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## Hamad v. Gates and the Continuing Interpretation of Boumediene: A Note on 732 F.3d 990 (9th Cir. 2013)

Paul Blenz

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***Hamad v. Gates and the Continuing Interpretation of  
Boumediene A Note on 732 F.3d 990 (9th Cir. 2013)***

**Paul Blenz\***

I. INTRODUCTION .....	444
II. HISTORICAL BACKGROUND .....	446
A. <i>September 11th and the Authorization for use of Military Force of 2001</i> .....	446
B. <i>Hamdi, Rasul, and the Combatant Status Review Tribunals</i> .....	448
C. <i>Detainee Treatment Act of 2005 and the Military Commissions Act of 2006</i> .....	451
D. <i>The Military Commissions Act of 2006 and Boumediene v. Bush</i> .....	452
E. <i>Money Damages Claims By Detainees After Boumediene</i> .....	458
III. THE FACTS .....	463
IV. PROCEDURAL HISTORY .....	465
V. ANALYSIS OF OPINION .....	467
A. <i>Did Boumediene Strike Down All of § 2441(e)?</i> .....	467
B. <i>Is §2241(e)(2) Severable from §2241(e)(1)?</i> .....	469
C. <i>Is §2241(e)(1) Unconstitutional as Applied to Hamad?</i> .....	472
VI. IMPACT .....	476
A. <i>Bivens Actions and the "Special Factors Counseling Hesitation"</i> .....	477
VII. CONCLUSION .....	480

## I. INTRODUCTION

After years of denial, the truth finally came out: The CIA carried out “brutal” interrogations of al-Qaeda suspects, involving extensive waterboarding described as a “series of near drownings,” sleep deprivation of up to a week, and medically unnecessary forced feedings.<sup>1</sup> Unequivocally, and undeniably, what was conducted in the name of national security was torture, which is fundamentally opposed to the United States’ values. Much of these abuses occurred at the secret prisons located at Guantanamo Bay, Cuba, where the government believed that the reach and protections of the Constitution did not extend. After years of wrangling between Congress and the Supreme Court the Supreme Court definitively ruled in 2008 that the detainees held at Guantanamo were protected by the Suspension Clause.<sup>2</sup> Since then, debate has raged among legal scholars about what other protections may apply to the detainees. Additionally, *Boumediene* sparked a wide variety of lawsuits, challenging the government’s practices.

A particularly prevalent type of claims in post-*Boumediene* cases are *Bivens* claims by detainees. One such case is *Hamad v. Gates*.<sup>3</sup> *Hamad* represents a typical claim made by such detainees, and is the focus of this note. In *Hamad*, the Ninth Circuit held that a statute that had previously thought to be entirely overruled by *Boumediene* actually survived. This statute, 28 U.S.C. § 2241(e), stemmed from years of back-and-forth debate between the Supreme Court and Congress. The result of this conflict is still unsettled. The main issue is whether the Court’s primary concern in overruling the jurisdiction-stripping statutes of Congress was in a separation-of-powers and a

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<sup>1</sup> Jeremy Asheknas, Hannah Fairfield, Josh Keller, and Paul Volpe, 7 *Key Points From the C.I.A. Torture Report*, THE NEW YORK TIMES (Dec. 9, 2014) <http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html>.

<sup>2</sup> *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

<sup>3</sup> 732 F.3d at 990.

muscular enforcement of judicial protections, or a more limited, Suspension-Clause specific analysis.

In Part II, this note will examine the historical background of the Military Commissions, the Detainee Treatment Act, and the Military Commissions Act.<sup>4</sup> It will also provide the Supreme Court's responses to each of these, illustrating how each time the Court enforced its own jurisdiction to hear cases at Guantanamo finally culminated in the full application of the Suspension Clause in *Boumediene*.<sup>5</sup> It will also explain the relevant post-*Boumediene* case law, as well as *Bivens* actions and how detainees attempt to assert such actions for money damages against the government.<sup>6</sup> These actions are significant because if such a *Bivens* claim is recognized, some constitutional protection that has been violated would also have to be recognized.<sup>7</sup> Part III of this note will examine the facts leading up to Hamad's claim, including his allegations of cruel, inhumane, and degrading treatment (CIDT), and his subsequent release without any charge.<sup>8</sup> Part IV will examine the District Court for the Western District of Washington's decision, which has been noted as the only court to hold that a detainee had a *Bivens* claim.<sup>9</sup> Part V will examine the Ninth Circuit's holding that § 2241(e)(2) was not overruled in *Boumediene*, including its application of the severability doctrine, as well as the holding that *Bivens* claims are never constitutionally required.<sup>10</sup> Part VI will examine the legal and social impact of *Bivens* claims' denials.<sup>11</sup> Finally, I will briefly conclude that courts should be more receptive towards acknowledging money damages for detainees as a way of protecting Americans from abuses by the government.<sup>12</sup>

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<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part VI.

<sup>12</sup> See *infra* Part VII.

## II. HISTORICAL BACKGROUND

### A. *September 11th and the Authorization for Use of Military Force of 2001*

On September 11, 2001, al-Qaeda agents hijacked four commercial airplanes and attacked the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and crashed the fourth airplane into a field in Pennsylvania.<sup>13</sup> These attacks resulted in the deaths of nearly 3,000 civilians.<sup>14</sup> Following the attacks, Congress authorized 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.”<sup>15</sup> Since then, the United States has been in armed conflict with the perpetrators of that attack, al-Qaeda and the Taliban, as well as other terrorist organizations.<sup>16</sup> As opposed to more traditional forms of warfare, with uniformed armies of nation-states fighting each other, this conflict has been different: Al-Qaeda and similarly affiliated groups have a worldwide presence and the ability to execute attacks internationally “with a magnitude and sophistication never before seen from a non-state actor.”<sup>17</sup> Though the United States had the authority under both international and domestic law to take military actions against al-Qaeda and its supporters,<sup>18</sup> the

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<sup>13</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> Authorization for Use of Military Force, Pub. L. No. 107- 40, 115 Stat. 224 (2001).

<sup>16</sup> Charles A. Allen, *Alternatives To Prosecution For War Crimes in the War on Terrorism*, 17 *TRANSNAT’L L. & CONTEMP. PROBS.* 121, 122 (2008).

<sup>17</sup> Allen, *supra* note 16, at 122.

<sup>18</sup> AUMF, *supra* note 15. The collective self-defense provision of the North Atlantic Treaty provided that if an armed attack occurred against one of the parties in Europe or North America, the others will exercise the right of individual or collective self-defense. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. In a statement by NATO the day after the September 11 attack, the North Atlantic Council agreed that if the attack was determined to have been directed from abroad, it would be covered by Article 5. Press Release,

position of individuals detained in the course of the conflict was less clear. The law of war recognizes the right to detain enemy lawful and unlawful combatants until the end of the conflict.<sup>19</sup> However, in contrast to a traditional war, the current conflict is not one that will have a single definite end.<sup>20</sup> Detainees captured in the course of the conflict therefore potentially an indefinite detention.<sup>21</sup>

After October 7, 2001, U.S. forces invaded Afghanistan, and captured and detained thousands of individuals that it alleged were enemy combatants.<sup>22</sup> The next year, Secretary of Defense Donald Rumsfeld announced that some of the al-Qaeda and Taliban combatants captured in Afghanistan would be detained by the Department of Defense (DOD) at Guantanamo Bay, Cuba.<sup>23</sup> The next day, Secretary Rumsfeld alleged that because these detainees had fought without uniforms or insignias and had chosen innocent civilians as their targets, they were “unlawful enemy combatants [who] do not have any rights under the Geneva Convention.”<sup>24</sup> At its

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North Atlantic Council, Statement by the North Atlantic Council, (2001)124 (Sep. 15, 2001) <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

<sup>19</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war’”) (citing *Ex parte Quirin*, 63 S.Ct. 2, 28, 30 (1942)) (alteration in original).

<sup>20</sup> Allen, *supra* note 14, at 122-123.

<sup>21</sup> *Id.*

<sup>22</sup> Alissa J. Kness, *The Military Commissions Act of 2006: An Unconstitutional Response to Hamdan v. Rumsfeld*, 52 S.D. L. REV. 382, 383 (2007).

<sup>23</sup> Donald Rumsfeld, U.S. Sec’y of Def., Department of Defense News Briefing with Secretary Rumsfeld and General Myers (Jan. 3, 2002), <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=1046>. Secretary Rumsfeld said that at that point, the U.S. had 248 detainees in various locations in Afghanistan, and that they would begin moving the detainees to Cuba as soon as the base was constructed. *Id.*

<sup>24</sup> Donald Rumsfeld, U.S. Sec’y of Def., Department of Defense News Briefing with Secretary Rumsfeld and General Myers (Jan. 11, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>. Common Article 3 of the Third Geneva Convention of 1949 provides that:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed [out of combat] by . . . detention . . . shall in all circumstances be treated humanely. . . . To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

height, Guantanamo housed over 770 such detainees, but of those, only ten received formal charges for crimes.<sup>25</sup> Many observers questioned the combatant status of the detainees because the majority were turned over by militias and civilians in Afghanistan and Pakistan in return for substantial bounties offered in exchange for al-Qaeda or Taliban forces.<sup>26</sup>

### B. *Hamdi, Rasul and the Combatant Status Review Tribunals*

Before 2004, no systematic effort had been made by the DOD or the military to determine if the detainees held at Guantanamo were combatants, in which case the Geneva protections<sup>27</sup> applied, or unlawful non-combatants not entitled to such protections.<sup>28</sup> In November 2001, President George W. Bush issued an Executive Order stating that he intended to detain and try individuals captured

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- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>25</sup> Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 816 (2007).

<sup>26</sup> *Id.* at 816-17. Many commentators have speculated that “the financial incentives for capture overwhelmed the true non-combatant nature of those detained.” *Id.* The military offered cash bounties as high as \$5,000 for any Taliban member and up to \$20,000 for any member of al-Qaeda. Kness, *supra* note 22, at 383. “In fact, 86 [percent] of the detainees captured . . . were handed over to the United States at a time in which the United States offered large bounties for the capture of suspected enemies.” *Id.* (quoting Mark Denbeaux, Joshua Denbeaux & Seton Hall-Students, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data (Feb. 6, 2006) [http://law.shu.edu/news/Guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/Guantanamo_report_final_2_08_06.pdf)).

<sup>27</sup> See Geneva Convention art. 3, *supra* note 24.

<sup>28</sup> Greenberger, *supra* note 25, at 818.

in Afghanistan and elsewhere in military tribunals.<sup>29</sup> The President would “from time to time” determine whom would be subject to the order (and not whether the person was a combatant), however, no process was created for detainees to object to their detention.<sup>30</sup> The “bare-bones” Executive Order, and the DOD’s attempts to implement it, were sharply criticized by the American Bar Association.<sup>31</sup> Additionally, the abuses the detainees suffered as well as the harsh interrogation practices at Guantanamo received worldwide condemnation.<sup>32</sup> Importantly, the detainees had no access to legal counsel, nor any way to address the reason for their detention.

In 2004, the Supreme Court issued two momentous decisions. In *Rasul v. Bush*, the Court held that federal courts have jurisdiction over “challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at . . .

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<sup>29</sup> Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

<sup>30</sup> *Id.* at 57834. See also Greenberger, *supra* note 25, at 817 (stating that the Afghanistan conflict was “the first conflict since the advent of the Geneva Conventions in 1949 where the United States military did not convene battlefield tribunals to determine whether those captured were properly classified as combatants or prisoners of war or were innocent civilians”).

<sup>31</sup> Letter from Karen J. Mathis, President, American Bar Association, to MG John D. Altenburg, Jr. USA (Ret.), Appointing Authority, Office of Military Commissions (Oct. 20, 2006)

[http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/antiterror/061020letter\\_milcom\\_dod.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/antiterror/061020letter_milcom_dod.authcheckdam.pdf). The lack of instruction on how to proceed with the commission meant that the DOD was “repeatedly forced to revise the military commission structure,” publishing “two separate military orders and ten military commission instructions outlining practices and procedures.” Greenberger, *supra* note 25, at 822.

<sup>32</sup> See, e.g., Foreign Affairs Committee, Visit to Guantanamo Bay, 2006-7, H.C. 44-2, at 37,

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcaff/44/44.pdf> (recommending that Guantanamo be closed as soon as a process could be found to deal with the detainees in consideration of the “overriding need to protect the public from terrorist threats”), Alix Kroeger, *Euro MPs Urge Guantanamo Closure*, BBC NEWS (June 13, 2006)

<http://news.bbc.co.uk/2/hi/americas/5074216.stm>. (The European Parliament called Guantanamo “an anomaly,” and voted “overwhelmingly in favour of a motion calling on the US to close the Guantanamo Bay detention camp.”)

Guantanamo Bay.”<sup>33</sup> This was the first time the Court recognized that Guantanamo Bay detainees could appeal to federal courts with a writ of habeas corpus to challenge their confinement.<sup>34</sup> The Court in *Rasul* specifically pointed to the power to grant writ under 28 U.S.C. § 2241.<sup>35</sup>

Two days later, in *Hamdi v. Rumsfeld* the Court held that a United States citizen held at Guantanamo Bay had Due Process rights: a “meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.”<sup>36</sup> Though the Court recognized the argument that requiring such a process might subject military officers to the “threat of litigation,” the Court dismissed such concerns because the disputes would be “limited to the alleged combatant’s acts.” The Court further reasoned that the separation of powers doctrines did not give a “blank check for the President” to override constitutional rights or the “constitutionally mandated roles of reviewing and resolving claims” by federal courts.<sup>37</sup> Even during times of war, the Court elaborated, the Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>38</sup> However, the Court provided little explanation of the contours of the due process hearing, and left the definition of the legal category of enemy combatant for the lower courts.<sup>39</sup>

After the decision in *Hamdi*, the Deputy Secretary of Defense established the Combatant Status Review Tribunals (CSRTs).<sup>40</sup> The purpose of the CSRTs was “to determine whether individuals detained at Guantanamo were ‘enemy combatants’ . . . .”<sup>41</sup> The CSRTs were to comply with the due process requirements set out by

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<sup>33</sup> 542 U.S. at 470 (2004).

<sup>34</sup> Joseph Landau, Article, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009).

<sup>35</sup> *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

<sup>36</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

<sup>37</sup> *Id.* at 535-36.

<sup>38</sup> *Hamdi*, 542 U.S. at 536.

<sup>39</sup> *Id.* at 522, n.1. See also Jenny S. Martinez, *Process and Substance in the “War on Terror”*, 108 COLUM. L. REV. 1013, 1048 (2008) (noting that the majority in *Hamdi* could not agree on what the procedures for the hearing would be).

<sup>40</sup> *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

<sup>41</sup> *Id.*

the Court in *Hamdi*.<sup>42</sup> These commissions were to have two parts: (1) a hearing by the CSRT to determine the status of a detainee, and if they were deemed an “enemy combatant,” then (2) the detainee would be eligible for trial by a military commission.<sup>43</sup> “An enemy combatant” was defined as “. . . an individual who was 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.”<sup>44</sup> The detainee would be represented by a “personal representative” and could call any witnesses, but were restricted from viewing classified evidence “even if it explained ‘how, where and from whom the information about the accusations supporting the enemy combatant charge originated.’”<sup>45</sup>

*C. Detainee Treatment Act of 2005 and the Military Commissions Act of 2006*

In response to the Supreme Court’s decisions in *Rasul* and *Hamdi*, Congress passed the Detainee Treatment Act of 2005 (DTA).<sup>46</sup> The DTA amended 28 U.S.C § 2241 by adding the new section (e) to it. The DTA stripped jurisdiction from any “court, justice, or judge” to hear (1) applications for writs of habeas corpus filed by aliens detained at Guantanamo Bay and (2) “any other action against the United States or its agents relating to any aspect of the detention . . . .”<sup>47</sup> The DTA also vested exclusive review of the CSRTs’ determination in the Court of Appeals for the D.C. Circuit.<sup>48</sup> Additionally, the DTA contained an “effective date” provision:

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION

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<sup>42</sup> *Id.*

<sup>43</sup> Kness, *supra* note 22, at 396-97.

<sup>44</sup> *Boumediene v. Bush*, 583 F.Supp.2d 133, 135 (2008).

<sup>45</sup> Kness, *supra* note 22, at 397.

<sup>46</sup> Detainee Treatment Act (DTA) of 2005, PL 109-148, 119 Stat 2680 (2005).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.<sup>49</sup>

The DTA “place[d] restrictions on the treatment and interrogation of detainees in U.S. custody,” as well as established protections for U.S. citizens who have been accused of mistreatment.<sup>50</sup> It also required the Secretary of Defense to provide a report to Congress on the procedures that the CSRTs, and the Administrative Review Boards (ARBs), would follow for determining the status of detainees.<sup>51</sup>

The Supreme Court countered Congress’s jurisdiction-stripping provisions in the DTA when it decided *Hamdan v. Rumsfeld*.<sup>52</sup> In *Hamdan*, the Court did not expressly overrule the DTA.<sup>53</sup> Instead, the Court concluded that the effective date provision of the DTA did not expressly apply to pending habeas corpus petitions, only future petitions.<sup>54</sup> Therefore, the Court held that such pending habeas actions as *Hamdan*’s could continue.<sup>55</sup>

*D. The Military Commissions Act of 2006 and Boumediene v. Bush*

In *Hamdan*, the Supreme Court’s decision had not reached the constitutional rights available to alien detainees of the government.<sup>56</sup> Justice Breyer’s separate concurrence, joined by Justices Kennedy, Souter, and Ginsburg, noted that *Hamdan* was not the last say on the issue of how the government should treat the alien detainees.<sup>57</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006).

<sup>51</sup> 119 Stat 2680, *see also Hamdan*, 548 U.S. at 572.

<sup>52</sup> 548 U.S. at 557.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 576-585.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006). (Breyer, J., concurring).

Justice Breyer noted that “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.”<sup>58</sup>

In fact, President Bush did return to Congress for the necessary authority, signing into law the Military Commissions Act of 2006 (MCA) on October 17, 2006.<sup>59</sup> Section 7(a) of the MCA retained much of the same language as the DTA, amending § 2241 by adding in a section (e) that eliminated jurisdiction from any court to hear (1) “an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States . . .” and (2) “any other action against the United States relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States . . . .”<sup>60</sup> Congress’s intent in enacting the MCA was broad. While the DTA only affected statutory habeas corpus jurisdiction, the MCA was meant to also include the constitutional writ.<sup>61</sup>

The MCA was viewed by many as a “harsh rebuke” of the Supreme Court’s decision in *Hamdan*.<sup>62</sup> Unlike in the DTA, the extent to which habeas corpus should apply to the detainees was

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<sup>58</sup> *Id.*

<sup>59</sup> Greenberg, *supra* note 25, at 811.

<sup>60</sup> Military Commissions Act of 2006, PL 109-366, 120 Stat 2600 (October 17, 2006). In full, the MCA provides:

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

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

<sup>61</sup> *Boumediene*, 553 U.S. at 2242.

<sup>62</sup> Greenberger, *supra* note 25, at 812.

debated thoroughly by Congress when it considered the MCA.<sup>63</sup> The habeas bar of the MCA was only the fifth time in the history of the United States that the writ had been suspended.<sup>64</sup>

The passage of the MCA met with immediate criticism from multiple commentators.<sup>65</sup> First, the MCA broadened the personal jurisdiction of the military commissions to include any alien who was “part of” the “associated forces” of terrorist organizations, even if they had not actively engaged in hostilities against United States forces.<sup>66</sup> Also, though the MCA prohibited evidence that was obtained through torture *after* December 30, 2005, there was no prohibition against evidence obtained *before* that date.<sup>67</sup> Even then, the MCA provided military commission judges great latitude in admitting statements coerced through cruel, inhumane, or degrading treatment.<sup>68</sup>

The MCA’s harsh jurisdiction-stripping provisions prevented the alien detainees from challenging their detention, even where the detainees had no other legal recourse.<sup>69</sup> Senator John McCain decried the fact that the MCA “stripped those detainees of any other recourse to the U.S. courts for legal actions regarding their detention

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g. Norman Abrams, *Developments in US Anti-Terrorism Law*, 4 J. INT’L CRIM. JUST. 1117, 1135 (2006); Greenberger, *supra* note 25, at 812-816; Kness, *supra* note 22,

<sup>66</sup> Greenberger, *supra* note 25, at 812 (citing 120 Stat. at 2601, § 3).

<sup>67</sup> *Id.* See also 152 CONG. REC. S10243-01.

<sup>68</sup> *Id.* Military judges could admit such statements depending on when the statements were made:

Coerced statements elicited prior to the DTA’s prohibition of “cruel, inhumane, or degrading” interrogations are admissible only if the military judge should conclude that “the totality of the circumstances renders the [coerced] statement reliable and possessing sufficient probative value” and “the interests of justice would best be served by admissi[bility].” Statements coerced after passage of the DTA’s McCain Amendment are admissible if the two standards articulated above are met and “the interrogation methods . . . do not amount to cruel, inhuman, or degrading treatment” prohibited, *inter alia*, by the Eighth Amendment. Thus, by legislative legerdemain, the protections within the much-lauded McCain Amendment are redefined merely to prevent conduct violating the quite limited reach of the Eighth Amendment. Greenberger, *supra* note 25, at 814 (internal citations omitted).

<sup>69</sup> 152 CONG. REC. S10243-01.

or treatment in U.S. custody.”<sup>70</sup> The broad, sweeping language of the MCA eliminated

. . . all other legal rights . . . for . . . aliens, including lawful permanent residents detained inside or outside the United States who have been determined by the United States to be the enem[y]. The only requirement . . . is that the [United States] determine[] that the alien detainee is an enemy combatant, but the bill provides no standard for this determination and offers the detainee no ability to challenge it. Consequently, even aliens who have been released from U.S. custody . . . would be denied any legal recourse as long as the United States continues to claim that they were properly held.<sup>71</sup>

Initially, it was unclear whether the federal courts would find the jurisdiction-stripping provisions of the MCA unconstitutional. In *Hamad*, the Supreme Court did not have to address the constitutionality of a similar measure in the DTA because the Court did not find that the DTA stripped it of jurisdiction.<sup>72</sup> In December of 2006, the D.C. District Court decided the remanded case of *Hamdan v. Rumsfeld*.<sup>73</sup> There, the District Court held that the MCA effectively stripped jurisdiction from the federal courts. But, it was not unconstitutional, and Hamdan had no access to the writ of habeas corpus.<sup>74</sup> Thus, despite the Supreme Court’s efforts, through *Hamdi*, *Rasul*, and *Hamdan*, to give the protections of the rule of law to detainees, the fact that no court had fully addressed what constitutional protections apply to the detainees meant that the detainees still lacked the ability to contest their detention.

In 2008, the Supreme Court conclusively established that aliens detained at Guantanamo had the right to petition for a writ of habeas corpus in order to challenge their detention.<sup>75</sup> The petitioners in *Boumediene* were aliens who had been captured in Afghanistan and

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> “[S]ubsections (e)(2) and (e)(3) [of DTA § 1005] grant jurisdiction only over actions to ‘determine the validity of any final decision’ of a CSRT or commission. Because Hamdan . . . is not contesting any ‘final decision’ of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3).” *Hamdan v. Rumsfeld*, 548 U.S. 557, 583 (2006).

<sup>73</sup> *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9 (D.D.C. 2006).

<sup>74</sup> *Id.*

<sup>75</sup> *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

elsewhere, had been designated as “enemy combatants” by the CSRTs, and were detained at Guantanamo Bay.<sup>76</sup> The petitioners had applied to the District Court for the District of Columbia for a writ of habeas corpus.<sup>77</sup> Using similar reasoning that it applied in the remanded *Hamdan* case,<sup>78</sup> the D.C. Court of Appeals held that MCA § 7 stripped jurisdiction for any federal court to hear their habeas petitions, that it was not unconstitutional, and the petitioners had no right to apply for the writ.<sup>79</sup>

In a five-to-four decision, the Supreme Court reversed the decision of the D.C. Court of Appeals, and held that Guantanamo detainees do have the habeas corpus privilege.<sup>80</sup> First, however, the Supreme Court had to decide whether MCA § 7 denied them jurisdiction to hear the case at all.<sup>81</sup> Unlike the DTA in *Hamdan*,<sup>82</sup> the MCA left “little doubt that the effective date provision applies to habeas corpus actions.”<sup>83</sup> However, the petitioners argued that:

Section 2241(e)(1) refers to “a writ of habeas corpus.” The next paragraph, § 2241(e)(2), refers to “any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who ... [has] been properly detained as an enemy combatant or is awaiting such determination.” There are two separate paragraphs . . . so there must be two distinct classes of cases. And the effective date subsection, MCA § 7(b) . . . refers only to the second class of cases, for it largely repeats the language of § 2241(e)(2) by referring to “cases . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States.”<sup>84</sup>

The Court rejected this argument, pointing to the fact that the phrase “other action” in § 2241(e)(2) can only be understood in reference to § 2241(e)(1), which mentions “writ of habeas corpus.”<sup>85</sup>

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<sup>76</sup> *Id.* at 734.

<sup>77</sup> *Boumediene*, 553 U.S. at 723.

<sup>78</sup> *See Hamdan*, 464 F.Supp.2d at 9.

<sup>79</sup> *Boumediene*, 553 U.S. at 724.

<sup>80</sup> *Id.* at 733.

<sup>81</sup> *Boumediene v. Bush*, 553 U.S. 723, 736 (2008).

<sup>82</sup> *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576-85 (2006).

<sup>83</sup> *Boumediene*, 553 U.S. at 737.

<sup>84</sup> *Id.* at 738.

<sup>85</sup> *Id.* at 737. *See* 28 U.S.C. § 2241(e)(1)–(2).

Even though the effective date provision of MCA § 7(b) appeared to have the same language as § 2241(e)(2),<sup>86</sup> the Court held that habeas actions are a type of action that the structure of the two paragraphs implies is covered by the effective date provision.<sup>87</sup> Pending habeas actions are therefore covered by § 2241(e)(1); so long as MCA § 7 was constitutionally valid, the petitioner's claims would have to be dismissed.<sup>88</sup> The Court thus faced two issues: (1) did the Guantanamo detainees have constitutional rights, and if so, (2) did the MCA and DTA provide adequate alternative procedures (through the CSRTs) to the writ of habeas corpus?<sup>89</sup>

Writing for the majority, Justice Anthony Kennedy held that the detainees are protected by the constitutional privilege of habeas corpus, and that the CSRTs provided an inadequate substitute for the writ.<sup>90</sup> Justice Kennedy explained that the writ of habeas corpus through the Suspension Clause<sup>91</sup> was meant to protect against the “cyclical abuses” of the Executive and the Legislative branches.<sup>92</sup> According to Justice Kennedy, the Suspension Clause was uniquely important as a tool for the Judiciary to use to enforce the separation-of-powers doctrine.<sup>93</sup> Justice Kennedy's emphasis on the separation-of-powers seemed to guide much of his analysis.<sup>94</sup> Thus, Justice Kennedy rejected the Government's argument that the “political question doctrine” required the Court to allow the political branches to limit habeas corpus jurisdiction based on de jure sovereignty.<sup>95</sup> Justice Kennedy emphasized that the Constitution does not grant the

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<sup>86</sup> Compare 28 U.S.C. § 2241(e)(2), and Military Commissions Act of 2006 § 7(b).

<sup>87</sup> *Boumediene v. Bush*, 553 U.S. 723, 737 (2008).

<sup>88</sup> *Id.*

<sup>89</sup> Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 725 (2012).

<sup>90</sup> *Boumediene*, 553 U.S. at 732–33.

<sup>91</sup> Article I, Section 9, Clause 2 of the Constitution, otherwise known as the Suspension Clause, provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

<sup>92</sup> *Boumediene*, 553 U.S. at 745.

<sup>93</sup> *Boumediene v. Bush*, 553 U.S. 723, 745–46 (2008)..

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

political branches “the power to decide when and where its terms apply,” and that the Government is still constrained by the restrictions of the Constitution.<sup>96</sup> The wider reasoning behind *Boumediene*, then, was to defend the reach of the judiciary: “To hold [that] the political branches have the power to switch the Constitution on or off at will is . . . a striking anomaly . . . leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”<sup>97</sup> However, Justice Kennedy emphasized that the decision by the Court was a narrow one:

Our decision today holds only that petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.<sup>98</sup>

The majority in *Boumediene* expressly declined to decide whether the CSRT procedures satisfied due process requirements.<sup>99</sup> Indeed, Chief Justice Roberts, writing for the dissent in *Boumediene*, sharply criticized the majority for extending the Suspension Clause without engaging in any due process analysis.<sup>100</sup>

#### *E. Money Damages Claims By Detainees After Boumediene*

After the Supreme Court extended legal rights to detainees through the Supremacy Clause of the Constitution, many commentators believed that other parts of the Constitution would be extended to Guantanamo.<sup>101</sup> To many commentators, the most likely constitutional right that would next be extended would be the Due Process Clause of the Fifth Amendment.<sup>102</sup> The Fifth Amendment’s Due Process Clause provides that “[n]o person shall be . . . deprived

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<sup>96</sup> *Id.* at 765.

<sup>97</sup> *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

<sup>98</sup> *Boumediene*, 553 U.S. at 795.

<sup>99</sup> *Boumediene v. Bush*, 553 U.S. 723, 785 (2008).

<sup>100</sup> *Id.* at 801–02 (Roberts, J., dissenting).

<sup>101</sup> *See, e.g.*, Geltzer, *supra* note 89, at 720.

<sup>102</sup> *Id.*

of life, liberty, or property, without due process of law.”<sup>103</sup> If the Due Process Clause was found to apply to Guantanamo detainees, then it would allow alien detainees to be able to pursue claims based on violations of the Fifth Amendment. More specifically, this would allow former Guantanamo detainees to pursue civil lawsuits for compensation in suits known as *Bivens* actions.

### 1. *Bivens* Actions And The “Special Factors Counseling Hesitation”

A *Bivens* action is a civil suit where the claimant alleges constitutional violations by federal agents, and is named after the case *Bivens v. Six Unknown Named Agents*.<sup>104</sup> In *Bivens*, agents from the Federal Bureau of Narcotics conducted a search of Bivens’ apartment without a warrant or probable cause and recovered narcotics.<sup>105</sup> Bivens sued the agents, alleging that they had violated his constitutional rights under the Fourth Amendment.<sup>106</sup> The Supreme Court reasoned that while there is no specific provision in the Fourth Amendment (or in the Constitution) that provides for money damages for violations of it, “federal courts may use any available remedy to make good the wrong done.”<sup>107</sup> Therefore, the Court held that where a constitutional right has been violated by federal agents, that person is entitled to recover money damages.<sup>108</sup>

In what would later become a limiting doctrine to *Bivens* claims, the Court noted several “special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>109</sup> The Court listed three special factors that were areas that were traditionally reserved to congressional judgment: federal fiscal policy, government-soldier relationship, and congressional employment.<sup>110</sup> The “special factors” evolved from factors that counseled hesitancy, into a nonjusticiability doctrine that courts could use to deny a *Bivens* remedy, especially

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<sup>103</sup> U.S. CONST. amend. V.

<sup>104</sup> 403 U.S. 388 (1971).

<sup>105</sup> *Id.* at 389–90.

<sup>106</sup> *Id.* at 390.

<sup>107</sup> *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>108</sup> *Id.*

<sup>109</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

<sup>110</sup> *Id.*

where a *Bivens* remedy “might compete with Congress’s statutory decisions.”<sup>111</sup> For example, the Supreme Court refused to infer *Bivens* remedies for claims of employment discrimination in violation of the First Amendment,<sup>112</sup> Social Security disability benefits terminated in violation of the Fifth Amendment,<sup>113</sup> and injuries arising from secret testing of LSD on an officer in the military in violation of tort law.<sup>114</sup>

Generally, the “special factors” were considered and used to bar a judicial remedy where Congress had created a statutory remedy for specific constitutional violations. However, *Wilkie v. Robbins* expanded the “special factors” to include areas where Congress had not created an express remedial scheme.<sup>115</sup> In *Wilkie*, the Court refused to create a *Bivens* remedy where Government employees harassed, intimidated, and trespassed onto Robbins’ property in an effort to obtain an easement over his land.<sup>116</sup> The Court reasoned that, even though no federal remedy existed, “Robbins had . . . a wide variety of [state] administrative and judicial remedies to redress his injuries.”<sup>117</sup> Fearful of “an onslaught of *Bivens* actions,” the Court signaled its intent to limit future *Bivens* actions and instead, defer to Congress’s legislative judgment to provide or not provide a remedy.<sup>118</sup>

## 2. *Bivens* Actions By Guantanamo Detainees

In general, most courts have attempted to avoid the issue of whether the detainees have any right to pursue a damages claim

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<sup>111</sup> Ian Samson, *Boumediene as a Constitutional Mandate: Bivens Actions at Guantanamo Bay*, 38 HASTINGS CONST. L. Q. 439, 453 (2011).

<sup>112</sup> *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

<sup>113</sup> *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988).

<sup>114</sup> *United States v. Stanley*, 483 U.S. 669, 681–84 (1987).

<sup>115</sup> 551 U.S. 537 (2007).

<sup>116</sup> *Id.* at 541.

<sup>117</sup> *Id.* at 562.

<sup>118</sup> *Id.* See also Samson, *supra* note 111, at 454.

based on alleged constitutional violations.<sup>119</sup> The D.C. Circuit has held that the Due Process Clause does not apply to alien detainees, and that *Boumediene* was limited to the Suspension Clause.<sup>120</sup> In *Rasul v. Myers*, also known as *Rasul II*, the D.C. Circuit held that *Boumediene* only invalidated the portion of the MCA that deprived federal court of habeas corpus jurisdiction, and retained the other portions, which restricted the detainee's judicial access.<sup>121</sup> In *Rasul II*, four British nationals brought an action asserting, among other claims, *Bivens* claims for violations of the Fifth and Eighth Amendments.<sup>122</sup> They argued that *Boumediene* created a "functional test" that entitled detainees to "fundamental constitutional rights" unless it was "impracticable and anomalous" to recognize those rights.<sup>123</sup> They further argued that the rights they sought were constitutional, and it would not be "impracticable and anomalous" to recognize them.<sup>124</sup> However, the D.C. Circuit skirted the issue, noting the narrow holding of *Boumediene*: "the Court stressed that its decision 'does not address the content of the law that governs petitioners' detention.'"<sup>125</sup> The *Rasul II* court interpreted that statement to mean "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause."<sup>126</sup> Despite this, the

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<sup>119</sup> Geltzer notes that, wherever possible, the D.C. Circuit has declined to address the issue of whether the Due Process, or any other constitutional protections, apply to the detainees. Geltzer, *supra* note 89, at 740–43.

<sup>120</sup> See *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir 2009), *vacated*, 559 U.S. 131 (2010), *reinstated by* 605 F.3d 1046 (D.C. Cir 2010). For a complete discussion of the *Kiyemba* case, see Geltzer, *supra* note 89 at 740–43.

<sup>121</sup> 563 F.3d 527 (D.C. Cir. 2009).

<sup>122</sup> *Id.* at 528.

<sup>123</sup> Supplemental Brief on Remand of Appellants/Cross Appellees *Rasul*, et al., *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (No. 06-5209, 06-5222), 2009 WL 700174 (C.A.D.C.) at \*1.

<sup>124</sup> *Id.*

<sup>125</sup> *Rasul*, 563 F.3d. at 529 (quoting *Boumediene v. Bush*, 553 U.S. 723, 797 (2008)). Samson noted that the *Rasul II* court ignored the following sentence, which stated that the issue of what constitutional provisions apply "is a matter yet to be determined." Samson, *supra* note 111, at 459 (quoting *Boumediene*, 553 U.S. at 797).

<sup>126</sup> *Rasul*, 563 F.3d at 529.

D.C. Circuit did not rule on whether any constitutional provisions applied to the detainees.<sup>127</sup> Instead, the court dismissed the *Bivens* claims based on qualified immunity.<sup>128</sup> *Rasul II* thus stood as the “definitive opinion on *Boumediene* in the D.C.-Circuit,” interpreting *Boumediene* to provide no constitutional rights to be violated for a *Bivens* claim.<sup>129</sup>

### 3. The Blueprint For The Ninth Circuit: *Al-Zahrani v. Rodriguez*

In 2012, the D.C. Circuit took the analysis that had begun in *Rasul II* to its full conclusion in *Al-Zahrani v. Rodriguez*, and held that *Boumediene* did not overrule 28 U.S.C. § 2241(e)(2).<sup>130</sup> *Al-Zahrani* was an action brought by the representatives of Yasser Al-Zahrani and Salah Ali Abdullah, citizens of Saudi Arabia and Yemen, respectively, who were detained at Guantanamo.<sup>131</sup> The two had died at Guantanamo under disputed circumstances.<sup>132</sup> Their representatives sought money damages in a *Bivens* action, alleging violations of the Fifth and Eighth Amendments, among other claims.<sup>133</sup> Relying on the D.C. Circuit’s prior decision in *Rasul II*, the D.C. District Court did not reach the constitutionality of the MCA, and instead dismissed the *Bivens* claims based on qualified immunity.<sup>134</sup> However, as opposed to the earlier decision in *Rasul II*, the D.C. Circuit chose to directly address whether the provisions of the MCA, which purported to strip jurisdiction from federal courts for non-habeas actions, survived *Boumediene*.<sup>135</sup> First, the D.C.

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<sup>127</sup>*Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).. “[W]e should not decide whether *Boumediene* portends application of the Due Process Clause and Cruel and Unusual Punishment Clause to Guantanamo detainees.”*Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Samson, *supra* note 111, at 457.

<sup>130</sup> *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 320 (D.C. Cir. 2012).

<sup>131</sup> *Id.* at 317.

<sup>132</sup> Josh White, *Guards’ Lapses Cited in Detainee Suicides*, THE WASHINGTON POST (Aug. 23, 2008) [http://www.washingtonpost.com/wp-dyn/content/article/2008/08/22/AR2008082203083\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/08/22/AR2008082203083_pf.html).

<sup>133</sup> *Al-Zahrani*, 669 F.3d at 318.

<sup>134</sup> *Al-Zahrani v. Rumsfeld*, 684 F.Supp.2d 103, 110-13 (D.D.C. 2010).

<sup>135</sup> *See supra*, Part II, section E, subsection b, for a discussion of *Rasul II*.

Circuit noted that *Boumediene* was an appeal from their own court, involving “a decision applying the first subsection of § 7 governing and barring the hearing of applications for writs of habeas corpus filed by detained aliens.”<sup>136</sup> Applying similar logic as it had applied in *Rasul II*, the D.C. Circuit reasoned that much of the Supreme Court’s decision focused on the Suspension Clause.<sup>137</sup> Additionally, the D.C. Circuit argued that § 2241(e)(2) governed the case, and had “no effect on habeas jurisdiction.”<sup>138</sup> The D.C. Circuit also rejected the argument that § 2241(e)(2) unconstitutionally barred remedies for violations of constitutional rights.<sup>139</sup>

Significantly, the court asserted that money remedies “are not constitutionally required.”<sup>140</sup> Utilizing the “special factors” analysis,<sup>141</sup> the court chose not to extend a *Bivens* remedy to the detainees.<sup>142</sup> Therefore, the court said, “the Supreme Court used a scalpel and not a bludgeon,” and thus § 2241(e)(2) continued to have effect.<sup>143</sup>

### III. FACTS

In 2002, Adel Hassan Hamad, appellant, a resident and citizen of Sudan,<sup>144</sup> was captured in Pakistan by Pakistani security forces “acting under the direction of an ‘unknown American official.’”<sup>145</sup> Hamad claims he was a humanitarian aid worker for the World Assembly of Muslim Youth (WAMY),<sup>146</sup> a Saudi Arabian-funded

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<sup>136</sup> *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See supra*, Part II, section E, subsection b.

<sup>142</sup> *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 320 (D.C. Cir. 2012).

<sup>143</sup> *Id.*

<sup>144</sup> Notice of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue, or, in the Alternative, for Transfer, and Memorandum of Points and Authority in Support Thereof.

<sup>145</sup> *Hamad v. Gates*, 732 F.3d 990, 993 (9th Cir. 2013).

<sup>146</sup> Andy Worthington, *The Shocking Stories of the Sudanese Humanitarian Aid Workers Just Released From Guantanamo*, ANDY WORTHINGTON (Dec. 7,

organization that has been accused of being “a discreet channel for . . . donations to hardline Islamic organisations.”<sup>147</sup> Hamad was transferred by the Pakistani security forces to the U.S. military, which detained him first at Bagram Airfield, Afghanistan, then at Guantanamo Bay, Cuba.<sup>148</sup> He claims that while he was detained, he “was subjected to prolonged arbitrary detention, cruel, inhuman, or degrading treatment . . . [and] torture.”<sup>149</sup>

In March 2005, a divided Combatant Status Review Tribunal (CSRT) determined that Hamad was an “enemy combatant.”<sup>150</sup> In November 2005, an Administrative Review Board (ARB) panel reviewed the detention of Hamad and determined that while he continued to be “a threat to the United States and its allies,” he was eligible to be transferred to Sudan.<sup>151</sup> However, he only received notice that he was eligible in February 2007.<sup>152</sup> After obtaining an agreement with Sudan as to the conditions of his transfer,<sup>153</sup> in December 2007, Hamad was transferred to Sudan.<sup>154</sup> He was never charged with any crime at any point in his detention.<sup>155</sup>

After his release, in 2010, Hamad filed a claim in federal court for money damages against twenty-two named military and civilian government officials, including former Secretary of Defense Robert Gates, and 100 other unnamed officials.<sup>156</sup> He alleges that these officials were acting outside the scope of their employment and in

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2014), <http://www.andyworthington.co.uk/2007/12/14/the-shocking-stories-of-the-sudanese-humanitarian-aid-workers-just-released-from-guantanamo/>.

<sup>147</sup> Greg Palast & David Pallister, *FBI Claims Bin Laden Inquiry Was Frustrated*, THE GUARDIAN (Nov. 7, 2001, 11:31 AM), <http://www.theguardian.com/world/2001/nov/07/afghanistan.september11>.

<sup>148</sup> *Hamad*, 732 F.3d at 993.

<sup>149</sup> Plaintiff’s Amended Complaint at 35, *Hamad v. Gates*, 732 F.3d 990 (2013) Nos. 12-35395, 12-35489.

<sup>150</sup> *Hamad*, 732 F.3d at 994.

<sup>151</sup> *Hamad v. Gates*, 732 F.3d 990, 994 (9th Cir. 2013).

<sup>152</sup> Brief for Appellant at 5.

<sup>153</sup> Second Brief on Cross-Appeal for the Defendants-Appellees/Cross-Appellants at 5 *Hamad*, 732 F.3d 990 (Nos. 12-35395, 12-35489).

<sup>154</sup> *Id.*

<sup>155</sup> Brief for Appellant at 4.

<sup>156</sup> 732 F.3d at 994.

their individual capacities.<sup>157</sup> Hamad raised six claims under state common law, the Alien Tort Statute,<sup>158</sup> international law, and the Geneva Conventions.<sup>159</sup> His six claims were for (1) prolonged arbitrary detention; (2) cruel, inhuman, or degrading treatment; (3) torture; (4) targeting of a civilian; (5) violation of due process; and (6) forced disappearance.<sup>160</sup> In addition, Hamad's second amended complaint alleged a seventh claim for damages for violation of due process under the Fifth Amendment of the United States Constitution.<sup>161</sup> His claims were based on his alleged wrongful detention, torture, and mistreatment during his initial detention in Pakistan and at Bagram Airfield, as well as during his transportation to and detention at Guantanamo Bay.<sup>162</sup> Hamad sought a judgment for compensatory damages, exemplary and punitive damages, and attorneys' fees from the defendants.<sup>163</sup>

#### IV. PROCEDURAL HISTORY

Hamad filed his action in the United States District Court for the Western District of Washington.<sup>164</sup> The district court dismissed all other defendants except for Defense Secretary Gates for lack of personal jurisdiction.<sup>165</sup> The district court also granted the government's motion to substitute itself for Gates for the first six claims under the Westfall Act.<sup>166</sup>

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<sup>157</sup> Hamad v. Gates, 732 F.3d 990, 994 (9th Cir. 2013).

<sup>158</sup> 28 U.S.C. § 1350.

<sup>159</sup> Plaintiff's Second Amended Complaint for Damages Hamad, 732 F.3d 990 (Nos. 12-35395, 12-35489).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See id.*

<sup>163</sup> *Id.*

<sup>164</sup> Hamad v. Gates, 732 F.3d 990, 994 (9th Cir. 2013).

<sup>165</sup> *Id.* at 995; *see also* Hamad v. Gates, No. C10-591 MJP, 2012 WL 1253167, at \*7 (W.D. Wash. Apr. 13, 2012) vacated and remanded, 732 F.3d 990 (9th Cir. 2013)

<sup>166</sup> 28 U.S.C. § 2679(d)(1) provides that

[u]pon certification . . . that the defendant employee was acting within the scope of his office . . . at the time of the incident out of

First, the District Court addressed whether Gates was protected by the qualified immunity doctrine.<sup>167</sup> The government argued that Gates was protected by qualified immunity<sup>168</sup> because, at the time Hamad was detained, there was a “‘lack of case law’ establishing the Due Process rights of Guantanamo detainees.”<sup>169</sup> The District Court rejected this argument, finding that a “reasonable federal official would know that detaining a person, after determining he is eligible for release, violates a clearly established constitutional right.”<sup>170</sup> Additionally, the District Court found that *Boumediene* struck down § 2241(e) in its entirety—both the section that “strip[ped] federal jurisdiction over habeas petitions [subsection (e)(1)] and the subsection that stripped federal jurisdiction over *Bivens* actions [subsection (e)(2)].”<sup>171</sup> Therefore, the District Court reasoned, *Boumediene* recognized that full constitutional protections extend to Guantanamo detainees.

However, the District Court agreed with the government’s second argument that Hamad failed to allege in his complaint that Gates was “personally involved in violating Hamad’s constitutional rights.”<sup>172</sup> The District Court rejected Hamad’s four factual allegations as “weak” and “not enough to meet *Iqbal*’s plausibility standard.”<sup>173</sup>

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which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant.

<sup>167</sup> *Hamad*, 2012 WL 1253167, at \*2.

<sup>168</sup> “The doctrine of qualified immunity protects government officials ‘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.’” *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223 (2009)). For a government official to be protected by qualified immunity, the court has discretion to consider one or both steps of a two-step inquiry: (1) the official violated a constitutional right and/or (2) the right was “clearly established” at the time. *Id.*

<sup>169</sup> *Id.* at \*3.

<sup>170</sup> *Id.* at \*5.

<sup>171</sup> *Hamad v. Gates*, No. C10-591 MJP, 2012 WL 1253167, at \*3 (W.D. Wash. Apr. 13, 2012) vacated and remanded, 732 F.3d 990 (9th Cir. 2013)

<sup>172</sup> *Id.* at \*5.

<sup>173</sup> *Id.*

The District Court held that while it was “possible Gates knew Hamad was unlawfully detained,” it was not plausible. Therefore, the District Court rejected Hamad’s last claim and dismissed it.<sup>174</sup>

## V. ANALYSIS OF OPINION

The Ninth Circuit held that 28 U.S.C. § 2241(e)(2) deprived the court of subject-matter jurisdiction to hear Hamad’s claims.<sup>175</sup> First, it considered whether the Supreme Court in *Boumediene v. Bush* had struck down all of the jurisdiction-stripping provisions of § 2241(e), and it held that it did not.<sup>176</sup> Next, the court then concluded that (e)(2) was severable from (e)(1).<sup>177</sup> Finally, the court held that § 2241(e)(2) was constitutional as applied to Hamad.<sup>178</sup>

### A. *Did Boumediene Strike Down All of § 2241(e)?*

The court first addressed whether the District Court had subject-matter jurisdiction over Hamad’s claim, despite the jurisdiction-stripping provisions of § 2241(e). The court outlined the five requirements that § 2241(e)(2) sets for a federal court to lack jurisdiction over an action:

- (1) the action is “against the United States or its agents”;
- (2) the action 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”;
- (3) the action relates to an alien who was “determined by the United States to have been properly detained as an enemy combatant or is [an alien] awaiting such a determination”;
- (4) the action is an action “other” than an application for a writ of habeas corpus . . . and

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<sup>174</sup> *Id.* at \*7.

<sup>175</sup> *Hamad v. Gates*, 732 F.3d 990, 993 (9th Cir. 2013).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

(5) the action does not qualify for an exception under § 1005(e)(2) or (3) of the Detainee Treatment Act of 2005(DTA)<sup>179</sup>, which provide the D.C. Circuit jurisdiction over a narrow class of challenges by enemy combatants.<sup>180</sup>

Looking at the five requirements, the court held that Hamad's action met each of them.<sup>181</sup> Since § 2241(e)(2) "applie[d] by its terms,"<sup>182</sup> the court next considered whether *Boumediene* struck down all of § 2241, or only referred to the subdivision stripping jurisdiction over habeas corpus actions.<sup>183</sup> First, the court reviewed the historical backdrop of Supreme Court precedent, Congressional legislation, and Presidential actions which lead to Hamad's argument.<sup>184</sup> The court noted that because *Boumediene*'s holding focused primarily on Congress's authority to suspend habeas corpus at Guantanamo Bay, it did not analyze the constitutionality of § 2241(e)(2).<sup>185</sup> Additionally, *Boumediene* did not address whether any other constitutional provisions applied to Guantanamo detainees.<sup>186</sup> Hamad argued that because the Supreme Court did not expressly differentiate between § 2241(e)(1) and (2), *Boumediene* should be read to strike down all of § 2241(e).<sup>187</sup> However, the Ninth Circuit disagreed, stating that the "logic and context of the opinion make clear that the Supreme Court was addressing only § 2241(e)(1)."<sup>188</sup> The Supreme Court's rationale in invalidating § 2241(e), according to the Ninth Circuit, was that the section deprived the detainees of habeas corpus review which unconstitutionally violated the Suspension Clause.<sup>189</sup> This rationale has no relation to subsection (e)(2), which relates to any other action other than habeas

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<sup>179</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (2005).

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<sup>181</sup> Hamad v. Gates, 732 F.3d 990, 993 (9th Cir. 2013).

<sup>182</sup> *Id.* at 996.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Hamad*, 732 F.3d at 999.

<sup>186</sup> *Id.*

<sup>187</sup> Hamad v. Gates, 732 F.3d 990, 999 (9th Cir. 2013).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

corpus.<sup>190</sup> Moreover, the Ninth Circuit cited specific language in *Boumediene* that limited the decision to the suspension of the writ of habeas.<sup>191</sup> The Ninth Circuit concluded that the decision in *Boumediene* could not have struck § 2241(e)(2) down.<sup>192</sup>

*B. Is § 2241(e)(2) Severable From § 2241(e)(1)?*

Next, the court considered whether § 2241(e)(2) was severable from § 2241(e)(1).

Hamad argued in his brief that Sections 2241(e)(1) and (e)(2) are textually interdependent, and that (e)(2) cannot stand alone.<sup>193</sup> He pointed to language in *Boumediene* which he argued demonstrated that the Court “understood the distinction between (e)(1) and (e)(2), but chose to strike both sections down as unconstitutional.”<sup>194</sup> Additionally, Hamad argued that if Section 2241(e)(2) were left standing, but (e)(1) were removed, the phrase “other action” would refer to a non-existing paragraph and it would still preclude habeas corpus actions.<sup>195</sup> The court rejected these arguments.<sup>196</sup> First, the court noted that generally, courts should not invalidate more of a statute than necessary because “[a] ruling of unconstitutionality frustrates the intent of the elected representatives.”<sup>197</sup> Citing Supreme Court precedent, the presumption when a statute is ruled unconstitutional is that the enactment is severable from the rest of the

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* The Supreme Court in *Boumediene v. Bush* stated: “[o]ur decision today holds *only* that petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.” 553 U.S. 723, 795 (2008). (emphasis added).

<sup>192</sup> *Hamad*, 732 F.3d at 1000.

<sup>193</sup> Third Brief on Cross-Appeal For Adel Hamad, Plaintiff-Appellant, Cross-Appellee Response and Reply Brief, at 10 [hereinafter Third Brief on Cross-Appeal].

<sup>194</sup> *Id.* at 9, *see also Boumediene*, 553 U.S. at 737-8.

<sup>195</sup> Third Brief on Cross-Appeal, at 10.

<sup>196</sup> *Hamad v. Gates*, 732 F.3d 990, 1000 (9th Cir. 2013).

<sup>197</sup> *Id.* (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006)).

statute.<sup>198</sup> The court outlined the three-part *Booker* severability test, and then applied it to Section 2241.<sup>199</sup> The severability test, as outlined in *Booker*, requires courts to retain portions of statutes that are “(1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress’ basic objectives in enacting the statute.”<sup>200</sup>

Beginning with the second inquiry of the *Booker* test, which views whether the statute could function independently, the court believed that the two provisions of § 2241(e) are capable of functioning independently.<sup>201</sup> The Ninth Circuit focused on the fact that the statute focused on two separate categories of actions that Guantanamo detainees could bring.<sup>202</sup> According to the Ninth Circuit, it was “apparent” that *Boumediene*’s conclusion only addressed habeas actions, and so nothing prevented § 2241(e)(2) from independently barring non-habeas action.<sup>203</sup>

The court then addressed Hamad’s argument that the Supreme Court’s interpretation of § 7(a) and (b) of the MCA shows that § 2241(e)(2) cannot function independently from § 2241(e)(1). In *Boumediene*, the Supreme Court rejected the petitioner’s argument that § 7(b) of the MCA applied only to non-habeas actions, reasoning that the phrase “any other action” in § 2241(e)(2) must be read in reference to § 2241(e)(1).<sup>204</sup> Hamad argued that because the Supreme Court’s reasoning shows that § 2241(e)(2) must be read in reference to § 2241(e)(1), and therefore cannot function independently.<sup>205</sup> The court disagreed, noting that a subsection of a statute is still able to function even if it can only be understood by referencing an inoperative part of the statute.<sup>206</sup> Therefore, the court

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<sup>198</sup> *Id.* at 1001, *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685-86 (1987).

<sup>199</sup> *Hamad*, 732 F.3d at 1001.

<sup>200</sup> *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 258-59 (2005)). The basis of the severability is the intent of Congress in enacting the statute. *Alaska Airlines*, 480 U.S. at 685.

<sup>201</sup> *Hamad*, 732 F.3d at 1001.

<sup>202</sup> *Hamad v. Gates*, 732 F.3d 990, 1001 (9th Cir. 2013).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*, *see also Boumediene v. Bush*, 553 U.S. 723, 737 (2008).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1002. *See also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987).

held that § 2241(e)(2) was fully operative because it bars jurisdiction over the subset of cases not covered by § 2241(e)(1).<sup>207</sup>

The court then addressed the third prong of *Booker*, which is whether the retained portion of the statute is consistent with Congress's basic objectives in enacting the statute.<sup>208</sup> Again, the court referred to the statute itself to show that Congress had two concerns: one was "to bar alien detainees from applying for habeas corpus," and the other was to prevent alien detainees from bringing any other type of action related to their detention or treatment.<sup>209</sup> The court then reasoned that, based on the history of Congress's responses to Supreme Court decisions<sup>210</sup>, Congress's basic objective "was to limit detainee's access to the courts."<sup>211</sup> After briefly reviewing the Supreme Court decisions and Congress's responses to each,<sup>212</sup> the court concluded that § 2241(e)(2) was consistent with Congress's objective.<sup>213</sup> Finally, the court rejected Hamad's argument that the absence of a severability clause meant that Congress did not intend the provisions to be severable.<sup>214</sup> Citing *Alaska Airlines*,<sup>215</sup> the court stated that it was "evident" that the two provisions were severable, in light of the text and historical background.<sup>216</sup> Therefore, the court concluded § 2241(e)(2) was severable from § 2241(e)(1), and would therefore bar Hamad's action so long as it was constitutional.<sup>217</sup>

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<sup>207</sup> *Hamad*, 732 F.3d at 1001.

<sup>208</sup> *Hamad v. Gates*, 732 F.3d 990, 1001 (9th Cir. 2013). (citing *United States v. Booker*, 543 U.S. 220, 258-59 (2005)).

<sup>209</sup> *Hamad*, 732 F.3d at 1002.

<sup>210</sup> For a discussion of these cases and the relevant statutes, see Part III.

<sup>211</sup> *Hamad*, 732 F.3d at 1003.

<sup>212</sup> *Id.*, see *infra* Part III.

<sup>213</sup> *Hamad*, 732 F.3d at 1003.

<sup>214</sup> *Hamad v. Gates*, 732 F.3d 990, 1003 (9th Cir. 2013).

<sup>215</sup> "In the absence of a severability clause . . . , Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 686 (1987).

<sup>216</sup> *Hamad*, 732 F.3d at 1003.

<sup>217</sup> *Id.*

*C. Is § 2241(e)(2) Unconstitutional As Applied to Hamad?*

Finally, the court examined Hamad's arguments that § 2241(e)(2) was unconstitutional, and therefore should have no effect.<sup>218</sup> Hamad argued that the statute unconstitutionally deprived him of a federal forum to seek a remedy for violations of his constitutional rights: "Article III demands some federal court review . . . over all federal question claims."<sup>219</sup> He argued that the Supreme Court has the "strongest of presumptions" against statutes that completely precludes access to federal courts for constitutional claims, and has in fact never upheld such a preclusion.<sup>220</sup> Finally, Hamad argued that § 2241(e) was a violation of the doctrine of separation of powers<sup>221</sup> and that it precludes claims based on state law as well, thereby violating the principle of federalism.<sup>222</sup>

The Court began its analysis by agreeing with Hamad that the Supreme Court has avoided whether Congress may deny access to federal court to seek a remedy for violations of constitutional rights.<sup>223</sup> However, the Court also chose to avoid the question as well, stating that the Constitution does not require the availability of money damages, which is the only remedy that Hamad sought.<sup>224</sup> The court referred to the Supreme Court's *Bivens* cases, noting that a *Bivens* damages remedy is "not an automatic entitlement . . . to

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<sup>218</sup> *Id.*

<sup>219</sup> Third Brief on Cross-Appeal, at 16.

<sup>220</sup> *Id.* See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (avoiding the "serious constitutional question" that would be presented if the Court "construed [a statute] to deny a judicial forum for constitutional claims"); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring a "heightened showing" that Congress clearly intended to preclude judicial review of constitutional claims to avoid the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

<sup>221</sup> Third Brief on Cross-Appeal, at 17.

<sup>222</sup> *Id.* at 17-18.

<sup>223</sup> *Hamad v. Gates*, 732 F.3d 990, 1003 (9th Cir. 2013). (citing *Bowen*, 476 U.S. at 681 n. 12).

<sup>224</sup> *Id.* The court also cited to *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012), discussed *infra* Part III.

vindicate a protected interest.”<sup>225</sup> The court then cited several different contexts where the Supreme Court declined to recognize a *Bivens* remedy.<sup>226</sup> Thus, the court held that “money damages are not constitutionally required for every violation of constitutional rights” and thus § 2241(e)(2) is not unconstitutional as applied to Hamad’s claim.<sup>227</sup>

Next, Hamad argued that § 2241(e) is an unconstitutional bill of attainder because it strips a discrete class of individuals, alien detainees, of access to courts.<sup>228</sup> Under the Bill of Attainder Clause,<sup>229</sup> a bill of attainder is any “legislative punishment, of any form or severity, of specifically designated persons or groups.”<sup>230</sup> A bill of attainder has three elements: “the statute (1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial.”<sup>231</sup> Since a statute must demonstrate “‘unmistakable evidence of punitive intent’ before it may be struck down as a bill of attainder,” the main issue was whether the statute inflicted legislative punishment.<sup>232</sup> Hamad argued that denying a class access to the courts is the type of punishment that has been historically recognized

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<sup>225</sup> *Hamad*, 732 F.3d at 1004 (citing *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

<sup>226</sup> *Hamad*, 732 F.3d at 1004. See *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting money damages for denial of Social Security benefits), *United States v. Stanley*, 483 U.S. 669 (1987) (rejecting money damages for injuries that arise out of military service), *Bush v. Lucas*, 462 U.S. 367 (1983) (rejecting money damages for First Amendment violations by federal employers), *Mirmehdi v. United States*, 689 U.S. 975 (9th Cir. 2012) (concluding that aliens not lawfully in the United States may not sue federal agents for money damages for wrongful detention).

<sup>227</sup> *Hamad*, 732 F.3d at 1004.

<sup>228</sup> Third Brief On Cross-Appeal, at 19.

<sup>229</sup> U.S. Const., art. I § 9, cl. 3.

<sup>230</sup> Third Brief On Cross Appeal, at 20 (citing *United States v. Brown*, 381 U.S. 437, 447 (1965)).

<sup>231</sup> *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013). (citing *SeaRiver Maritime Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002)).

<sup>232</sup> *Id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 619 (1960)). “In determining whether a statute inflicts punishment, we look to whether the statute “‘falls within the historical meaning of legislative punishment’ or does not ‘further nonpunitive legislative purposes.’” *Id.* (citing *SeaRiver Maritime Fin. Holdings Inv. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002)) (internal citation omitted).

as a form of legislative punishment.<sup>233</sup> Hamad tried to distinguish his case from that of *Nagac v. Derwinski*,<sup>234</sup> arguing that the statute in *Nagac* which restricted access to the courts did not fully restrict access, “only the exclusivity of which court could hear review” of veteran’s administrative decisions.<sup>235</sup> Additionally, Hamad argued that the Congressional record showed that Congress intended to punish Guantanamo Bay detainees for exercising their habeas rights,<sup>236</sup> whereas the record in *Nagac* did not demonstrate a desire to punish veterans.<sup>237</sup>

However, the court rejected Hamad’s arguments, and held that § 2241(e)(2) is not a bill of attainder.<sup>238</sup> The court found *Nagac* persuasive, and cited it for the proposition that “[j]urisdictional limitations, such as the limitations imposed by § 2241(e)(2), do not fall within the historical meaning of legislative punishment.”<sup>239</sup> According to the court, the purpose of the statute was not to impose punishment, but to limit review of the ARB and military commission decisions.<sup>240</sup> Since the court saw no “unmistakable evidence of punitive intent,” the court held that § 2241(e)(2) was not a bill of attainder.<sup>241</sup>

Lastly, Hamad argued that § 2241(e) should be struck down as an unconstitutional violation of the Due Process Clause of the Fifth

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<sup>233</sup> Third Brief on Cross-Appeal, at 21. Hamad referred to the post-Civil War case of *Cummings v. Missouri*, 71 U.S. 277 (1866). In that case, the Supreme Court struck down certain amendments of the Missouri constitution which prohibited a person from engaging in certain professions unless they took an oath that they had no part in the rebellion. *Cummings*, 71 U.S. at 282-83. The Court struck down the amendments as bills of attainder because they inflicted legislative punishment on people of those professions whom had participated in the rebellion and could not truthfully take the oath

<sup>234</sup> *Nagac v. Derwinski*, 933 F.2d 990 (Fed. Cir. 1991).

<sup>235</sup> Third Brief on Cross-Appeal, at 21. *See Nagac*, 933 F.2d 990.

<sup>236</sup> Third Brief on Cross-Appeal, at 22.

<sup>237</sup> *Id.*

<sup>238</sup> *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013).

<sup>239</sup> *Id.*; *see Nagac*, 933 F.2d at 991 (“The jurisdictional limitation of section 402 does not impose a punishment ‘traditionally adjudged to be prohibited by the Bill of Attainder Clause’” (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977))).

<sup>240</sup> *Hamad*, 732 F.3d at 1004.

<sup>241</sup> *Id.*

Amendment.<sup>242</sup> He argued that access to the courts is a “fundamental right,”<sup>243</sup> and since § 2241(e) prevents access to the courts, it is subject to strict scrutiny.<sup>244</sup> Hamad argued that because the statute prevents “enemy combatants” from bringing specified actions in courts, while imposing “no comparable legal disabilities” on anyone else, § 2241(e) would not survive strict scrutiny.<sup>245</sup>

Considering Hamad’s argument, the court noted that the Supreme Court has never decided whether the Fifth Amendment protections apply to Guantanamo detainees.<sup>246</sup> However, the court “assum[ed], without deciding, that the Fifth Amendment’s protections apply to aliens detained outside the United States” because according to the court, § 2241(e) did not violate the Due Process Clause.<sup>247</sup> Since § 2241 clearly made a distinction between aliens and citizens, the main issue for the court was what standard of review should be applied to the classification.<sup>248</sup> While individual states have “substantial limitations . . . in making classifications based upon alienage,”<sup>249</sup> the court noted that Congress has “broad authority” to make such classifications for a variety of reasons.<sup>250</sup> Touching on the political question doctrine, the court noted that the authority to legislate, regarding aliens, is so closely tied to foreign policy and war powers that “[s]uch matters are . . . largely immune from judicial inquiry or

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<sup>242</sup> *Hamad*, 732 F.3d at 1004.

<sup>243</sup> Third Brief on Cross-Appeal, at 18. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (“The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”)

<sup>244</sup> *Hamad*, 732, F.3d at 1004.

<sup>245</sup> *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013).

<sup>246</sup> *Hamad*, 732 F.3d at 1005. *See Boumediene v. Bush*, 553 U.S. at 723, 770 (2008) (“[B]efore 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”), *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (“*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause”).

<sup>247</sup> *Hamad*, 732 F.3d. at 1005.

<sup>248</sup> *Id.*

<sup>249</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

<sup>250</sup> *Hamad*, 732 F.3d at 1005.

interference.”<sup>251</sup> Therefore, the court decided to analyze the alienage classification of § 2241(e)(2) under the rational basis test.<sup>252</sup> Under the rational basis test, the court reviewed whether the classification was rationally related to a legitimate government interest.<sup>253</sup> In *United States v. Lopez-Flores*,<sup>254</sup> the court applied the rational basis test to uphold the Hostage Taking Act, where certain conduct was criminalized when there was a foreign perpetrator or victim, but not when either were United States nationals.<sup>255</sup> In *Lopez-Flores*, the court found that the Hostage Taking Act was “clearly intended to serve Congress’ legitimate foreign policy concerns.”<sup>256</sup> Like the Hostage Taking Act, Congress’s focus on alien detainees in § 2241(e)(2) is the type of decisions that are “at the core of Congress’s authority.”<sup>257</sup> The court found that Congress had legitimate foreign policy concerns that members of the armed forces would be targeted by damages claims for conducting the war on terror.<sup>258</sup> Therefore, the court held that § 2241(e)(2) passed the rational basis review; and therefore, did not violate the Due Process Clause.<sup>259</sup>

Since the court rejected or dismissed all of Hamad’s arguments, the court upheld § 2241(e)(2) to preclude Hamad’s claim.<sup>260</sup> Therefore, the court did not have subject matter jurisdiction and did not consider any of Hamad’s other arguments.<sup>261</sup>

## VI. IMPACT

This section explores the impact of the Ninth Circuit’s interpretation of *Boumediene* on future claims by detainees. The Ninth Circuit’s holding represents a broader issue that will have an

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<sup>251</sup> *Hamad v. Gates*, 732 F.3d 990, 1005 (9th Cir. 2013) (citing *Mathews v. Diaz*, 426 U.S. 67, at 81 n. 17 (1976)).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1006.

<sup>254</sup> *United States v. Lopez-Flores*, 63 F.3d 1468, 1475 (9th Cir. 1995).

<sup>255</sup> *Id.* at 1470-72.

<sup>256</sup> *Id.* at 1470.

<sup>257</sup> *Hamad v. Gates*, 732 F.3d 990, 1006 (9th Cir. 2013).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

impact on many future cases. Federal courts have been “categorically hostile to damages claims arising out of post-September 11 counterterrorism policies.”<sup>262</sup> *Hamad* represents an extension of the logic that the D.C. Circuit created in *Al-Zahrani*, which is, that the *Boumediene* holding only pertained to the jurisdictional bar on habeas claims and nothing else. This section will explain the legal implications of *Hamad*, specifically, the court’s interpretation of the *Boumediene* holding, the implications of the court’s use of the severability test to uphold § 2241(e)(2) separately from § 2241(e)(1), and the court’s holding that rejected a *Bivens* claim for Guantanamo detainees. This section will also explore the potential social impacts, especially considering recent government admissions that it tortured detainees and the actions of other governments around the world that have given money damages for detainees.

A. *Bivens* Actions And The “Special Factors Counseling Hesitation”

The decision in *Hamad* interpreted the Supreme Court’s holding as only relevant to bars on habeas corpus claims. However, many commentators believe that the *Boumediene* decision was much broader than the interpretation that the Ninth Circuit, and other circuits, have come to rely on *Boumediene*. Joshua Geltzer argued, “the logic of *Boumediene* itself suggests that” the Ninth Circuit should have come to a different conclusion.<sup>263</sup> Geltzer posited that there are five different manners in which the Suspension Clause and the Due Process Clause relate to each other: 1) habeas provides jurisdiction for federal courts, while the Due Process clause provides the basis for substantive rights, 2) habeas review provides the remedy to the protections afforded by the Due Process Clause, 3) habeas offers minimal due process rights of its own, 4) habeas review provides a structural guarantee to balance the powers of the government, while Due Process protects individual rights, and 5)

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<sup>262</sup> Steve Vladeck, *Unlawfully Detained By the U.S. Government? Don’t Bother Suing*. NEW REPUBLIC (October 17, 2013) <http://www.newrepublic.com/article/115216/unlawful-detainment-lawsuits-against-us-government-keep-failing>.

<sup>263</sup> Geltzer, *supra* note 89, at 720.

habeas is a form of equitable relief, while Due Process is distinct.<sup>264</sup> The *Hamad* court seems to have taken the first view, that the *Boumediene* decision was Suspension Clause specific, in that it only served to provide jurisdiction for the courts to hear the detainee's cases, and nothing more.<sup>265</sup> However, a more careful reading of *Boumediene* seems to suggest otherwise. Much of the decision by the Supreme Court seems to emphasize that the Court wished to protect the separation-of-powers doctrine, and ensure that the Court would be the one to interpret "what the law is."<sup>266</sup> As Geltzer wrote, *Boumediene* "suggests that the decision emerged in significant part from an emphasis on ensuring that the political branches could not deliberately operate in the absence of the judiciary."<sup>267</sup> Thus, a reading of *Boumediene* suggests that Due Process protections should apply to Guantanamo detainees would not be inconsistent with the Court's intentions in *Boumediene*.

Despite this, the Ninth Circuit decided to limit its reading of *Boumediene* to only apply to habeas corpus jurisdiction, and nothing else. This interpretation has had significant impact in the analysis of nearly every Circuit court that has heard non-habeas claims from detainees.<sup>268</sup> The Ninth Circuit's holding is therefore not anomalous, and it is likely that such an interpretation is likely to continue. In fact, in subsequent litigation, the Ninth Circuit's reasoning has been specifically utilized.

*Al-Nashiri v. McDonald* is one such case where the Ninth Circuit has continued the logic which guided it in *Hamad*.<sup>269</sup> *Al-Nashiri* involved a similar claim brought by a former Guantanamo detainee seeking a *Bivens* remedy for violations of his constitutional rights.<sup>270</sup> In a brief statement, the court cited its previous decision in *Hamad* to uphold § 2241(e)(2) and bar jurisdiction to hear his claim.<sup>271</sup> Similarly to *Hamad* as well, the court used this reasoning to reject his

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *See infra*, Part II

<sup>267</sup> Geltzer, *supra* note 89, at 768.

<sup>268</sup> *See infra* Part II.

<sup>269</sup> *Al-Nashiri v. McDonald*, 741 F.3d 1002 (9th Cir. 2013).

<sup>270</sup> *Id.* at 1006.

<sup>271</sup> *Id.*

claim, without reaching the merits. Just as in *Hamad*, the court rejected Al-Nashiri's arguments that § 2241(e)(2) violated his rights to equal protection and constituted a bill of attainder.<sup>272</sup> This case demonstrates that the decision in *Hamad* would continue to bar any sort of judicial relief for Guantanamo detainees.

The court in *Hamad* not only upheld § 2241(e)(2) separately from § 2241(e)(1), it did so by ruling that denial of a *Bivens* claim is not unconstitutional.<sup>273</sup> The reasoning that the court used, however, and which has been used by the D.C. Circuit in *Al-Zahrani*, *Rasul II*, and most recently in *Janko v. Gates*,<sup>274</sup> is likely to affect all future *Bivens* type claims in the future. In *Hamad*, the court never reached the substantive issues on the merits of Hamad's *Bivens* claim.<sup>275</sup> Instead, the court held that money damages are never constitutionally required where constitutional rights have been violated.<sup>276</sup> The problem with this holding, as Steve Vladeck points out, is that "the Supreme Court has never, in fact, squarely held that damages remedies for constitutional claims are *never* constitutionally required."<sup>277</sup> In every case that the Court has rejected *Bivens* claims, there has always been at least some form of remedial scheme.<sup>278</sup> The detainees, under the decisions reached in *Hamad* and others, have no forum that they could seek a remedy—no federal statutory scheme nor any state remedies in torts or otherwise. This holding suggests a reading that would apply in cases other than Guantanamo detainee cases: "if there is no constitutional right to a *Bivens* claim in all cases, then there can be no constitutional problem with Congress foreclosing jurisdiction in all such cases."<sup>279</sup>

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<sup>272</sup> *Id.*

<sup>273</sup> *Hamad v. Gates*, 732 F.3d 990, 1003-04 (9th Cir. 2013).

<sup>274</sup> *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014).

<sup>275</sup> *See Hamad*, 732 F.3d at 1003-04.

<sup>276</sup> *Id.* at 1004.

<sup>277</sup> Steve Vladeck, *Another (Dubious) Guantanamo Precedent*, JUST SECURITY (January 31, 2014) <http://justsecurity.org/6608/dubious-guantanamo-precedent/>.

<sup>278</sup> *Id.*

<sup>279</sup> Vladeck, *supra* note 263.

## VII. CONCLUSION

As Senator Dianne Feinstein stated, it is important to remember “the pervasive fear in late 2001 and how immediate the threat felt. . . Nevertheless, such pressure, fear, and expectation of further terrorist plots do not justify, temper, or excuse improper actions taken by individuals or organizations in the name of national security.”<sup>280</sup> The United States government has admitted that what it did in the years after September 11, 2001 to suspected terrorists constituted torture in contravention of international laws and the laws of the U.S. Despite this, not one person who was responsible for this blight on American history has been held accountable. The judicial hostility to damages claim by the detainees reflects a more general hostility by the courts to hold the government accountable for its counterterrorism abuses.<sup>281</sup> These cases, though decided in the name of national security, put the American public at greater risk. Firstly, they have the effect of condoning governmental abuses.<sup>282</sup> Secondly, they create uncertainty, because the courts have not adjudicated the merits of the claims.<sup>283</sup> And finally, the strenuous efforts of the courts to reject *Bivens* remedies for detainees may have the unintentional effect of encouraging the Government to preclude other meritorious constitutional claims.<sup>284</sup> It is unlikely that the analysis that guided the Ninth Circuit in *Hamad* will change among the circuit courts hearing these claims. A favorable Supreme Court ruling will likely only change the severe implications of these holdings.

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<sup>280</sup> Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Foreword, Dc. 4, 2014, [http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html?\\_r=0](http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html?_r=0).

<sup>281</sup> Vladeck, *supra* note 263.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*