No. 16-661

# In the Supreme Court of the United States

MOHAMMED JAWAD, PETITIONER

*v.*

ROBERT M. GATES,
FORMER SECRETARY OF DEFENSE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Section 2241(e)(2) of Title 28 of the United States Code provides that no court, justice, or judge shall have jurisdiction over any non-habeas-corpus "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 who "has been determined by the United States to have been properly detained as an enemy combatant." 28 U.S.C. 2241(e)(2). A Combatant Status Review Tribunal determined that petitioner, a former detainee at the United States Naval Base at Guantanamo Bay, Cuba, was an enemy combatant. Petitioner subsequently filed a damages action against the United States and several federal officials for alleged mistreatment he suffered while detained at Guantanamo Bay and in Afghanistan.

The question presented is whether, pursuant to Section 2241(e)(2), the district court lacked jurisdiction over petitioner's damages claims against the United States and the federal officials.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 832 F.3d 364. The opinion of the district court (Pet. App. 17a-41a) is reported at 113 F. Supp. 3d 251.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on August 12, 2016. The petition for a writ of certiorari was filed on November 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner is an alien who was formerly detained by the United States at the United States Naval Base at Guantanamo Bay, Cuba (Naval Base). Pet. App. 1a, 4a. While at the Naval Base, a Combatant Status

Review Tribunal (CSRT) determined that petitioner was an enemy combatant. *Id.* at 64a. Petitioner was released in 2009. *Id.* at 1a-2a. He subsequently filed this action in district court in 2014 against the United States and 16 federal officials seeking damages for his alleged mistreatment while he was detained at the Naval Base and earlier in Afghanistan. *Id.* at 4a-5a. The question presented is whether the district court lacked jurisdiction over petitioner's damages action under 28 U.S.C. 2241(e)(2), which was enacted as part of Section 7(a) of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2635-2636.[1]

Section 2241(e)(2) addresses jurisdiction over non-habeas-corpus actions against the United States and 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." 28 U.S.C. 2241(e)(2). With an exception not relevant here, Section 2241(e)(2) provides that "no court, justice, or judge shall have jurisdiction to hear or consider any [such] action" if the "alien * * * has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *Ibid.*

2. Because petitioner's action was dismissed at the pleading stage, the factual allegations in his complaint are accepted as true for purposes of this Court's review. *Leatherman* v. *Tarrant Cnty. Narcotics Intelli-*

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[1] Section 7(a) enacted two provisions in 28 U.S.C. 2241(e). Section 2241(e)(1) concerns jurisdiction over habeas corpus actions by aliens detained as enemy combatants. In *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the Court held that Section 2241(e)(1) was unconstitutional as applied to detainees held by the United States at the Naval Base. Section 2241(e)(1) is not at issue in this case.

*gence & Coordination Unit*, 507 U.S. 163, 164 (1993). In his amended complaint (Pet. App. 42a-79a), petitioner alleges that he is an Afghan citizen and believes he was born in 1987. *Id.* at 52a-53a. If that is correct, petitioner would have been 15 years old by late 2002.

a. On December 17, 2002, Afghan authorities apprehended petitioner in Kabul, Afghanistan, following a hand grenade attack that badly injured two United States soldiers and an Afghan interpreter. Pet. App. 53a. Petitioner alleges that the Afghan authorities abused him and forced him to sign (with his thumbprint) a confession admitting responsibility for the attack. *Id.* at 54a. The Afghan authorities gave the confession to United States officials and transferred petitioner to the custody of the United States Armed Forces. *Id.* at 54a-55a. Petitioner further alleges that, "[d]espite his apparent status as a juvenile," the United States officials immediately interrogated him and subjected him to harsh treatment. *Id.* at 55a-56a. Although he initially denied knowledge of or responsibility for the attack, petitioner eventually confessed to participating in the attack. *Id.* at 56a.

On December 18, 2002, petitioner was transferred to a United States detention facility at Bagram, Afghanistan, where he alleges he was subjected to further abuse. Pet. App. 57a. Petitioner subsequently asserted his innocence and denied throwing the hand grenade. *Id.* at 57a-58a.

On or about February 6, 2003, petitioner was transferred to the Naval Base, where, he alleges, he "was housed with the adult population rather than in separate facilities for juveniles" and spent most of 2003 "in social, physical, and linguistic isolation." Pet. App. 58a-59a. On December 25, 2003, petitioner attempted

suicide. *Ibid.* By March 2004, petitioner alleges, he "was deemed to be of no intelligence value to the [United States]" but was nevertheless subjected to over 60 interrogations before he was released. *Id.* at 59a-60a.

Petitioner further alleges that United States authorities at the Naval Base subjected him to abuse, including a sleep-deprivation regimen called the "frequent flyer" program. Pet. App. 60a-61a. Although the commanding officer had ordered discontinuation of the "frequent flyer" program "as an interrogation technique" in March 2004, petitioner alleges that it continued as "a method of controlling detainees" and that, for a two-week period in May 2004, he was subjected to the program and suffered physical effects of acute sleep deprivation. *Id.* at 61a-62a.

b. In his compliant, petitioner acknowledges that "'enemy combatants' may be detained for the duration of an armed conflict" and explains that the Department of Defense established CSRTs to provide a form of review of the detention of the detainees at the Naval Base. Pet. App. 62a. Petitioner alleges that, in November 2004, he appeared before a CSRT and, on November 4, 2004, the CSRT determined that he was an "enemy combatant." *Id.* at 64a. Petitioner further alleges that on December 8, 2005, and again on November 8, 2006, Administrative Review Boards responsible for periodically determining whether detainees continued to pose a threat to the United States or its allies "reaffirmed" his "enemy combatant status." *Ibid.*; see *id.* at 63a.[2] Petitioner alleges that both the

[2] Administrative Review Boards were not established to review the propriety of CSRT determinations but "to assess annually the need to continue to detain each enemy combatant during the

CSRT and the Administrative Review Boards "relied heavily" on the confessions petitioner made to Afghan and United States authorities in Afghanistan. *Id.* at 64a.

c. On October 9, 2007, United States authorities charged petitioner under the MCA with three specifications of attempted murder in violation of the law of war. Pet. App. 65a. On January 30, 2008, the charges were referred to trial by military commission. *Ibid.* After military prosecutors announced their intention to submit petitioner's confession to United States officials in Afghanistan as evidence of petitioner's involvement in the hand grenade attack, petitioner's counsel moved to suppress the statement as the product of torture. *Ibid.* The military commission granted petitioner's motion. *Ibid.* The military commission also found that subjecting petitioner to the "frequent flyer" program for two weeks constituted "abusive conduct and cruel and inhuman treatment." *Id.* at 69a.

d. Meanwhile, in 2005, a petition for a writ of habeas corpus was filed on petitioner's behalf and, in 2009, petitioner filed an amended petition. Pet. App. 69a-70a. The United States initially opposed the habeas petition and relied on petitioner's statements that had been suppressed by the military commission. *Id.* at 70a. Petitioner then moved to suppress those statements in the habeas proceeding. *Ibid.* The government declined to oppose his suppression motion, and the district court granted the unopposed motion. *Ibid.*; see C.A. App. 81.

In July 2009, the United States filed a notice (C.A. App. 81-85) informing the district court that it would

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course of the current and ongoing hostilities." *Associated Press* v. *United States Dep't of Def.*, 554 F.3d 274, 279 n.1 (2d Cir. 2009).

no longer treat petitioner as legally detainable. Pet. App. 70a. The notice stated more specifically that (1) the federal defendants in the action would "no longer treat petitioner as detainable under the Authorization for Use of Military Force" (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, see C.A. App. 81, and (2) the government no longer opposed entry of a writ of habeas corpus, Pet. App. 70a; see C.A. App. 82 (notice). The notice explained that the government's position reflected "the evidence that remain[ed] in the record" of the habeas case but that, in light of "multiple eyewitness accounts that were not previously available for inclusion in the record—including videotaped interviews"—the Attorney General had directed the continuation of "the criminal investigation of petitioner in connection with the allegation that petitioner threw a grenade at U.S. military personnel." C.A. App. 81-82.

On July 30, 2009, the district court granted a writ of habeas corpus. Pet. App. 70a. The United States subsequently repatriated petitioner. *Ibid.*

3. a. In 2014, petitioner filed the present action asserting claims for monetary damages against the United States and various federal officials. Pet. App. 4a. Petitioner's amended complaint seeks compensatory and punitive damages on six claims, all of which are based on alleged actions against petitioner while he was detained by the United States. *Id.* at 70a-79a. The first three claims assert causes of action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, and the Alien Tort Statute (ATS), 28 U.S.C. 1350, for alleged "torture[] and inhumane[] treat[ment]," which petitioner contends were in violation of "the law of the nations," Pet. App. 71a, "the

Third and Fourth Geneva Conventions," *id.* at 72a, and "Article 6 and Article 7 of the Optional Protocol on the Involvement of Child Soldiers in Armed Conflict," *id.* at 74a. See *id.* at 70a-74a. The fourth claim asserts a cause of action under the FTCA and ATS for petitioner's alleged torture in violation of the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note. See Pet. App. 75a-76a. The fifth and sixth claims allege causes of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for petitioner's alleged mistreatment, which petitioner contends violated the Fifth and Eighth Amendments. Pet. App. 76a-78a.

The United States substituted itself as the defendant for petitioner's first three claims pursuant to the Westfall Act, 28 U.S.C. 2679(d), based on a certification that the individual-capacity defendants "were acting within the scope of their federal office or employment at the time of the incidents out of which [petitioner's] claims arose," C.A. App. 49. See *id.* at 45-47. The United States and individual-capacity defendants moved to dismiss petitioner's claims. Pet. App. 18a.

b. The district court dismissed petitioner's claims. Pet. App. 17a-41a. The court based its dismissal of each claim on two independent grounds. First, the court held that jurisdiction over all six of petitioner's claims was foreclosed under the "MCA's jurisdiction-stripping provision" in 28 U.S.C. 2241(e)(2). Pet. App. 34a-38a. The court explained that petitioner "does not dispute" that his action qualifies as the type of non-habeas action described in Section 2241(e)(2) in that it relates to an aspect of his "detention, transfer, treatment, trial, or conditions of confinement" when petitioner (an alien) was detained by the United States.

*Id.* at 35a (quoting 28 U.S.C. 2241(e)(2)). The court further held that Section 2241(e)(2)'s jurisdictional bar applied because the United States had determined that petitioner was properly detained as an "enemy combatant," emphasizing that petitioner himself conceded that a CSRT determined that he was an "enemy combatant." *Id.* at 35a-36a. The court rejected petitioner's various arguments against dismissal, explaining, *inter alia*, that Section 2241(e)(2) does not "require a finding that [petitioner] was an '*unlawful* enemy combatant,' merely that he was an 'enemy combatant,'" *id.* at 35a; and that the CSRT's determination to that effect was not rescinded by the government's subsequent notice in petitioner's habeas action, which "merely stated that the government would 'no longer treat [petitioner] as detainable,'" *id.* at 36a (citation omitted). See *id.* at 35a-38a.

The district court further determined that each of petitioner's six claims should be dismissed on other, independent grounds. Pet. App. 23a-39a. The court concluded that the United States was properly substituted as the defendant in petitioner's first three claims and that those claims must be dismissed for lack of subject-matter jurisdiction because the United States had not waived its sovereign immunity from suit on such claims. *Id.* at 23a-31a. The court dismissed petitioner's fourth claim under the TVPA for failure to state a claim, because the TVPA imposes liability only on an individual acts "'under actual or apparent authority, or color of law, of any foreign nation'" and because petitioner failed to allege any wrongdoing by individual defendants "acting pursuant to the authority of a foreign nation." *Id.* at 31a-33a (quoting TVPA § 2(a), 28 U.S.C. 1350 note). Finally, the court dis-

missed petitioner's *Bivens* claims on the ground that "special factors" counseled against creating a *Bivens* cause of action in this context and that petitioner simply "fail[ed] to address" the binding D.C. Circuit precedent foreclosing his *Bivens* claims. *Id.* at 33a-34a (citing *Allaithi* v. *Rumsfeld*, 753 F.3d 1327, 1334 (D.C. Cir. 2014), cert. denied, 136 S. Ct. 37 (2015), and *Ali* v. *Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011)).

4. The court of appeals affirmed. Pet. App. 1a-14a. The court agreed with the district court that it lacked jurisdiction under Section 2241(e)(2), and the court of appeals therefore did not address the district court's alternative grounds for dismissal. *Id.* at 5a-14a.

The court of appeals explained that petitioner conceded both that "he is an 'alien'" and that his damages action fell within the scope of Section 2241(e)(2) because it "is an 'action against the United States or its agents relating to . . . [his] detention, . . . treatment, . . . or conditions of confinement.'" Pet. App. 6a (quoting 28 U.S.C. 2241(e)(2)) (brackets in original). The court further concluded that the balance of Section 2241(e)(2)'s requirements had been met, rejecting petitioner's argument that "he has not 'been determined by the United States to have been properly detained as an enemy combatant.'" *Ibid.* (quoting 28 U.S.C. 2241(e)(2)). The court explained that petitioner's "conce[ssion] that a CSRT found that he was an 'enemy combatant'" itself "fully satisfie[d]" the "requirement that an alien be determined by the United States to have been properly detained as an enemy combatant." *Ibid.* (citation omitted).

The court of appeals rejected petitioner's various contentions that the CSRT determination was insufficient in this particular case. Pet. App. 6a. First, the

court concluded that the government's notice in petitioner's habeas action did not override the CSRT's earlier determination that petitioner had been properly detained as an enemy combatant. *Id.* at 6a-7a. The court assumed *arguendo* that a government statement in a habeas action might override a prior CSRT determination, but it concluded that the notice "did not do so here" because the notice "never said that [petitioner] was *not* properly detained, only that the United States would no longer *treat* him as such." *Id.* at 7a. If "the government [had] conceded before the district court that [petitioner] had never been properly detained," the court added, the case would have been "much different and a closer call." *Ibid.* "But that," the court emphasized, "is not the case here." *Ibid.*

The court of appeals likewise rejected petitioner's contention that Section 2241(e)(2) applies only if the United States has determined that he was "an *unlawful* enemy combatant" and that no such determination had been made. Pet. App. 10a-12a. The court explained that Section 2241(e)(2)'s jurisdictional bar is "tied to the AUMF's detention authority, which allows 'the President to detain enemy combatants'—not solely unlawful ones." *Id.* at 11a (citation omitted). That authority, the court continued, is different from "the MCA's grant of jurisdiction to military commissions" to try combatants for violations of the law of war or other offenses. *Ibid.* Cf. 10 U.S.C. 948b(a) and 948d. "Congress's use of 'unlawful' in the sections of the 2006 MCA that deal with military-commission jurisdiction, but not in [Section 2241(e)(2)]," the court explained, confirms that Section 2241(e)(2) "does not require a finding of *unlawfulness*." Pet. App. 11a-12a.

Cf. MCA § 3(a)(1), 120 Stat. 2601-2603 (2006 provisions governing military commissions).

Finally, the court of appeals rejected petitioner's contention that Section 2241(e)(2) does not apply because the CSRT's enemy-combatant determination was "illegal and void." Pet. App. 7a-10a. The court assumed without deciding that Section 2241(e)(2)'s jurisdictional bar might depend on whether the CSRT's determination was "illegal and void," but it concluded that petitioner failed to show that "his CSRT determination ran afoul of any domestic or international law." *Id.* at 8a. The court explained that petitioner cites no "provision in the Uniform Code of Military Justice or other domestic law that prohibits the detention of juvenile enemy combatants pursuant to the AUMF, much less explain how violations of any such provisions would 'void' the CSRT's determination." *Ibid.* Although petitioner relied on decisions showing that "military courts [lack] jurisdiction to try juveniles," the court explained that that point has "no relevance here because [petitioner] is not being tried by any military court." *Id.* at 10a. The court likewise explained that the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031 *et seq.*, was "immaterial" because, even if it could be applied to detainees like petitioner, it at best addressed the treatment of juveniles in detention. Pet. App. 10a. Petitioner's reliance on military-court jurisdiction and the FJDA, the court explained, "sidesteps the relevant question" because neither addressed "the question at issue here: whether juveniles detained under the AUMF are barred from filing damages actions in federal court." *Ibid.*

The court of appeals similarly rejected petitioner's reliance on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Protocol), May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 236. See Pet. App. 8a-9a. That protocol, the court explained, concerns the rehabilitation and reintegration of detained juveniles, but petitioner "never explain[ed] how these provisions would render his initial detention improper under the treaty, let alone why a violation of the treaty would 'void' the CSRT's determination." *Id.* at 9a.

**ARGUMENT**

Petitioner contends (Pet. 8-30) that the D.C. Circuit erred in affirming the dismissal of his damages action under Section 2241(e)(2). The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner largely fails to respond to the D.C. Circuit's reasons for rejecting his contentions. No further review is warranted.

1. Congress enacted Section 2241(e)(2) in 2006 as part of the MCA to address jurisdiction over non-habeas-corpus actions against the United States and 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." 28 U.S.C. 2241(e)(2). Petitioner has conceded that his case is such an action. Pet. App. 6a. Section 2241(e)(2) further provides, subject to an exception not relevant here, that "no court, justice, or judge shall have jurisdiction to hear or consider any [such] action" if the "alien * * * has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determina-

tion." 28 U.S.C. 2241(e)(2). Petitioner concedes that a CSRT reviewing his detention determined in 2004 that he was an "enemy combatant." Pet. App. 6a; see *id.* at 64a. As the court of appeals concluded, that determination fully satisfies Section 2241(e)(2)'s "requirement that an alien be determined by the United States to have been properly detained as an enemy combatant." *Id.* at 6a. For purposes of Section 2241(e)(2)'s jurisdictional bar, that should be the end of the matter.

Petitioner, however, argues (Pet. 12-30) that the government's 2004 enemy-combatant determination does not trigger Section 2241(e)(2)'s jurisdictional bar for several reasons that are peculiar to his case, including his allegation that he believes he was a juvenile when he was detained. Petitioner is incorrect and he identifies no conflict of authority that might warrant this Court's review.

a. Petitioner first argues (Pet. 12-23) that "[t]he United States did not have jurisdiction to detain and charge [p]etitioner" and that its "failure to comply with binding law on the treatment of juveniles precludes any determination that his 'enemy combatant status' was *properly* determined." Pet. 12, 22. Petitioner misses the point. Section 2241(e)(2) simply requires that the "alien * * * has been *determined by the United States* to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. 2241(e)(2) (emphasis added). That provision, which expressly focuses on the determination by "the United States" that an alien may properly be detained as an enemy combatant, does not open that detention decision to after-the-fact review when a "court, justice, or judge" determines whether it has

jurisdiction over a subsequent non-habeas-corpus action. See *ibid.*

Moreover, petitioner's various bases for challenging the CSRT's determination are meritless. Petitioner argues (Pet. 13-17) that military commissions lack jurisdiction over juveniles. But petitioner relies on authority that addresses the jurisdiction of such commissions to try juveniles for military offenses. As the court of appeals recognized, the government's determination that an alien is an "enemy combatant" and may therefore be detained to take him off the field of battle is quite different from trying (and punishing) the alien for violations of the law of war or other offenses. See p. 10, *supra*. Thus, petitioner's assertion (Pet. 14) that the D.C. Circuit's "decision directly conflicts with [decisions of the former Court of Military Appeals (now the Court of Appeals for the Armed Forces)] on the same important matter of jurisdiction over juveniles" is particularly misplaced. The D.C. Circuit simply held that such decisions have "no relevance here because [petitioner] is not being tried by any military court." Pet. App. 10a. Petitioner provides no response.

Petitioner's reliance (Pet. 17-19) on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 236, fares no better. Petitioner argues (Pet. 18) that the Protocol's provisions address "rehabilitation and reintegration" of children combatants and that "[d]etaining and subjecting a juvenile to a CSRT" violates the Protocol. That contention is meritless and makes no practical sense. If a juvenile is an enemy combatant, nothing in the Protocol prevents the United

States Armed Forces from detaining the juvenile and determining his status as an enemy combatant. As the court of appeals concluded, petitioner has "never explain[ed] how [the Protocol] would render his initial detention improper under the treaty, let alone why a violation of the treaty would 'void' the CSRT's determination." Pet. App. 9a. Petitioner again provides no response.

Petitioner's reliance (Pet. 19-21) on the Federal Juvenile Delinquency Act is equally misplaced. That Act provides a procedural alternative in federal district court to a normal criminal prosecution for juveniles who violate federal criminal prohibitions. See 18 U.S.C. 5031 ("'juvenile delinquency' is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x)"); see also, *e.g.*, 18 U.S.C. 5032. It has no relevance to the *detention* of alien enemy combatants apprehended abroad. Thus, as the court of appeals recognized, the FJDA is "immaterial" in this context. Pet. App. 10a. Even if the FJDA's procedures "were somehow applicable to detainees," "any argument based on such procedures relates only to [petitioner's] merits claims about his treatment in detention," which does not address "the question at issue here: whether juveniles detained under the AUMF are barred from filing damages actions in federal court." *Ibid.* Petitioner yet again provides no response.

b. Petitioner contends (Pet. 23-26) that the Fourth Circuit's recent decision in *Al Shimari* v. *CACI Premier Technology, Inc.*, 840 F.3d 147 (2016), supports his contention (Pet. 26) that he "was not 'properly detained'

because his CSRT determination was produced by unlawful acts of torture." But the relevant question under Section 2241(e)(2) is not whether petitioner was properly detained, but whether he was "*determined by the United States* to have been properly detained as an enemy combatant." 28 U.S.C. 2241(e)(2) (emphasis added). The CSRT's 2004 determination clearly did so.

More fundamentally, nothing in *Al Shimari* supports petitioner's case. The *Al Shimari* court held that the political question doctrine did not deprive a federal court of jurisdiction to hear certain claims of torture and war crimes asserted by former detainees against a private military contractor. See 840 F.3d at 151-152, 162; see also *id.* at 158 ("[W]hen a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review."). Petitioner asserts (Pet. 25) that just "[a]s the justiciability doctrine could not bar the plaintiffs' torture claims in *Al Shimari*, [Section 2241(e)(2)] should not bar [p]etitioner's torture claims." Petitioner is mistaken. The political question doctrine has no legal relationship to the question of statutory construction at issue here.

c. Finally, petitioner argues (Pet. 27-30) that the court of appeals erred in concluding that the government's notice in petitioner's habeas case did not rescind the CSRT's determination. Although petitioner asserts that that notice reflected a "determination he did not 'meet the [AUMF's] criteria for enemy-combatant status,'" Pet. 28 (citation omitted), the court of appeals correctly rejected that characterization. Nothing in the statement that the government

would "no longer *treat* [petitioner]" as properly detained reflects a determination that he "was *not* properly detained." Pet. App. 7a.

Petitioner argues (Pet. 29) that "allegations in a complaint are assumed to be true" and asserts (Pet. 30) that the notice was a "determination [that] he was not properly detained as an enemy combatant." But petitioner's complaint does not allege that the notice made that determination. See, *e.g.*, Pet. App. 70a. Moreover, petitioner's assertions are fatally undercut by the actual notice (C.A. App. 81-85) that petitioner himself attached to his district court brief opposing dismissal. See D. Ct. Doc. 31, Ex. D (Apr. 20, 2015). The notice explains that the government's decision that it would "no longer treat petitioner as detainable under the [AUMF]" was based on the "evidence that remain[ed] in the record" of the habeas corpus action after other evidence was suppressed. C.A. App. 81. The notice's explanation (*id.* at 82) that the Attorney General had ordered that the criminal investigation of petitioner concerning the grenade attack in Kabul be continued "in light of the multiple eyewitness accounts that were not previously available for inclusion in the record—including videotaped interviews"—itself demonstrates that the notice did not reflect a determination that petitioner was not, in fact, properly held as an enemy combatant. In any event, petitioner's fact-bound arguments would not merit this Court's review.

2. Finally, this case would be a poor vehicle for review because other independent grounds exist for dismissing petitioner's claims. See pp. 8-9, *supra*. The district court correctly held that the United States was properly substituted as the defendant for petitioner's first three claims, which fall outside the United

States' waiver of immunity in the FTCA. See Pet. App. 23a-31a. The court also correctly held that petitioner's fourth claim, which rests on the TVPA, must be dismissed because the TVPA concerns only actions taken "under actual or apparent authority, or color of law, of *any foreign nation*," TVPA § 2(a), 28 U.S.C. 1350 note (emphasis added), and petitioner has made no such allegation. Pet. App. 31a-33a. Finally, as the court concluded, petitioner's fifth and sixth claims asserting a *Bivens* cause of action are foreclosed by D.C. Circuit precedent that correctly holds that special factors counsel against creating a *Bivens* remedy in this context. *Id.* at 33a-34a (citing *Allaithi* v. *Rumsfeld*, 753 F.3d 1327, 1334 (D.C. Cir. 2014), cert. denied, 136 S. Ct. 37 (2015), and *Ali* v. *Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011)).[3]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The other courts of appeals to have addressed the issue have likewise held that courts may not infer a *Bivens* remedy in the military-detention context. See *Vance* v. *Rumsfeld*, 701 F.3d 193, 195, 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).