

IN THE SUPREME COURT OF THE UNITED STATES

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ADEL HASSAN HAMAD, PETITIONER

v.

ROBERT M. GATES, IN HIS INDIVIDUAL CAPACITY, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. 2241(e)(2) bars petitioner's action for money damages against military and civilian officials.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 13-9200

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2A-34A) is reported at 732 F.3d 990. The opinions of the district court (Pet. App. 35A-47A, 48A-67A, 68A-76A) are unpublished but are available at 2011 WL 2118280, 2011 WL 6130413, and 2012 WL 1253167. A fourth unpublished district court opinion addressing personal jurisdiction and venue is available at 2010 WL 4511142.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2013. A petition for rehearing was denied on December 16, 2013 (Pet. App. 77A). The petition for a writ of certiorari was

filed on March 13, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Sudanese citizen, was formerly detained by the U.S. military at Bagram Airfield and Guantánamo Bay, Cuba. Pet. App. 6A, 8A. After petitioner's transfer from Guantánamo to Sudan, he brought a damages action based on his former detention against then-Secretary of Defense Robert Gates, 21 other named current or former Department of Defense officials, and 100 unnamed "John Doe" federal officials, all in their individual capacities. Id. at 8A. Petitioner's complaint alleged violations of the Fifth Amendment and international law. Ibid.

The district court dismissed all of the defendants other than Secretary Gates for lack of personal jurisdiction. Pet. App. 9A, 69A, 76A. The United States subsequently substituted itself for Secretary Gates on petitioner's international-law claims under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the "Westfall Act," 28 U.S.C. 2679. Pet App. 62A. Secretary Gates and the United States then sought dismissal of the action on the ground that it was jurisdictionally barred by 28 U.S.C. 2241(e)(2). That provision states that except as provided in provisions not relevant here, "no court, justice, or judge shall have

jurisdiction to hear or consider any [non-habeas] 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." The district court held that Section 2241(e)(2) did not deprive the court of jurisdiction after concluding that this Court in Boumediene v. Bush, 553 U.S. 723 (2008), had held Section 2241(e)(2) unconstitutional. Pet. App. 50A-53A.

The district court then dismissed petitioner's claims on the merits. With respect to the international-law claims, the district court ruled that the United States had properly substituted itself for Secretary Gates under the Westfall Act, and the court then dismissed those claims as barred by the Federal Tort Claims Act, 28 U.S.C. 2679(b)(1) and 2680(k). Pet. App. 9A, 61A-67A. With respect to the Fifth Amendment claim, the court rejected Secretary Gates's arguments that special factors counseled against recognizing an implied remedy in this context under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and that he was entitled to qualified immunity because he had not violated any clearly established law. Id. at 38A-42A, 53A-59A. The court dismissed the Fifth Amendment claim, however, on the ground that

petitioner had failed to allege that Secretary Gates was involved personally in any violation of petitioner's rights. Id. at 43A-47A.

2. The court of appeals vacated the district court's orders, holding that the district court lacked subject-matter jurisdiction over petitioner's action under 28 U.S.C. 2241(e)(2). Pet. App. 6A, 9A, 33A-34A. The court explained that petitioner's action satisfies all of the prerequisites for application of Section 2241(e)(2)'s jurisdictional bar. Id. at 10A-11A.

The court of appeals then rejected petitioner's arguments that Section 2241(e)(2) is invalid. First, in accord with the prior holdings of the United States Court of Appeals for the D.C. Circuit, the court concluded that this Court's decision in Boumediene did not hold Section 2241(e)(2) unconstitutional. See Pet. App. 20A-22A (citing Kiyemba v. Obama, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009)). The court recognized that Boumediene stated generally that Section 2241(e) operates as "an unconstitutional suspension of the writ" of habeas corpus as applied to Guantánamo detainees. Id. at 19A (quoting Boumediene, 553 U.S. at 792). But the court explained that "the logic and context of the opinion make clear that the Supreme Court was addressing only [Section] 2241(e)(1)," which bars jurisdiction over certain habeas actions, not Section

2241(e)(2), which addresses only certain non-habeas actions. Id. at 21A.

Second, the court of appeals concluded that Section 2241(e)(2) is severable from Section 2241(e)(1) and thus remains in force after Boumediene. Pet. App. 22A-27A. The court explained that Section 2241(e)(2) is "capable of functioning independently" of Section 2241(e)(1), id. at 23A, and it further concluded that retaining Section 2241(e)(2) is "consistent with Congress's basic objectives in enacting the statute," id. at 25A.

Finally, the court of appeals held that Section 2241(e)(2) may constitutionally be applied to bar petitioner's damages action, without reaching the question whether Section 2241(e)(2) could constitutionally bar claims seeking other types of relief. See Pet. App. 27A-28A. Agreeing again with the prior holding of the D.C. Circuit, the court rejected petitioner's argument that Section 2241(e)(2) unconstitutionally "deprives him of a federal forum to seek a remedy for violations of his constitutional rights." Id. at 27A-29A (citing Al-Zahrani v. Rodriguez, 669 F.3d 315, 319 (D.C. Cir. 2012)). The court explained that "the Constitution does not require the availability of [a money damages] remedy, even where the plaintiff's claim is based on alleged violations of constitutional rights." Id. at 28A. That conclusion, the court observed, follows from this Court's Bivens

precedents, which have declined to recognize a Bivens remedy in a variety of contexts and have expressly held that Bivens remedies are "not an automatic entitlement, no matter what other means there may be to vindicate a protected interest." Ibid. (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

The court of appeals also rejected petitioner's contention that Section 2241(e)(2) violates the equal-protection component of the Due Process Clause insofar as it applies only to aliens. See Pet. App. 30A-32A. The court explained that rational-basis review governs alienage classifications established by Congress and held that Section 2241(e)(2) "easily passes" under that standard because the statute "ensur[es] that members of the armed forces are not unduly chilled in conducting the war on terror by concerns about foreign nationals targeting them with damages claims." Id. at 32A-33A.

#### ARGUMENT

The court of appeals correctly held that this Court did not invalidate Section 2241(e)(2) in Boumediene v. Bush, 553 U.S. 723 (2008), and that Section 2241(e)(2) is constitutional insofar as it bars petitioner's money-damages claims arising out of his detention. Petitioner's arguments to the contrary (Pet. 7-23) lack merit, and he has not identified any conflict among the circuits. Indeed, the only other circuit to address the validity of Section 2241(e)(2) has reached the same conclusion



as the decision below. Further review is therefore not warranted.

1. The court of appeals correctly rejected petitioner's contention that this Court's decision in Boumediene invalidated Section 2241(e)(2).

The current version of Section 2241(e) was enacted in Section 7 of the Military Commissions Act of 2006. See Pub. L. No. 109-366, § 7(a), 120 Stat. 2635-2636. Section 2241(e)'s two subsections purported to eliminate court jurisdiction over certain habeas actions (Subsection (e)(1)) and over certain non-habeas actions (Subsection (e)(2)). In Boumediene, this Court held that the Suspension Clause of the Constitution extends to aliens detained at Guantánamo and therefore concluded that "[Section] 7 of the Military Commissions Act of 2006, 28 U.S.C.A. § 2241(e), operates as an unconstitutional suspension of the writ" as applied to individuals detained at Guantánamo. 553 U.S. at 733, 753-771.

Petitioner relies (Pet. 9-10) on this Court's general references in Boumediene to Section 7 and Section 2241(e) to argue that this Court intended to hold invalid all of Section 2241(e), including Subsection (e)(2). The court of appeals correctly rejected that argument. As it explained, the "logic and context" of Boumediene make clear that this Court held unconstitutional only Subsection (e)(1)'s bar on habeas actions

(and only as applied to aliens detained at Guantánamo), not Subsection (e)(2)'s bar on non-habeas actions. Pet. App. 21A. This Court's rationale for holding the statute invalid -- that it was unconstitutional under the Suspension Clause -- "applies exclusively to § 2241(e)(1), the statutory subsection [addressing] habeas actions, and has no applicability to § 2241(e)(2), the statutory subsection that applies to actions other than habeas petitions." Ibid. Indeed, this Court "took pains to emphasize that it was invalidating § 2241(e) only to the extent that the statute barred the petitioners from filing habeas corpus actions." Ibid. (citing Boumediene, 553 U.S. at 795); see Boumediene, 553 U.S. at 795 ("[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.") (emphasis added).

Thus, the court of appeals correctly held that, despite Boumediene's general references to Section 7 of the Military Commissions Act and to Section 2241(e), the opinion cannot reasonably be read to have invalidated Subsection (e)(2). The D.C. Circuit has reached the same conclusion, explaining that Boumediene's "discussion of the Suspension Clause clearly

indicates it was referring only to that part of § 7 codified at § 2241(e)(1).” Al-Zahrani v. Rodriguez, 669 F.3d 315, 319 (D.C. Cir. 2012); see Kiyemba v. Obama, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009), cert. denied, 559 U.S. 1005 (2010); Janko v. Gates, 741 F.3d 136, 140 n.3 (D.C. Cir. 2014) (petition for rehearing filed Mar. 31, 2014).

Petitioner appears to contend (Pet. 9) that this Court determined in Boumediene that Subsection (e)(1) was “not severable” from Subsection (e)(2).<sup>1</sup> But the opinion in Boumediene conducted no severability analysis. Accordingly, petitioner’s argument lacks merit, and, at least absent any circuit conflict, it does not warrant this Court’s review.

2. Petitioner argues (Pet. 16-23) that application of Subsection (e)(2) to prohibit his money-damages action violates the Due Process Clause, the separation of powers, and his asserted right of access to the courts, and (Pet. 10-16) that the court of appeals should have construed Subsection (e)(2) to permit review of his constitutional claims so as to avoid the “serious constitutional question” that would otherwise arise,

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<sup>1</sup> In this Court, petitioner does not make an affirmative argument that Subsection (e)(1) is not severable from Subsection 2241(e)(2). See Pet. App. 22A-27A. Petitioner has thus forfeited that argument.

Webster v. Doe, 486 U.S. 592, 603 (1988) (internal quotation marks omitted).<sup>2</sup> Those arguments are unfounded.

a. The court of appeals correctly held that, even if petitioner is entitled to the constitutional protections that he invokes, he has no constitutional right to pursue a money-damages remedy against federal officials. As the court of appeals recognized, "the Constitution does not require the availability of [a money damages] remedy, even where the plaintiff's claim is based on alleged violations of constitutional rights." Pet. App. 28A; see id. at 30A-31A. In so holding, the court joined the D.C. Circuit, the only other circuit that has ruled on the constitutionality of Section 2241(e)(2). See Al-Zahrani, 669 F.3d at 319-20; Janko, 741 F.3d at 146. The court of appeals' conclusion is also consistent with precedent in other courts of appeals holding that it is "certain[]" that the Constitution does not "mandate[]" a tort damages remedy for every claimed constitutional violation." Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir.), vacated, 197 F.3d 1059 (11th Cir. 1999) (en banc), reinstated in relevant part, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert.

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<sup>2</sup> Petitioner has not advanced any other constitutional challenges in his certiorari petition, such as his argument below that Section 2241(e)(2) constitutes a bill of attainder. He has therefore forfeited any other constitutional challenge.

denied, 532 U.S. 1065 (2001); see also, e.g., Zehner v. Trigg, 133 F.3d 459, 461-462 (7th Cir. 1997).

That analysis comports with this Court's decisions. In Wilkie v. Robbins, 551 U.S. 537 (2007), this Court explained that a judicially created damages remedy for alleged constitutional violations "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a Bivens remedy unjustified." Id. at 550. That instruction dispels any notion that individuals are constitutionally entitled to a money-damages remedy for any constitutional violation. And even if a common-law damages remedy might be warranted in this context in the absence of congressional action,<sup>3</sup> petitioner cites no case in which this Court has held or suggested that an express congressional bar on money-damages claims, such as Section 2241(e)(2), is unconstitutional. Indeed, under this Court's Bivens jurisprudence, courts may not recognize a common-law

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<sup>3</sup> Although not necessary to the decision in this case, every court of appeals to have addressed the issue has held -- correctly, in our view -- that courts may not imply a Bivens remedy in the military detention context. See Vance v. Rumsfeld, 701 F.3d 193, 198-203 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013); Lebron v. Rumsfeld, 670 F.3d 540, 547-556 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012); Doe v. Rumsfeld, 683 F.3d 390, 393-397 (D.C. Cir. 2012); Ali v. Rumsfeld, 649 F.3d 762, 773-774 (D.C. Cir. 2011); Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009).

Bivens remedy where Congress's creation of an alternative remedy -- even one that does not provide complete relief -- demonstrates implicitly that Congress "expected the Judiciary to stay its Bivens hand." Id. at 550, 554; see Schweiker v. Chilicky, 487 U.S. 412, 421, 425 (1988); Bush v. Lucas, 462 U.S. 367, 388 (1983). It follows from that principle that Congress may preclude a damages remedy for constitutional violations when it does so expressly.

Moreover, the contrary position would be inconsistent with this Court's well-settled immunity jurisprudence. As the D.C. Circuit has recognized, this Court has made it "eminently clear" that there is no constitutional right to a damages remedy "in its jurisprudence finding certain of such claims barred by common law or statutory immunities" even where a plaintiff's constitutional rights were violated. Al-Zahrani, 669 F.3d at 319-20. "Even in circumstances in which a Bivens remedy is generally available," this Court has held, "an action under Bivens will be defeated if the defendant is immune from suit." Hui v. Castaneda, 559 U.S. 799, 806-08 (2010). In Imbler v. Pachtman, 424 U.S. 409 (1976), for example, this Court catalogued a wide array of immunities available in damages suits alleging violations of constitutional rights, including absolute immunity available to judges for "acts committed within their judicial jurisdiction." Id. at 418 (internal quotation marks

omitted); see id. at 417-29. And in Harlow v. Fitzgerald, 457 U.S. 800 (1982), as well as numerous subsequent cases, this Court recognized that qualified immunity shields a government official from civil liability if his conduct "does not violate clearly established statutory or constitutional rights." Id. at 818. Given those well-established bars on money damages, Section 2241(e)(2) -- which shields military officials from money-damages claims in connection with sensitive decisions relating to ongoing military operations -- was well within Congress's power to enact.

Petitioner cites (Pet. 9, 11, 16-18) this Court's decisions requiring a "heightened showing" of congressional intent to "preclude judicial review of constitutional claims" so as 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." Webster, 486 U.S. at 603 (internal quotation marks omitted); see Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 668, 681 n.12 (1986); Johnson v. Robison, 415 U.S. 361, 364-365, 373-374 (1974). But as courts of appeals have recognized, those decisions did not address jurisdictional bars on damages remedies, which is all that is at issue here. Compare Pet. App. 28A-29A, with American Fed'n of Gov't Emps. v. Stone, 502 F.3d 1027, 1036-1037 (9th Cir. 2007); Bryant v. Cheney, 924 F.2d 525, 528 n.2 (4th Cir.

1991); Stephens v. Department of Health & Human Servs., 901 F.2d 1571, 1577 (11th Cir.), cert. denied, 498 U.S. 998 (1990); cf. Bartlett v. Bowen, 816 F.2d 695, 696, 698 (D.C. Cir. 1987). And in any event, Section 2241(e)(2) does bar petitioner's Fifth Amendment damages claim with specificity by prohibiting "any [non-habeas] action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." 28 U.S.C. 2241(e)(2) (emphases added). Given the types of claims likely to be brought in connection with military detention, it is not plausible to believe that Congress intended to exclude constitutional claims from the bar.<sup>4</sup> See also Janko, 741 F.3d at 145-146 & n.9.

b. Petitioner contends that the court of appeals committed two additional errors in concluding that Section 2241(e)(2) validly bars his action. First, petitioner argues (Pet. 13) that his complaint sought declaratory and injunctive relief in addition to money damages. But petitioner never asserted that argument in district court or the court of appeals, and the

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<sup>4</sup> Relying on the text and enactment history of Article III of the U.S. Constitution, amicus Center for Constitutional Rights argues (at 3-12) that Section 2241(e)(2) is unconstitutional because it removes federal jurisdiction over federal questions. None of the text or history on which amicus relies, however, speaks to the only issue relevant to the court of appeals' holding in this case -- the permissibility of removing federal jurisdiction over money-damages claims.



court of appeals did not pass on the application of Section 2241(e)(2) to claims for declaratory or injunctive relief. See Pet. App. 28A (“[Petitioner] seeks only money damages.”). That argument therefore provides no basis for further review. See Glover v. United States, 531 U.S. 198, 205 (2001). In any event, given that he is no longer in United States custody, petitioner does not identify any declaratory or injunctive relief that he has standing to pursue or that would be available against the defendants in their individual capacities. See City of Los Angeles v. Lyons, 461 U.S. 95, 105-113 (1983).

Petitioner also contends (Pet. 13-16) that the court of appeals “attempt[ed] to decide the merits of [his] claim prematurely” when it relied on this Court’s Bivens precedents, arguing that “the issue is not whether [petitioner] is ultimately entitled to damages.” Petitioner misunderstands the court of appeals’ analysis. Like the D.C. Circuit in Al-Zahrani, the court of appeals adverted to Bivens decisions because they support the principle that it is permissible for Congress to decline to provide a money-damages remedy for constitutional violations. Pet. App. 28A; Al-Zahrani, 669 F.3d at 319-320. The court of appeals did not hold that special factors barred a Bivens remedy here. But see note 3, supra. -

c. Petitioner briefly asserts (Pet. 19-20) that Section 2241(e)(2) violates the separation-of-powers principle

set out in United States v. Klein, 80 U.S. (13 Wall. 128 (1871)), which held that Congress may not direct the outcome of litigation in certain circumstances. See id. at 143-148. As the D.C. Circuit recently explained in rejecting the same argument, however, Klein "applies [only] where the Congress prescribes the outcome of pending litigation" and thus could not be thought to bar the application of Section 2241(e)(2) to suits such as petitioner's that were filed after that provision was enacted in 2006, Pet. App. 8A. Janko, 741 F.3d at 146. And in any event, a statute such as Section 2241(e)(2) that "replace[s] the legal standards underlying [a case] \* \* \* without directing particular applications under either the old or the new standards" is fully consistent with Klein. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437-438 (1992).

d. Finally, petitioner argues (Pet. 21-23) that the court of appeals erred in reviewing his equal-protection challenge under the rational-basis standard. Petitioner does not challenge the court of appeals' conclusion that alienage classifications established by Congress are generally subject to rational-basis review. See Pet. App. 31A-32A. Instead, petitioner contends (Pet. 21-23) that the classification in Section 2241(e)(2) affects his asserted right of access to the courts, which he characterizes as a fundamental right. He

argues that Section 2241(e)(2) must therefore be reviewed under strict scrutiny.

The premise of petitioner's argument -- that Section 2241(e)(2)'s withdrawal of jurisdiction over his money -- damages action affects his asserted right of access to the courts--is incorrect. For the reasons explained above (see pp. 9-13, supra), the Constitution does not provide a right to pursue an action for damages. Petitioner cites no decisions holding that the withdrawal of jurisdiction over damages actions violates any right of access to the courts, and numerous court of appeals decisions have reached the opposite conclusion in similar circumstances. See, e.g., Inmates of Suffolk Cnty. Jail v. Rouse, 129 F.3d 649, 660 (1st Cir. 1997) ("[W]hile there is a constitutional right to court access, there is no complementary constitutional right to receive or be eligible for a particular form of relief."), cert. denied, 524 U.S. 951 (1998).<sup>5</sup> And it

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<sup>5</sup> See also, e.g., Marozsan v. United States, 90 F.3d 1284, 1288 (7th Cir. 1996) (rejecting access-to-courts challenge to jurisdictional provision, noting that there "is no constitutional requirement that the federal courts hear any and every case; rather, it is within the power of Congress to limit the jurisdiction of the lower federal courts"), cert. denied, 520 U.S. 1109 (1997); Christensen v. Ward, 916 F.2d 1462, 1472 (10th Cir. 1990) (upholding Westfall Act and explaining that "[t]he Constitution does not create a fundamental right to pursue specific tort actions"), cert. denied, 498 U.S. 1000 (1991); Bowman v. Niagara Mach. & Tool Works, Inc., 832 F.2d 1052, 1054-1055 (7th Cir. 1987) ("[the plaintiff] cannot claim that he has been denied access to court simply because the \* \* \* legislature has restricted a particular cause of action in a way

would be difficult to reconcile petitioner's legal position with this Court's Bivens jurisprudence or the numerous cases recognizing officials' absolute or qualified immunity from suit for various constitutional violations.

3. Amicus Center for Constitutional Rights suggests (at 13-18) that this Court should grant the petition, vacate the court of appeals' decision, and remand for that court to consider respondents' grounds for dismissing petitioner's complaint other than Section 2241(e)(2) (such as qualified immunity and personal jurisdiction). There is no dispute, however, that it was permissible for the court of appeals to resolve this case on jurisdictional grounds without reaching any of respondents' other arguments. The existence of additional grounds for dismissing this action, however, does underscore that certiorari is unwarranted here: Even if the court of appeals erred in its jurisdictional holding, dismissal of the complaint would be justified on a number of alternative grounds, including lack of personal jurisdiction, Westfall Act substitution and the Federal Tort Claims Act, qualified immunity, the inappropriateness of a Bivens remedy in this context, and, as the district court held, the absence of a

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that makes it unavailable to him"); see also, e.g., Palmer v. City Nat'l Bank, of W. Va., 498 F.3d 236, 247 (4th Cir. 2007), cert. denied, 553 U.S. 1053 (2008).

plausible allegation that Secretary Gates participated personally in the alleged constitutional violations. See Pet. App. 43A-47a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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