exercise of that Constitutional power with Congress' express authorization to use "all necessary and appropriate force" to prevent future terrorist attacks against the United States. Petitioners are barking up the wrong tree by seeking equitable relief from Executive officers who are powerless in their private capacities to undo official decisions and order petitioners' release.

Petitioners attempt to extract damages from these officials is equally futile. The doctrine of absolute immunity shields the President and Secretary of Defense from personal liability for their official acts so that they will not become mired in litigation that stymies the performance of their duties. Their detentions of enemy combatants during war-time hostilities in response to Congress' express directive are unquestionably official acts. Hence, the President and Secretary of Defense are invulnerable to all of petitioners' damages claims.

An umbrella of absolute immunity similarly shelters not just the President and Secretary of Defense, but all respondents, against the subset of petitioners' claims under federal and international law. That is because the United States must be substituted for the named respondents on these claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Liability Reform Act"), 28 U.S.C. § 2679, and plaintiffs' exclusive remedy is a tort action against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. But petitioners are barred from pursuing the claims under the FTCA because, inter alia, they have failed to exhaust the required administrative remedies.

Finally, with respect to petitioners' constitutional claims, the Supreme Court has only sparingly extended damages liability for alleged constitutional violations by federal employees. It would be a sharp departure from settled precedent to extend potential damages liability here, where the Court would thereby be trespassing on the domain of the Executive in matters of national security and foreign policy, and where petitioners already have a remedy in habeas. Moreover, petitioners' constitutional claims are barred by qualified immunity. As aliens captured on foreign soil whose only attachment to the United States is as enemy combatants, petitioners lack any constitutional rights. Thus, an objective official in respondents' shoes could not reasonably have believed that petitioners' detentions would run afoul of the Constitution. The individual respondents' motion to dismiss all of petitioners' claims against them in their individual capacities, therefore, should be granted.

BACKGROUND

On September 11, 2001, the al Qaeda terrorist network launched a coordinated attack on the United States, killing approximately 3,000 persons. Congress responded by passing a resolution authorizing the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001) ("AUMF"). Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Id.

Pursuant to this authorization and his authority under the Constitution, the President, as Commander in Chief, dispatched United States armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of that campaign – which remains ongoing – the United States and its allies have captured thousands of individuals overseas, many of whom are foreign nationals. The Military has determined that many of those individuals should be detained during the conflict as enemy combatants. Approximately 550 of the foreign nationals designated for detention as enemy combatants are being held by the Department of Defense ("DoD") at the United States Naval Base at

Guantanamo Bay, Cuba. The petitioners[1] in the above-captioned cases are among those being so detained.

The Guantanamo Bay detentions have been the subject of extensive diplomatic discussions between the Executive Branch and officials of the foreign governments of detainees' home countries. Some detainees have been released from Guantanamo to foreign governments. Others have been determined eligible for prosecution by a military commission for violations of the laws of war.

Currently, each petitioner's status as an enemy combatant is undergoing review by military tribunals, known as Combatant Status Review Tribunals ("CSRTs"), convened for that purpose.[2] During the CSRT proceedings, the detainees are provided with notice of the factual basis for their classification as enemy combatants, they are allowed to present evidence on their own behalf, and the tribunal members then make an independent determination as to whether the detainees should continue to be designated as enemy combatants. Those who are not so designated have been and will be released.

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[1] The word "petitioners" is used in this sentence, and elsewhere in this brief to the extent the context requires, to mean the petitioners who are individuals detained by DoD at Guantanamo Bay (as opposed to their "next friends" who are also petitioners in most of these cases).

[2] The July 7, 2004 Order establishing the CSRTs and the July 29, 2004 Memorandum implementing them can be found at the following web sites, respectively: http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf. In addition, the documents are attached to respondents' Response to Petitions and Motion to Dismiss or for Judgment as a Matter of Law, and Supporting Memorandum ("Response Memo."), filed contemporaneously herewith.

The present motion concerns eleven habeas petitions[3] brought by approximately sixty-one aliens who were captured overseas in connection with the war against al Qaeda and its supporters and transferred to Guantanamo Bay. Petitioners in these actions have sued the President, Secretary of Defense, and other military commanders in both their official and personal capacities. The central focus of each of these petitions is the alleged unlawfulness of the detentions. Hence, petitioners uniformly assert jurisdiction under the habeas statutes, 28 U.S.C. §§ 2241-42; challenge the validity of their detention and request a declaration that it is unlawful; and seek either a writ of habeas corpus or an order requiring their release from custody.[4]

The petitions share common substantive claims under the Constitution and various provisions of federal and international law. Specifically, petitioners allege that respondents have violated their Constitutional rights, including under Article 1, Section 8 (the War Powers Clause)[5]; Article 1, Section 9 (unlawful suspension of the writ of habeas corpus)[6]; the Fifth

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[3] Citations to "Petitions" in this brief are to the most recently amended petition/complaint filed in a particular case. The filing in the O.K. case consists of a combined petition for writ of habeas corpus and a complaint for declaratory and injunctive relief. The petitioners in Al Odah have styled their filing as a complaint only. These two submissions, like the remaining nine, assert jurisdiction under the habeas statutes and seek release from custody; therefore, they are referred to herein as "petitions."

[4] The habeas statute provides that a writ of habeas corpus may be granted to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

[5] Abdah Petition ¶¶ 82-83; Almurbati Petition ¶¶ 80-81; Anam Petition ¶¶ 89-90; Boumediene Petition ¶¶ 57-58; El-Banna Petition ¶¶ 71-72; 3; Habib Petition ¶¶ 58-59; Khalid Petition ¶¶ 76-77; Kurnaz Petition ¶¶ 62-63; O.K. Petition ¶¶ 48-52.

[6] Abdah Petition ¶¶ 84-85; Almurbati Petition ¶¶ 82-83; Anam Petition ¶¶ 91-92; Boumediene Petition ¶¶ 59-60; El-Banna Petition ¶¶ 73-74; Habib Petition ¶¶ 60-61; Khalid Petition ¶¶ 78-79; Kurnaz Petition ¶¶ 64-65.

Amendment Due Process Clause[7]; and the Fourteenth Amendment Equal Protection Clause.[8] They also claim violations of their alleged statutory rights under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706,[9] and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.[10] Another common thread under federal law arises from petitioners' claims under unspecified "military regulations"[11] or Army Regulation 190-8.[12]

The final common strain of claims in the petitions falls under international law. Petitioners allege that respondents violated, inter alia, the International Covenant on Civil and

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[7] Abdah Petition ¶¶ 72-75; Almurbati Petition ¶¶ 70-73; Al Odah Petition ¶ 37; Anam Petition ¶¶ 79-82, 95-97; Boumediene Petition ¶¶ 47-50; El-Banna Petition ¶¶ 47-50; Habib Petition ¶¶ 48-51; Hicks Petition ¶¶ 73-74, 89, 111; Khalid Petition ¶¶ 52-55; Kurnaz Petition ¶¶ 38-41; O.K. Petition ¶¶ 60-62.

[8] Hicks Petition ¶¶ 75-77.

[9] Abdah Petition ¶¶ 86-87; Almurbati Petition ¶¶ 101-102; Al Odah Petition ¶ 39; Anam Petition ¶¶ 93-94; El-Banna Petition ¶¶ 75-76; Hicks Petition ¶ 92; Khalid Petition ¶¶ 80-81; Kurnaz Petition ¶¶ 66-67; O.K. Petition ¶¶ 53-56, 64-66, 80-82.

[10] Almurbati Petition ¶¶ 84-100; Al Odah Petition ¶ 38; El-Banna ¶¶ 55-68; Khalid Petition ¶¶ 60-73; Kurnaz Petition ¶¶ 46-59; O.K. Petition ¶¶ 83-100. Those respondents against whom ATS claims are brought are President Bush; Secretary Rumsfeld; Gordon R. England, Secretary of the Navy; General Richard B. Myers, Chairman, Joint Chiefs of Staff; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Rich Baccus, Commander, Joint Task Force - 160; Colonel Terry Carrico, Commander, Camp X-Ray and Camp Delta; Colonel Brice A. Gyurisko, Commander, Joint Detention Operations Group, Joint Task; and Lieutenant Colonel William Cline, Commander, Camp Delta.

[11] Abdah Petition ¶¶ 80-81; Almurbati Petition ¶¶ 78-79; Anam Petition ¶¶ 87-88; Boumediene Petition ¶¶ 55-56; El-Banna Petition ¶¶ 69-70; Habib Petition ¶¶ 56-57; Khalid Petition ¶¶ 74-75.

[12] Hicks Petition ¶¶ 91-92; O.K. Petition ¶¶ 58.

Political Rights and the American Declaration on the Rights and Duties of Man,[13] as well as the Geneva Conventions.[14]

Petitioners seek equitable relief, primarily in the form of a declaration that their custody is unlawful and/or an injunction prohibiting respondents from further detaining them. Five petitioners also request damages against respondents.[15] The claims for equitable relief and damages against respondents in their individual capacities[16] should be dismissed.

ARGUMENT

I. THE HABEAS PETITIONS HAVE NOT BEEN PROPERLY SERVED ON THE INDIVIDUAL RESPONDENTS, AND THE COURT LACKS PERSONAL JURISDICTION OVER THE INDIVIDUAL RESPONDENTS IN AL ODAH, HABIB, AND HICKS

As will be shown below, the petitions in these cases are properly filed only against federal officers in their official capacities, and as to those claims, petitioners must serve the U.S. Attorney or Attorney General of the United States. Cf. Fed. R. Civ. P. 4(i). A suit against a federal employee in his or her individual capacity, however, is a "drastically different" type of

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[13] Abdah Petition ¶¶ 76-81; Almurbati Petition ¶¶ 74-77; Anam Petition ¶¶ 83-86; Boumediene Petition ¶¶ 51-54; El-Banna Petition ¶¶ 51-54; Habib Petition ¶¶ 52-55; Khalid Petition ¶¶ 56-59; Kurnaz Petition ¶¶ 42-45; Hicks Petition ¶ 90; O.K. Petition ¶¶ 57-58.

[14] Abdah Petition ¶¶ 76-81; Almurbati Petition ¶¶ 78-79; Anam Petition ¶¶ 87-88; Boumediene Petition ¶¶ 55-56; El-Banna Petition ¶¶ 69-70; Habib Petition ¶¶ 56-57; Hicks Petition ¶¶ 82-89, 94-97, 103-107, 111; Khalid Petition ¶¶ 74-75; Kurnaz Petition ¶¶ 60-61; O.K. Petition ¶¶ 57-58, 61, 67-71, 77-78.

[15] See Almurbati, El-Banna, Khalid, Kurnaz and O.K. Petitions. Petitioners in Almurbati and O.K. seek damages generally in their prayers for relief. Petitioners in El-Banna, Khalid, and Kurnaz request damages only with respect to their claims under the ATS.

[16] The term "individual" capacity is used interchangeably with the terms "personal" or "private" capacity, and all three refer to claims against respondents in other than their official capacities.

action, and the individual's knowledge of the action against them "can not be imputed from the service of process on the Attorney General." Moore v. State of Indiana, 999 F.2d 1125, 1130 (7th Cir. 1993). Thus, while the claims against respondents in their individual capacities are improper and should be dismissed for the reasons explained infra, petitioners' failure to perfect service so as to notify the individual respondents of the charges against them is improper.

Further, to the extent the Federal Rules of Civil Procedure may apply with respect to service in the cases that purport to be or include "complaints," the Court lacks personal jurisdiction over the individual respondents in the Al Odah, Habib, and Hicks actions because petitioners in these cases have failed to perfect service in these actions even though they were filed more than two years ago.[17] See Fed. R. Civ. P. 4(m) (requiring service within 120 days after filing of the complaint). A failure to either effect service or obtain a waiver of service deprives a court of personal jurisdiction. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987); Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 514 (D.C. Cir. 2002). A plaintiff bringing an action against a federal official in his or her individual capacity must satisfy the requirements for personal service. Simpkins v. District of Columbia Gov't, 108 F.3d 366, 369 (D.C. Cir. 1997). Official capacity service does not accomplish personal service. See id.

To the extent Federal Rule of Civil Procedure 4(i)(2)(B) applies, proper service under that Rule on an officer or employee of the United States sued in an individual capacity requires personal service made in the manner prescribed by Rule 4(e). That subsection provides generally

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[17] The petitions in these cases were originally filed on July 8, 2002 (Al Odah), June 10, 2002 (Habib), and March 12, 2002 (Hicks). Respondents hereby also move to dismiss any additional petitions as to which service has not been perfected within 120 days of filing as of the date of decision on this motion.

for service either (1) pursuant to the law of the state in which the district court is located, or (2) by delivering a copy of the summons and complaint to the individual personally, or to a person of suitable age at the individual's home, or to an authorized agent. Fed. R. Civ. P. 4(e). The District of Columbia service requirements closely resemble those of the Federal Rules. See Rules 4, 5, D.C. Rules of Court, Superior Court Rules of Civil Procedure.

Petitioners in Al Odah, Habib, and Hicks have given no indication that they have attempted, let alone accomplished, personal service on the individually named respondents.[18] The docket sheets do not reflect the filing of any proof of service with the Court. See Fed. R. Civ. P. 4(l). The certificates of service accompanying the petitions do not include any of the individual respondents, nor do they indicate any attempt to serve the individual respondents. Finally, respondents' counsel have received no information from the individual respondents or their respective agencies that the individual respondents have been served, or that petitioners' counsel have attempted to secure a waiver of service pursuant to Rule 4(d) of the Federal Rules.[19]

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[18] Petitioners in Al Odah, Habib, and Hicks are now approximately two years outside the 120-day period within which service is required under Fed. R. Civ. P. 4(m). The Court should decline to extend that time because (a) there is no good cause for their failure even to attempt resolution of the service issue within the time provided by the Federal Rules, see Hilska v. Jones, 297 F. Supp. 2d 82, 90 (D.D.C. 2003) (dismissing claims for failure to perfect service despite having more than fifteen months to do so); Claasen v. Brown, No. 94-1018, 1996 WL 79490 (D.D.C. 1996) (dismissing claims for failure to perfect service despite having more than nine months to do so); and (b) the equitable relief and damages claims are plainly lacking in merit, see Simpkins, 108 F.3d at 370 (declining to permit plaintiff to correct insufficiency of service of process, because allowing another suit to be filed containing the same worthless claims would be contrary to the Supreme Court's instruction to the lower courts "'to weed out' insubstantial Bivens suits 'expeditiously'").

[19] As the Rules provide, service can be accomplished through an appropriate agent, or waived altogether. Fed. R. Civ. P. 4 (d); (e)(2). Here, however, petitioners in the Al Odah, Habib, and Hicks actions apparently have made no attempt to accomplish either.

Absent personal service, this Court lacks personal jurisdiction over the federal officials whom petitioners have attempted to sue in their personal capacities. Further, petitioners' equitable relief and damages claims against respondents in their personal capacities in Al Odah, Habib, and Hicks must be dismissed. Cf. Fed. R. Civ. P. 12(b)(2), (4), (5).

II. THE CLAIMS FOR EQUITABLE RELIEF BY ALL PETITIONERS SHOULD BE DISMISSED AS AGAINST FEDERAL OFFICIALS IN THEIR INDIVIDUAL CAPACITIES

Petitioners have sued respondents in their individual capacities seeking equitable relief. Specifically, the primary relief they request consists of a declaration that their detention is unlawful and an order compelling the government to release them from custody.[20] For petitioners to label their suits as having been brought against respondents in their "individual" or "personal" capacities is a misnomer, however, because the real party in interest with respect to this relief is a proper respondent in his official capacity. Respondents would be powerless to provide this equitable relief except as agents of the United States, and hence they cannot be properly sued for equitable relief in their private capacities.[21]

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[20] See Abdah Petition, Prayer for Relief ¶ 16 (seeking order and declaration that detention violates Constitution and international law); Al Odah Petition, Prayer for Relief ¶¶ 40-41 (asking that respondents be enjoined from, inter alia, refusing petitioners access to counsel and the courts and declaring their refusal to be unlawful); Almurbati Petition, Prayer for Relief ¶ 7 (seeking order releasing detainees from unlawful custody); Anam Petition, Prayer for Relief ¶ 16 (same); Boumediene Petition, Prayer for Relief ¶ 19; El-Banna Petition, Prayer for Relief ¶ 4 (same); Habib Petition, Prayer for Relief ¶ 2 (same); Hicks Petition, Prayer for Relief ¶ 8 (same); Khalid Petition, Prayer for Relief ¶ 4 (same); Kurnaz Petition, Prayer for Relief ¶ 2 (same); O.K. Petition, Prayer for Relief ¶ 2 (same).

[21] Insofar as some of the petitioners complain concerning conditions under which they allege to be detained, the relief they seek is still the "'immediate release or a speedier release'" from detention. Monk v. Secretary of the Navy, 793 F.2d 364, 367 (D.C. Cir. 1986) (quoting Preiser v. Rodriguez, 411 U.S. 475, 500 (1973)). Regardless of how they couch it, the equitable relief they seek is essentially against the government, and therefore, is not properly against respondents

Petitioners' detentions resulted from official action by the government, viz., from the President's exercise of his war powers under the Constitution and his implementation of a resolution passed by Congress in response to the September 11, 2001 attacks. The resolution authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines" were involved in the September 11 attacks "in order to prevent any future acts of international terrorism against the United States . . . ." AUMF, §§ 1-2, 115 Stat. 224. Pursuant to this authorization, the President dispatched armed forces to wage a military campaign against al Qaeda and its supporters, including the Taliban regime. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004) (plurality opinion). Plaintiffs were captured and detained as a result of this campaign. See Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004) (noting that detainees were captured as a result of the President's military campaign pursuant to the AUMF); id. at 2693 (referring to the "Executive detention" of aliens); id. at 2698 (same).

In requesting a release from custody and a declaration that their detention by the Executive Branch is unlawful, petitioners are seeking to hold respondents "to account for, or to prevent them from implementing in the future, actions of the United States." Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (emphasis in original). They are in essence challenging official actions of the government rather than private wrongdoing. See id.; see also Kennedy v. Rabinowitz, 318 F.2d 181, 183 (D.C. Cir. 1963) ("If the essential nature and effect of the proceeding may be such as to make plain that the judgment sought would . . . interfere with the public administration, the suit is one against the sovereign.") (citing Land v. Dollar, 330 U.S.

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in their personal capacities. See Response Memo. (demonstrating the lack of merit in petitioners' claims against respondents in their official capacities).

731, 738 (1947)). That the claims for a declaration and injunction operate only against the United States is apparent from the fact that those claims are not redressable by respondents in their personal capacities since they involve official orders of the President implemented by officers of the Executive Branch. See, e.g., Acierno v. Cloutier, 40 F.3d 597, 608 (3d Cir. 1994) (en banc) ("[A] defendant who loses a claim for injunctive relief is simply ordered to refrain from taking certain action in his or her official capacity").

Insofar as petitioners seek equitable relief, they can properly sue respondents only in their official capacities. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690, n.55 (1978)). Because petitioners are essentially asking that the United States, as opposed to any private individual, be ordered to release them and be enjoined from further detaining them, their claims for equitable relief against respondents in their personal capacities should be dismissed.

If petitioners were entitled to any remedy against respondents in their individual capacities, which they are not, it would be exclusively in the form of damages for the alleged Constitutional violations. This remedy is potentially available pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971), in which the Supreme Court held that a damages suit could be maintained against federal agents in their individual capacities for alleged violations of the Fourth Amendment. See Bivens, 403 U.S. at 409-410 (Harlan, J., concurring) ("It is apparent that some form of damages is the only possible

remedy for someone in Bivens' alleged position") (emphasis added). For the reasons explained below, however, petitioners' claims for damages against respondents should also be dismissed.

III. THE PRESIDENT AND SECRETARY OF DEFENSE ARE ENTITLED TO ABSOLUTE IMMUNITY

A. The President Is Entitled To Absolute Immunity For His Official Acts As President

Petitioners in Almurbati, Kurnaz, and O.K. have sued the President for damages and seek to hold him personally liable for directing the U.S. military to detain them at Guantanamo.[22] The President prescribed these measures pursuant to the exercise of his Constitutional powers and Congress' authorization that he "take action to deter and prevent acts of international terrorism against the United States." AUMF, 115 Stat. 224. It is well-settled, however, that the President of the United States "is absolutely immune from civil damages liability for his official acts." Nixon v. Fitzgerald, 457 U.S. 731, 748 n.27 & 749 (1982); see also Clinton v. Jones, 520 U.S. 681, 693 (1997); In Re Sealed Case, 121 F.3d 729, 748 (D.C. Cir. 1997). Petitioners' claims against the President must therefore fail.

The President's absolute immunity from damages liability derives from the "unique position" he occupies in the Constitutional scheme. Nixon v. Fitzgerald, 457 U.S. at 749. As the "chief constitutional officer of the Executive Branch," id. at 749-50, U.S. Const. Art. II, sec. 1, he is "entrusted with supervisory and policy responsibilities of the utmost discretion and

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[22] Of the five actions requesting damages, petitioners in Khalid and El-Banna have sued the President and Secretary of Defense in their official capacities only, El-Banna Petition ¶¶ 11-12; Khalid Petition ¶¶ 21-22, thereby implicitly acknowledging that these respondents are absolutely immune from liability for their official acts. In contrast, they have sued respondents Hood and Cannon in their official and personal capacities. El-Banna Petition ¶¶ 13-14; Khalid Petition ¶¶ 23-24.

sensitivity." Nixon v. Fitzgerald, 457 U.S. at 750. These include "the enforcement of federal law . . .; the conduct of foreign affairs . . .; and management of the Executive Branch . . . ." Id. Because of the "singular importance" of the President's duties, "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Id. at 751.

In the present case, the President has taken actions he deemed necessary to prevent further terrorist attacks against the United States, consistent with Congress' authorization that he "use all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001 terrorist attacks. AUMF, 115 Stat. 224; Hamdi v. Rumsfeld, 124 S. Ct. at 2640. Congress found that these acts of terrorism "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." AUMF, 115 Stat. 224. The President authorized the military to detain petitioners in pursuance of his constitutional responsibilities. See Nixon v. Fitzgerald, 457 U.S. at 751. For the President to be distracted from these core duties while the United States is engaged in active hostilities with enemy forces would inure "to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." Id. at 742. With national security and highly sensitive foreign relations matters hanging in the balance, the exercise of jurisdiction by the Court over a private suit for damages based on the President's official acts would constitute an especially unwarranted "intrusion on the authority and functions of the Executive Branch." Id. at 754. Therefore, petitioners' claims against the President for damages should be dismissed. See, e.g., Idrogo v. United States Army, 18 F. Supp. 2d 25, 29 (D.D.C. 1998) (dismissing claim against President on absolute immunity grounds because "the plaintiff[s] cannot possibly win relief");

Demos v. Clinton, No. 94-1057, 1994 WL 238833, at *1 n.1 (D.D.C.) (sua sponte dismissing complaint as against the President because he was "indisputably . . . immune from suit" and was an "inappropriate defendant[] in a habeas action").

B. The Secretary of Defense Is Entitled To Absolute Immunity

Petitioners in Almurbati, Kurnaz, and O.K. also seek to hold the Secretary of Defense personally liable for damages for their detentions at Guantanamo Bay. On behalf of the President, the Secretary of Defense ordered petitioners' detentions consistent with Congress' authorization of the President to "use all necessary and appropriate force against those nations, organizations, or persons" the President determines were involved in the September 11 attacks "in order to prevent any future acts of international terrorism against the United States." AUMF, 115 Stat. 224. The Secretary implemented the President's orders to detain petitioners as "enemy combatants," i.e., because he deemed them to be "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." July 7, 2004 Order Establishing Combatant Status Review Tribunal ¶ (a) (definition of enemy combatant) (available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf); see also Hamdi, 124 S. Ct. at 2637-40 (holding that United States may detain for the duration of hostilities individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States"). For his performance of these duties on behalf of the President and in furtherance of the national security and foreign policy interests of the United States, the Secretary of Defense is entitled to absolute immunity.

While senior Executive officials like Cabinet officers are ordinarily entitled to qualified immunity, Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982), they are entitled to absolute immunity where "essential for the conduct of the public business." Butz v. Economou, 438 U.S. 478, 507 (1978). An executive official's claim to absolute immunity must be justified "by reference to the public interest in the special functions of his office." Harlow, 457 U.S. at 812. In order to receive absolute immunity, a Cabinet officer (1) "must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability," and then (2) "must demonstrate that he was discharging the protected function when performing the act for which liability is asserted." Id. at 812-13.

The first step of the test is clearly satisfied here. Military decisionmaking pertaining to the United States' involvement in active hostilities against al Qaeda and its supporters, and in particular, the determination of whether individuals apprehended during these hostilities should be detained to prevent their return to fighting or to obtain intelligence helpful to ongoing military operations, see Hamdi, 124 S. Ct. at 2640 (observing that the purpose of detentions is to prevent the captured individual from serving the enemy); Response Memo. § I, are unquestionably "sensitive" functions. They are ultimately reserved for the Commander in Chief or senior Executive officials operating under his command. See U.S. Const. Art. II, § 2, cl. 1 (providing that "[t]he President shall be Commander in Chief of the Army and Navy of the United States"); id. (providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices . . . ."); cf. Mitchell v. Forsyth, 472 U.S. 511, 536-37 (1985) (Burger, C.J., concurring) (Cabinet officer "is an 'aide' and arm of the President in the execution of the President's

constitutional duty to 'take Care that the Laws be faithfully executed.'"). The effective performance of such conduct-of-war duties is "essential to our continued existence as a sovereign nation." United States v. Moussaoui, 365 F.3d 292, 306 (4th Cir. 2004). Indeed, "no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981).

These highly sensitive responsibilities can effectively be discharged by the Secretary of Defense only without the distraction of potentially vexatious personal litigation. "For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest." See Harlow, 457 U.S. at 812. Exposing the Secretary of Defense to suits by aliens determined to be enemy combatants, from scores of countries across the globe, while the United States is engaged in far-reaching conflicts to combat al Qaeda and its supporters would interfere with the exercise of Executive functions critical to national security and foreign policy. It would also impair a key Presidential function, namely, ordering appropriate military action in response to external threats. Accordingly, absolute immunity for Secretary Rumsfeld is necessary to ensure his vigorous and unimpeded performance of responsibilities vital to the national interest.

Moreover, in performing the tasks assigned by Congress to the President under the AUMF, the Secretary of Defense is serving as a Presidential "alter ego" by taking vital actions that would otherwise necessarily be accomplished by the President himself. See Harlow, 457 U.S. at 812 n.19. Because these activities fall within the Presidential domains of national security and foreign policy, the Secretary is entitled to a derivative immunity based on the

President's own immunity. See id. ("[A] derivative claim to Presidential immunity would be strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.") (citing Gravel v. United States, 408 U.S. 606, 621-22 (1972) (holding Speech and Debate Clause derivatively applicable to the "legislative conduct" of a Senator's aide that would have been privileged if performed by the Senator himself)).

The second part of the Harlow absolute immunity test – that the act for which liability is asserted arise from the discharge of the sensitive, protected function – also is met. When the Secretary of Defense detained petitioners pursuant to the determination that they were part of or supporting terrorist or hostile forces, he was carrying out Congress' authorization that the President take action "to prevent future acts of international terrorism against the United States." See AUMF, 115 Stat. 224; Hamdi v. Rumsfeld, 124 S. Ct. at 2639-40 (holding that the AUMF constitutes express Congressional authorization for detaining enemy combatants at Guantanamo). Thus, he detained petitioners in the course of discharging protected functions with respect to Congressionally authorized war efforts. Secretary Rumsfeld is entitled to absolute immunity for the detention of petitioners, and their claims against him in his personal capacity should therefore be dismissed.

IV. RESPONDENTS ARE ABSOLUTELY IMMUNE FROM SUIT FOR ALL NONSTATUTORY AND NONCONSTITUTIONAL CLAIMS

A. Petitioners' Exclusive Remedy Is Against The United States Through The Federal Torts Claims Act

Petitioners in the Almurbati, El-Banna, Khalid, Kurnaz, and O.K. actions seek damages against respondents Bush, Rumsfeld, Hood, and Cannon for alleged violations of the Alien Tort

Statute, Army Regulation 190-8, and unspecified "military regulations." They also claim the individual respondents violated various provisions of international law, i.e., the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, the Geneva Conventions, the Optional Protocol of the Convention of Children in Armed Conflict, and International Labour Organization Convention 182.[23] The United States should be substituted for the individual respondents with respect to all of these provisions, and the claims should be dismissed for failure to follow jurisdictional prerequisites.

The Liability Reform Act, 28 U.S.C. § 2679, provides that, for all civil actions arising out of the wrongful act of a federal employee acting within the scope of his or her duties, the United States is to be substituted as a defendant, and the claims may proceed only under the Federal Tort Claims Act ("FTCA") (28 U.S.C. §§ 2671-80). See 28 U.S.C. § 2679(b)(1); Alvarez-Machain v. United States, 331 F.3d 604, 631 (9th Cir. 2003) (per curiam), rev'd on other grounds, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004). The Liability Reform Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." United States v. Smith, 499 U.S. 160, 166 (1991). In the instant case, petitioners' claims under the above provisions are subject to substitution under the Liability Reform Act, and their exclusive remedy against the United States, in lieu of the individual respondents, is through the FTCA.

There are only two exceptions to this exclusive remedy provision under the Liability Reform Act. The exclusive remedy provision does not apply in an action "which is brought for a

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[23] Petitioners also seek damages under the Administrative Procedure Act, but those claims should be dismissed, since the APA by definition applies only to actions seeking relief "other than damages." 5 U.S.C. § 702.

violation of the Constitution of the United States, or . . . a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2). Neither of these exceptions applies to petitioners' claims under the ATS, federal regulations, and international law in the present matter.

It is self-evident that the claims under federal regulations and international law do not qualify for the exception, since they do not allege constitutional or statutory violations. Similarly, with respect to the ATS, although petitioners allege violations of the ATS, that statute is only jurisdictional, as recently affirmed by the Supreme Court, so there can be no cause of action for violating the ATS itself. Sosa v. Alvarez-Machain, 124 S. Ct. at 2755; see also Alvarez-Machain v. United States, 331 F.3d at 631-32. While a court can hear a limited class of common law claims under the ATS, those are not claims for "a violation of a statute of the United States" as would be required to fall within the exception to the exclusive remedy provision in 28 U.S.C. § 2679(b)(2)(B).

B. Petitioners Have Failed To Follow Jurisdictional Prerequisites

The Attorney General has initial responsibility for determining who is a federal employee for purposes of the FTCA. Section 2679(d)(1) of the FTCA states that, upon the Attorney General's certification that a defendant in a civil action was acting within the scope of federal employment at the time of the act or omission giving rise to the case, such action "shall be deemed an action against the United States . . . [under the FTCA] and the United States shall be substituted as the party defendant." Authority has been delegated to the Deputy Assistant Attorneys General of the Civil Division, United States Department of Justice, to certify scope of

office. See 28 C.F.R. § 15.3 and appendix.[24] Thomas R. Lee, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, has executed a certification of scope of employment for respondents with respect to petitioners' allegations against them. (Attached as Exhibit 1). Accordingly, as to those respondents and by operation of law, petitioners' claims must be "deemed . . . action[s] [asserted solely] against the United States" under the FTCA. 28 U.S.C. § 2679(d)(1); Kimbro, 30 F.3d at 1504.

The FTCA waives sovereign immunity from suit for damages for state law torts committed by federal employees within the scope of their employment. Lehner v. U.S., 685 F.2d 1187, 1189 (9th Cir. 1982), cert. denied, 460 U.S. 1039 (1983). In order to pursue an FTCA claim in court, Congress established certain absolute jurisdictional prerequisites that must be "strictly construed." Carr v. Veterans Administration, 522 F.2d 1355, 1357 (5th Cir. 1975); see also Brown v. Secretary of Army, 78 F.3d 645, 649-50 (D.C. Cir.), cert. denied, 519 U.S. 1040 (1996) (waivers of sovereign immunity must be strictly construed in United States' favor). Among those prerequisites is the requirement that petitioners each present an administrative claim to the responsible federal agency prior to filing suit. 28 U.S.C. § 2675(a). Failure to present such a claim is a jurisdictional bar to suit.[25] McNeil v. United States, 508 U.S. 106

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[24] Certifications of scope of employment are subject to judicial review when properly challenged. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995). However, to present a valid challenge, a plaintiff must present evidence that raises at least a genuine issue of material fact that the conduct giving rise to the suit was performed outside the scope of federal employment. See Kimbro v. Velten, 30 F.3d 1501, 1509 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995).

[25] The Liability Reform Act specifically contemplates that dismissal will often be necessary for failure to exhaust administrative remedies under the FTCA when the United States is substituted for individual defendants in litigation. The Liability Reform Act allows plaintiffs 60 days after dismissal to file an administrative claim under the FTCA if the lawsuit against the

(1993) (holding that § 2675 barred suit although no substantial progress had been made in litigation and although claim was eventually denied). Petitioners have failed to exhaust the FTCA administrative remedies in regard to their claims under the ATS, federal regulations, and international law. Those claims must therefore be dismissed.[26]

V. THE CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED

A. Special Factors Counseling Hesitation Preclude Creation Of A Damages Action

Petitioners in the Almurbati, El-Banna, Khalid, Kurnaz, and O.K. actions have variously sued respondents Bush, Rumsfeld, Hood, and Cannon in their individual capacities seeking damages for alleged violations of their constitutional rights. Specifically, petitioners challenge the fact of their detention and contend that it is unconstitutional. However, the creation of a damages remedy for petitioners' detentions as enemy combatants would constitute an inappropriate intrusion by the judiciary into foreign affairs and war-making matters, and furthermore, the habeas statutes provide petitioners with an adequate remedy for their grievances

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individual defendants giving rise to the substitution was filed within the time otherwise permitted by the FTCA to commence the administrative process. 28 U.S.C. § 2679(d)(5)(A) & (B).

[26] In this case, presenting an administrative claim and re-filing against the United States would be futile since petitioners cannot state viable claims under federal or international law. See Response Memo. §§ II-III. Moreover, the United States can be held liable under the FTCA only for violations of domestic law, see 28 U.S.C. § 1346(b)(1). Thus, petitioners' claims under international law would fail, as would their claims under the ATS, which countenances a cause of action only for violations of international law, Alvarez-Machain, 331 F.3d at 632. The ATS claims in the Al Odah, Habib, and Hicks actions are also time-barred. See 28 U.S.C. § 2401(b) (providing that applicable limitations period is two years). Finally, the United States may also be exempt from the FTCA's coverage under one of the exceptions contained in 28 U.S.C. § 2680. See, e.g., id. § 2680(a) (exemption for discretionary acts); id. § 2680(j) (exemption for claim arising out of combatant activities of the military); id. § 2680(k) (exemption for claim arising in a foreign country).

concerning the unlawfulness of confinement. These circumstances constitute "special factors" which preclude the creation of a damages remedy against respondents.

In Bivens, the Supreme Court authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits. The Court has expressly cautioned, however, that such a remedy will not be available when "special factors counseling hesitation" are present. Bivens, 403 U.S. at 396; see also Carlson v. Green, 446 U.S. 14, 18 (1980); Sanchez-Espinoza v. Reagan, 770 F.2d at 208. Before a damages remedy may be fashioned, therefore, a court must take into account any "special factors counseling hesitation." Two such "special factors" counsel against any potential damages remedy here.

1. The Judicial Creation of a Damages Remedy for Foreign Affairs Decisions Is Unwarranted

First, petitioners seek to extend Bivens to a new, highly sensitive military area in which it would be inappropriate for the Court to intervene. In Sanchez-Espinoza v. Reagan, 770 F.2d at 208, the Court held that considerations of institutional competence precluded the judicial creation of damages remedies in foreign affairs matters. It explained as follows:

> Just as the special needs of the armed forces require the courts to leave to Congress the creation of damage remedies against military officers for allegedly unconstitutional treatment of soldiers, see Chappell v. Wallace, . . . [462 U.S. 296 (1983)], so also the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.

Id. at 208-09. The preclusion of damages actions against federal officials was compelled by the foreign affairs implications of such suits, i.e., their ability to produce "'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one

question.'" Id. (quoting Baker v. Carr, 369 U.S. 186, 226, 217 (1962)). Given the acute danger of foreign citizens' using the courts "to obstruct the foreign policy of our government" in such situations, the Court determined that "we must leave to Congress the judgment whether a damage remedy should exist." Id. at 209; see also United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (stressing that the creation of a damages action for aliens would have "significant and deleterious consequences" on foreign policy operations); Van Tu v. Koster, 364 F.3d 1196, 1198 (10th Cir. 2004) (finding "availability of a Bivens remedy" for the conduct of U.S. military officers during the Vietnam War to be "questionable"); Beattie v. Boeing Co., 43 F.3d 559, 563 (10th Cir. 1994) (holding that the predominant issue of "national security clearances" was a special factor that precluded a Bivens action arising from the denial of access to a secured work area).[27]

The harm to our military and foreign policy that would be caused by actions for damages against federal officials springs from the heavy social costs of such actions, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Harlow v. Fitzgerald, 457 U.S. at 814. There is also the "danger that fear of being sued 'will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Id. (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)). And this latter harm "is particularly severe in the national security field, since 'no governmental interest is more

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[27] See discussion in Response Memo. §§ I-II (discussing extreme deference due Executive in the exercise of his authority to detain enemy combatants), which is incorporated herein.

compelling.'" Halperin v. Kissinger, 807 F.2d 180, 187 (D.C. Cir. 1986) (quoting Haig v. Agee, 453 U.S. at 307).

These factors account for the traditional reluctance of federal courts, whether in the context of a Bivens action or otherwise, to "intrude upon the authority of the Executive in military and national security affairs."[28] Department of the Navy v. Egan, 484 U.S. 518, 530 (1988); see also Hamdi v. Rumsfeld, 124 S. Ct. at 2647 ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); Franklin v. Massachusetts, 505 U.S. 788, 818 (1992) (plurality opinion) (stating that the principle of judicial deference "pervades the area of national security"); Haig v. Agee, 453 U.S. at 292 (recognizing that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); see also National Federation of Federal Employees v. United States, 905 F.2d 400, 406 (D.C. Cir. 1990) (stating that "the federal judiciary is ill-equipped to conduct reviews of the nation's military policy").

For the Court, through the vehicle of a Bivens action, to second-guess Executive decisions regarding how best to conduct ongoing hostilities would constitute an unwarranted intrusion into national security matters that are outside the Court's proper domain. Even aside

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[28] In the same vein, it has been held that reparations for wartime injury, such as those essentially reflected in petitioners' requests for damages, are matters committed to diplomacy among the affected governments and are not matters for private litigation. See Perin v. United States, 4 Ct. Cl. 543, 544 (1868), aff'd, 79 U.S. 315 (1870) (stating that questions raised by wartime injuries "are international political questions" that courts are not empowered to decide); Ware v. Hylton, 3 U.S. (2 Dall.) 199, 230 (1796) (observing that recovery for wartime losses is a matter committed to diplomacy); Zivkovich v. Vatican Bank, 242 F. Supp. 2d 659, 666-67 (N.D. Cal. 2002) (holding that war reparations fall within the domain of the political branches).

from any Bivens action, contradictory conclusions by the Court and the Executive as to whether particular individuals should be detained in the interest of our national security could create confusion in our foreign affairs dealings and diminish the credibility of our government abroad. However, these deleterious effects on our military and foreign policy will be amplified if the stakes are raised to include damages against federal officials for their decisions in military and national security matters. The threat of personal liability will shackle them from making uninhibited judgments pertaining to the war against al Qaeda and its supporters, judgments in which the best interests of the Nation must be the highest priority. Regarding these matters of utmost importance, federal officials in responsible positions will instead be distracted by the possibility that any given decision could carry ruinous personal financial consequences and result in the absorption of their time and energy by protracted litigation.

Inferring a damages remedy here would also create a paradoxical and undesirable result. The Supreme Court already has held that the "inappropriate[ness]" of "intrusion into military affairs by the judiciary" constitutes a "special factor" barring members of the U.S. Armed Forces from bringing claims under Bivens for alleged constitutional wrongs suffered incident to their military service. See United States v. Stanley, 483 U.S. 669, 683-84 (1987); Chappell v. Wallace, 462 U.S. 296, 304-05 (1983). Thus, if this Court were to infer a damages remedy under Bivens for enemy combatant detainees, it would place enemies of the United States in a favored legal position compared to the very United States forces who captured them. Cf. Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) ("It would be a paradox indeed if what the [Fifth] Amendment denied to Americans it guaranteed to enemies"). Rather than conferring a right of action on enemy aliens that is denied to U.S. soldiers, the Court instead should find that the

Executive's authority over the military is a special factor warranting the dismissal of petitioners' constitutional claims for damages.

With two exceptions since the decision in Bivens,[29] the Supreme Court has "consistently refused to extend Bivens liability to any new context or new category of defendants." Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001). Allowing a damages cause of action against high-ranking Executive officials for their war-time actions in capturing and detaining aliens enemy combatants abroad would represent a sharp departure from the Supreme Court's well-settled reluctance to extend Bivens liability. Petitioners' constitutional claims for damages should therefore be dismissed for failure to set forth a claim on which relief can be granted.

2. Petitioners' Exclusive Remedy Is In Habeas

A second special factor counseling caution relates to the Supreme Court's holding that persons injured by federal officials cannot recover money damages from them where Congress has provided "another remedy, equally effective in the view of Congress," to redress their grievances. Bivens, 403 U.S. at 397. "When Congress provides an alternative remedy, it may . . . indicate its intent by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised." Bush v. Lucas, 462

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[29] See Davis v. Passman, 442 U.S. 228 (1979) (recognizing implied damages remedy under the Due Process Clause of the Fifth Amendment because there was no explicit Congressional declaration that money damages were not available to persons injured by unconstitutional federal employment discrimination, equitable relief would be unavailing, and plaintiff lacked any other remedy); Carlson v. Green, 446 U.S. 14, 19-20 (1980) (recognizing implied damages remedy under the Cruel and Unusual Punishments Clause of the Eighth Amendment where it was "crystal clear" that Congress intended the Federal Tort Claims Act and Bivens to serve as "parallel" and "complementary" sources of liability).

U.S. 367, 378 (1983). The Court has recognized "Congress' institutional competence in crafting appropriate relief" as a "'special factor counseling hesitation in the creation of a new remedy.'" Correctional Servs. Corp. v. Malesko, 534 U.S. at 68; see also Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies"). Therefore, so long as a plaintiff has "an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." Malesko, 534 U.S. at 69.

Such an avenue for potential redress is available to petitioners in the present cases – under the habeas statutes – with respect to their challenge to their detention. In fact, petitioners have already availed themselves of this remedy. Alleging that they are incarcerated and being indefinitely held in unlawful custody, petitioners uniformly assert jurisdiction under the habeas statutes, 28 U.S.C. §§ 2241, 2242. Almurbati Petition ¶ 5; El-Banna Petition ¶ 4; Khalid Petition ¶ 4; Kurnaz Petition ¶ 4; O.K. Petition ¶ 1; see Preiser v. Rodriguez, 411 U.S. at 484 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"). Habeas corpus is not only an adequate remedy for petitioners' claims as to the lawfulness of their confinement; it is the exclusive remedy. It is well settled that "[c]hallenges to the validity of any confinement or to the particulars affecting its duration are the province of habeas corpus." Muhammad v. Close, 124 S. Ct. 1303, 1304 (2004) (per curiam); accord Preiser, 411 U.S. at 489-490; Bourke v. Hawk-Sawyer, 269 F.3d 1072, 1074 (D.C. Cir. 2001); Chatman-Bey v. Thornburgh, 864 F.2d 804, 809-810 & n.5 (D.C. Cir. 1988); Monk v. Secretary of the Navy, 793

F.2d at 366. Therefore, as petitioners have an opportunity through habeas potentially to fully remedy their alleged invalid confinement, Congress has provided meaningful redress which forecloses the need to fashion a new, judicially crafted cause of action under Bivens here.

C. All Individual Respondents Are Entitled To Qualified Immunity

The President, the Secretary of Defense, and the high-ranking military officials petitioners have sued in their individual capacities for damages are additionally entitled to qualified immunity and the dismissal of the constitutional claims against them. Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. at 818; International Action Ctr. v. United States, 365 F.3d 20, 24 (D.C. Cir. 2004). The defense turns on the "objective reasonableness of an official's conduct, as measured by reference to clearly established law." Harlow, 457 U.S. at 818. Thus, the judge may appropriately determine, "not only the currently applicable law, but whether that law was clearly established at the time an action occurred." Id.

The qualified immunity analysis is a two-step process. First, the court must determine "the existence or nonexistence of a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001); International Action Ctr., 365 F.3d at 24. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Saucier, 533 U.S. at 201. Second, if a violation could be made out, the court must ask whether the right was "clearly established." Id.; International Action Ctr. v. United States, 365 F.3d at 24-25. This inquiry "must be undertaken in light of the specific

context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. Therefore, the relevant inquiry in determining whether a right is clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id.

As shown in the Response Memo. § II, which is incorporated herein, petitioners are aliens detained by the military outside the sovereign territory of the United States without any significant, voluntary connection to this country. Therefore, they have no cognizable constitutional rights. Since no constitutional violation could have occurred even if petitioners could prove their factual allegations, no further inquiry under the Harlow analysis is necessary, and respondents are entitled to qualified immunity with respect to petitioners' claims against them in their personal capacities.

Assuming, arguendo, that petitioners could allege cognizable constitutional violations, their claims against the individual respondents are nonetheless barred by qualified immunity because their alleged constitutional rights were and are, by no means, clearly established. Indeed, this case presents a question of first impression as to whether alien enemy combatants detained outside the sovereign territory of the United States have any constitutional rights. Given those circumstances, it perforce cannot be said that such rights were or are clearly established. In fact, the law clearly shows the opposite, viz., that petitioners have no constitutional rights. Similarly, even if petitioners ability to avail themselves of the Constitution could be clearly established, it could not be shown that any specific rights were clearly violated: the constitutional claims asserted in their petitions under the Fifth, Sixth, Eighth, and Fourteenth Amendments and War Powers Clause are without merit and hence do not provide a clear basis for relief. See Response Memo. § II.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. at 202. A reasonable officer in respondents' position would have been far more assured of having acted lawfully – rather than unlawfully – when he captured and detained petitioners. At the very least, the constitutional questions presented by this case are "by no means open and shut," Wilson v. Layne, 526 U.S. 603, 615 (1999), such that respondents could be accused of violating "clearly established" rights. To the contrary, respondents had every reason to expect that the detentions of petitioners at Guantanamo Bay were lawful, and respondents are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the individual respondents' motion to dismiss should be granted.

Dated: October 4, 2004

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