UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YUKSEL CELIKGOGUS, *et al*,	)	
	)	
Plaintiffs,	)	
	)	**06-CV-1996 (HHK)**
v.	)	
	)	
DONALD RUMSFELD, *et al*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Defendants move to dismiss plaintiffs' claims without regard to the facts of this case. Raising what amounts to a single-sentence argument, defendants assert that *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.) (*per curiam*) ("*Rasul II*"), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1013 (2009), "forecloses recovery for Plaintiffs on any and all claims raised in the Second Amended Complaint." Defs.' Mot. To Dismiss ("Mot.") at 2. Not only do defendants fail to acknowledge the harrowing ordeal endured by these plaintiffs – who were detained at Guantanamo yet were not enemies of the United States – but they are also wrong about the effect of *Rasul II*.

Here, five men – Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam and Abu Muhammad[1] – were detained for years by the United States, subjected to inhumane treatment, abuses and torture, and were released without any determination that they were enemy combatants. Indeed, most significant for purposes of this motion, two of the plaintiffs, Mr. Hasam and Mr. Muhammad, were evaluated by Combatant Status Review Tribunals and formally classified by the United States as not enemy combatants but nevertheless held and abused at Guantanamo for two years after that determination.

These facts – ignored by defendants – raise a question of first impression regarding the plaintiffs' Alien Tort Statute claims: Were defendants, in their continued abuse of individuals determined not to be enemy combatants, acting within the scope of their employment and thus subject to the protections of the Westfall Act? This issue was

[1] Messrs. Hasam and Muhammad are using pseudonyms (with the Court's permission) in order to protect their families from persecution relating to their status as former Guantanamo detainees. *See* Order, Docket No. 15 (Apr. 9, 2007); Plaintiffs' Zakirjan

not presented in *Rasul II* and it cannot be resolved as a matter of law, certainly not prior to discovery.

There are also other differences between this case and *Rasul II*. For example, two of the plaintiffs here allege violations of the Vienna Convention because their requests to see consular officials were refused – not a claim raised in *Rasul II*. Plaintiffs have also asserted violations of the First Amendment based on harassment they experienced when they attempted to practice their religion. Defendants' assertion that "*Rasul* directly disposes of all the claims in the instant action" – the proposition at the core of their Motion to Dismiss – is therefore wrong. *See* Mot. at 6.

Finally, there is a sound basis for this Court to reach a different result than in *Rasul II* and allow plaintiffs' *Bivens* claims to proceed. These non-combatants are entitled to basic protections under the Constitution. Nothing in *Rasul II* compels a different result.

II. BACKGROUND

A. Afghani and Pakistani Elements Seized Plaintiffs, Then Transferred Them to United States Forces.

The plaintiffs in this case are former detainees at Guantanamo Bay Naval Base.

Mr. Hasam is an Uzbeki citizen. He was formally determined by the United States not to be an enemy combatant in late 2004, yet he was detained at Guantanamo and subjected to continued abuse and inhumane treatment until his release on November 16, 2006. Second Amended Complaint ("SAC") at ¶¶ 124, 141-47. Mr. Hasam came

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Hasam and Abu Muhammad's Motion for Continued Use of Pseudonyms, Docket No. 8, (Mar. 22, 2007).

into the custody of the United States military after he sought refuge in Tajikistan from religious persecution in his native country and was forcibly sent to Afghanistan in early 2001. *Id.* at ¶ 124. When the bombing in Afghanistan began, an Afghan group took him in, then handed him over to U.S. custody. *Id.* He was initially taken to the U.S. military base at Bagram in April or May of 2002, then moved to Kandahar. *Id.* at ¶¶ 125, 128. At Bagram he was severely beaten, subjected to lengthy and brutal interrogations and forced to undergo an operation against his wishes. *See id.* at 126-27. On being transferred to Kandahar, he was stripped naked, subjected to a body cavity search, put on a table, then photographed and mocked. *See id.* at ¶ 129. Guards sat on him, despite his recent operation. *See id.* at ¶¶ 128-29. He was also forced to assume stress positions. *See id.* at ¶ 131. On or around June 13, 2002, Mr. Hasam was transferred to Guantanamo where the inhumane treatment expanded to include threats of more serious forms of torture, threats to his family, threatening and abusive interrogation by the security services of his country of origin, forcible, prolonged stress positions and lengthy solitary confinement, among other things. *Id.* at ¶¶ 136-40. Mr. Hasam's condition deteriorated to the point that he attempted suicide. *Id.* at ¶¶ 138-39. Following this attempt, the defendants' resuscitated him, then, on the same day, resumed the interrogation practices that had precipitated it. *Id.* at ¶ 139.

Abu Muhammad is a refugee from Algeria.[2] He was also formally determined by the United States not to be an enemy combatant in late 2004, yet he was detained at Guantanamo and subjected to further abuse and inhumane treatment for almost two years

[2]The United Nations High Commissioner for Refugees formally conferred refugee status on Mr. Muhammad. SAC at ¶ 148.

following that determination. *Id.* at ¶¶ 148, 163-73. Mr. Muhammad was seized in May 2002 by Pakistani officials who, specifically seeking a man of a different nationality, took him instead. *Id.* at ¶¶ 148-49. At the time, Mr. Muhammad was a schoolteacher attempting to make a new home in Pakistan with his wife and children. *Id.* at ¶ 148. Pakistani forces held him for approximately nine days, then turned him over to the United States military. *Id.* at ¶ 149-50. Mr. Muhammad was taken first to Bagram, where he was held for about two months, during which time he was bound so tightly he bled, repeatedly stripped and subjected to full body searches, deprived of sleep, threatened he would be shot, forced into stress positions and interrogated multiple times, among other abuses. *Id.* at ¶¶ 151-56. He was forcibly shaved, an affront to his faith, and his Koran was desecrated. *Id.* at ¶ 153. In or around August 2002, the U.S. military transferred him to Guantanamo, where the physical and psychological abuses continued, as did the mockery of his religion and obstruction of his efforts to practice his faith. *Id.* at ¶¶ 157-63.

Mr. Celikgogus and Mr. Sen are Turkish citizens who were taken into United States custody in late 2001, after they, along with crowds of others, crossed into Pakistan to avoid the bombing in Afghanistan. *Id.* at ¶¶ 53, 77. Pakistani villagers handed them over to the Pakistani police, who five weeks later transferred them to United States officials. *Id.* at ¶¶ 53-54, 77-78. Messrs. Celikgogus and Sen were then taken to the U.S. military base in Kandahar, where one or both were beaten, kicked in the genitals, stripped and photographed naked, subjected to body cavity searches, deprived of adequate food, water, warmth and sleep, threatened, forced into stress positions, subjected to electric shocks during interrogation, prevented from praying, deprived of medical care, and

otherwise abused. *Id.* at ¶¶ 56-63, 78-84. In or around January 2002, they were transferred to Guantanamo, where the abuses continued. *Id.* at ¶¶ 64-72, 85-93.

Nuri Mert, who is also Turkish, was abducted by armed Afghanis in late 2001, then seized from that group by another group of armed Afghan men shortly thereafter. *Id.* at ¶ 98. After he had been held for about two months, U.S. soldiers came to his prison, bound and hooded him, and took him to the base in Kandahar. *Id.* at ¶ 99. Approximately three days later, having been physically and psychologically abused, Mr. Mert was transferred to Guantanamo, where the abuses continued. *Id.* at ¶¶ 100-119.

B. The United States Determined That Certain Plaintiffs Were Not Enemy Combatants Yet Continued Their Detention and Inhumane Treatment.

In July 2004, Deputy Defense Secretary Paul Wolfowitz ordered the establishment of Combatant Status Review Tribunals ("CSRTs"), which purported to provide an administrative process for determining whether a prisoner was an "enemy combatant" or not. *Id.* at ¶ 52.[3] Although the U.S. has referred to detainees formally exonerated through this process as "no longer enemy combatants," the CSRTs issued only two kinds of determinations: that the detainee is an enemy combatant, or that he is not. *See Qassim v. Bush*, 407 F. Supp. 2d 198, 199-200 (D.D.C. 2005) ("The government's use of the Kafkaesque term 'no longer enemy combatants' deliberately begs the question of whether these petitioners ever were enemy combatants.").

[3] The CSRTs lacked even the most basic elements of due process, including the right to present evidence, to know the evidence in the accusation, to have independent counsel and to have the case heard by an independent body. *Id.* ¶ 52.

In December 2004, CSRTs were held on the status of Zakirjan Hasam and Abu Muhammad. *See id.* at ¶¶ 141, 164. Despite the biased nature of the proceedings, each was determined not to be an enemy combatant. *Id*. Notwithstanding the United States' own conclusion that neither Mr. Hasam nor Mr. Muhammad were members or supporters of groups fighting the United States or its allies, they continued to be held and abused at Guantanamo Bay for nearly two more years. *Id.* at ¶ 145.

During the 23 months after his exoneration and before his release, military personnel repeatedly put Mr. Hasam in solitary confinement, although a military psychologist had concluded that he should never be held in solitary confinement. *Id.* at ¶ 143. He was deprived of sleep for prolonged periods, deliberately subjected to cold temperatures, prevented from praying and forcibly shaved. *Id.* at ¶¶ 142-43. He was medicated with pills and injections against his will. *Id.* at ¶ 144. He was denied access to family members. *Id.* at ¶ 144. When finally transferred from Guantanamo to Albania on November 16, 2006, he was shackled and tied to his airplane seat. *Id.* at ¶ 145.

Mr. Muhammad also was regularly subjected to abuses in the many months after his CSRT determination. For example, Guantanamo officials allowed Algerian officials to interrogate him, even though Mr. Muhammad was known to be a refugee from the Algerian regime; similar interrogations had driven other detainees to attempt suicide. *Id.* at ¶¶ 137-38, 168. Mr. Muhammad continued to be shackled, subjected to body searches and forced to wear blackened goggles and ear coverings, as he had been prior to his CSRT determination. *Id.* at ¶ 165. He was under constant surveillance, including while in or around the bathrooms. *Id.* at ¶ 166. His prayer was disrupted and his religious practices mocked. *Id.* at ¶ 167. His need for medical care was ignored, with lasting

consequences. *Id.* at ¶¶ 163, 173. When transferred from Guantanamo to Albania, he, like Mr. Hasam, was shackled and then tied to his airplane seat. *Id.* at ¶¶ 145, 171.

The other plaintiffs – none of whom were ever determined to be enemy combatants – also experienced prolonged detention, abuses and inhumane treatment at Guantanamo. This included sleep deprivation, sometimes in connection with interrogations but at other times for no apparent reason. *Id.* at ¶¶ 70, 91, 117. Guards also inflicted extraordinary punishments on Messrs. Celikgogus, Sen, and Mert, pummeling them with a stream of water from an industrial hose, or spraying them with chemicals and then turning off the water in their cells to prevent them from rinsing off the chemicals. *Id.* at ¶¶ 67, 88, 111. Guards would at times take away Mr. Celikgogus's mattress, forcing him to sleep on the cement floor of his cell. *Id.* at ¶ 67. Mr. Mert and Mr. Celikgogus were harassed when they attempted to pray. *Id.* at ¶¶ 68, 113. All three were forcibly medicated with pills or injections on multiple occasions, and Mr. Celikgogus and Mr. Mert were operated on even though they did not understand the purpose of the surgery. *Id.* at ¶¶ 71, 92, 118, 121. Repeated requests by Mr. Mert to speak to a Turkish official were ignored, as was a similar request by Mr. Sen. *Id.* at ¶¶ 93, 119. Messrs. Celikgogus, Sen and Mert were released to their country of origin, Turkey, before the CSRT process was established.[4] Their harsh treatment continued up to and during the airplane journey from Guantanamo. For example, during his transfer to Turkey, Mr. Mert was chained to a hook in the floor of the airplane. *Id.* at ¶ 121.

[4] Yuksel Celikgogus and Ibrahim Sen were transferred to Turkey in November 2003, SAC at ¶¶ 75, 96, approximately two years after being detained by the United States. Nuri Mert was sent back to Turkey in April 2004, nearly 27 months after being handed over to the United States by Afghanis. *Id.* at ¶¶ 98, 122.

C. The Defendants Ordered, Encouraged, and/or Carried Out These Abuses.

Defendants ordered, encouraged, enabled or carried out cruel, inhumane and degrading treatment for detainees at Guantanamo, including persons – such as plaintiffs – known not to be enemy combatants. Specifically, defendants Michael Dunlavey and Geoffrey Miller pressed for the use of so-called "aggressive interrogation techniques" at Guantanamo that were never before approved by the U.S. military. *Id.* at ¶ 182. Donald Rumsfeld gave blanket approval for the use of a substantial number of these practices on detainees, including forced shaving, forced nudity, isolation, light deprivation, prolonged forced stress positions, intimidation with dogs and other exploitation of phobias, hooding, prolonged interrogations lasting up to 20 hours, "mild, non-injurious physical contact" and a range of other practices that constitute torture and cruel, inhumane and degrading treatment in violation of the Geneva Conventions and U.S. law. *Id*. Although a few weeks later he rescinded the blanket approval, Mr. Rumsfeld did not seek to end the use of these methods; to the contrary, he indicated that they could be employed whenever specifically approved. *Id*. In April 2003, he issued new guidance which included approval of many practices that violated domestic and international law, and which continued in use at Guantanamo. *Id.* at ¶ 183. The plaintiffs were victims of those abuses.

For their part, defendants Richard Myers, Peter Pace, James Hill, Bantz Craddock, Michael Lehnert, Jay Hood, Harry Harris, Terry Carrico, Adolph McQueen, Nelson Cannon, Mike Bumgarner, Wade Dennis and Esteban Rodriguez, who at various times all occupied military positions with responsibility for personnel at Guantanamo Bay Naval Base, perpetuated the ongoing practice of abusing detainees – including those known not

to be enemy combatants – by instructing subordinates on the employment of harsh interrogation techniques, ratifying subordinates' actions, and otherwise encouraging inhumane treatment. *Id.* at ¶¶ 15-29, 178. They neither acted to stop abuses, including the continued use of interrogation techniques formally disapproved by the Defense Department, nor did they carry out investigations of or take any action against those who used torture or cruel, inhumane or degrading treatment on detainees, including those persons, like plaintiffs, who were not enemy combatants. *Id.* at ¶¶ 177-78; *see also, e.g.*, *id.* at ¶ 143.

The named defendants not only enabled, encouraged and instructed others to abuse detainees held at Guantanamo, they ordered or implemented prolonged, arbitrary detentions for persons brought to Guantanamo. *Id.* at ¶¶ 73, 94, 120, 125, 141, 165. Persons were held at Guantanamo for years without process of any kind to determine whether they were, in fact, enemy combatants. *See*, *e.g.*, *id.* at ¶¶ 73, 94, 120, 145, 165. And the defendants continued to detain, for months and years on end, persons whom they knew were not enemy combatants. *Id.* at ¶ 145, 165, 179.

Finally, a number of U.S. military personnel whose names remain unknown to the plaintiffs put into effect the arbitrary detention, the deliberate infliction of pain and fear, the deprivation of sleep, warmth, human contact, and even medical care, and the constant humiliations that the plaintiffs suffered. These personnel are co-defendants Does 1-100. *Id.* at ¶ 185.

D. Plaintiffs Have Suffered Continuing Effects From Their Abuse.

Although they have now been released, all five plaintiffs continue to suffer the effects of the defendants' conduct. They have ongoing medical problems stemming from

the physical injuries and medical neglect they suffered while in Guantanamo. *Id*. at ¶¶ 76, 97, 123, 147, 173. They remain traumatized by their treatment, experiencing lingering psychological problems. *Id*. at ¶¶ 76, 97, 123, 147, 173. Their economic opportunities are seriously reduced, their standing in their communities – to the extent they could even return to their communities – diminished, and their family relations in some cases drastically altered. *Id*. at ¶¶ 76, 97, 123, 147, 173. Even those plaintiffs who were able to return to their country of origin have had great difficulty securing employment and reintegrating into their community because of their injuries and the stigma of having been detained at Guantanamo. *Id*. at ¶¶ 76, 97, 123. Mr. Hasam and Mr. Muhammad, initially sent to live in a refugee center in Albania, were particularly isolated and disadvantaged. *Id*. at ¶¶ 146, 173.

E. Procedural History.

Plaintiffs filed this action on November 21, 2006, and amended their complaint on March 21, 2007. *See* Docket Nos. 1, 11. On May 22, 2007, this Court stayed the case pending resolution of the consolidated appeals in *Rasul v. Rumsfeld*, Nos. 06-5209, 06-5222 (D.C. Cir.), a case involving constitutional, statutory and international law claims against many of the same civilian officials, military commanders, and military personnel for the torture and abuse of detainees at Guantanamo.[5] *See Rasul v. Myers*, 512 F.3d 644,

[5] The defendants insist that *Rasul* is a related case and therefore determinative of the outcome here. *See, e.g.*, Mot. at 2. That is not correct. In fact, this Court declined defendants' request to reassign this action to the judge before whom *Rasul* was pending, Order, Docket No. 19 (May 22, 2007); Defs.' Mot. to Stay, Docket No. 13, at 1 n.1 (Mar. 27, 2007). Nor does the Court's grant of a stay, whilst *Rasul* was pending, establish that *Rasul* is determinative of the claims in this case. Likewise, plaintiffs' request for a continued stay in 2008 to allow the appeals in *Rasul* and *Boumediene* to run their course simply recognized that certain *legal* questions in those cases overlapped with legal

658-59 (D.C. Cir. 2008) ("*Rasul I*"). The Supreme Court vacated the Court of Appeals' first decision on the case in light of *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008). *See Rasul v. Myers*, 129 S. Ct. 763 (2008). The Court of Appeals subsequently issued a second decision, *Rasul II*, which the Supreme Court has declined to review. *See Rasul v. Myers*, 130 S. Ct. 1013 (2009).

The Court entered the parties' Joint Stipulation on the Schedule for a Motion to Dismiss on December 31, 2009. *See* Docket No. 41. The defendants filed this Motion to Dismiss on February 19, 2010. *See* Docket No. 43.

III. ARGUMENT

This case differs from *Rasul II* in significant respects that warrant a different outcome on plaintiffs' Alien Tort Statute claims (Counts I-V). Most importantly, two of the plaintiffs – Mr. Hasam and Mr. Muhammad – were formally determined by CSRTs not to be enemy combatants, yet were held at Guantanamo and subjected to abuses and inhumane treatment for two years after that determination. In *Rasul II* none of the plaintiffs received CSRT determinations. Thus, this case raises an important and novel question: Were defendants, in continuing to detain people known not to be enemy combatants and subjecting them to abuses and inhumane treatment, acting within the scope of their employment? That question cannot be resolved as a matter of law by *Rasul*

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questions here and that a stay pending final resolution of *Rasul* (and *Boumediene*, which the defendants are not arguing is related) would be convenient and efficient. *See* Pls.' Mot. for Further Stay, Docket No. 25, at 3 n.3 (Mar. 7, 2008).

II or by the Attorney General's self-serving certification that defendants were all acting within the scope of their employment.[6]

In considering a motion to dismiss, "the court must accept [the plaintiffs'] factual allegations as true." *Wuterich v. Murtha*, 562 F.3d 375, 383 (D.C. Cir. 2009). Moreover, at this early stage of the litigation plaintiffs are not required to put forward all the facts that might be uncovered by discovery; they need only state a claim that is plausible. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). At a minimum, they are entitled to explore, through discovery, the parameters of defendants' employment under these circumstances – including as it related to detainees determined not to be enemy combatants.

Nor is *Rasul II* dispositive of plaintiffs' constitutional claims. It is open to this Court to find that detainees at Guantanamo, such as plaintiffs, are entitled to assert First and Fifth Amendment claims. Although the court in *Rasul II* first chose to address the question of whether such rights were "clearly established," thereby obviating its need to consider the underlying constitutional question, it did not foreclose this or other courts from addressing the substantive question first – a question that can and should be answered in the affirmative. The facts of this case – as distinct from those in *Rasul* – further compel this answer.

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[6] Nor should defendants be relieved, as a matter of law, of responsibility for cruel and degrading treatment of detainees not exonerated by a CSRT. For the reasons discussed below, the question of whether some or any of these abuses can be within the scope of employment depends upon the circumstances of the individual case, not least the government's information about the detainee, its policies on detainees, and the defendant's motivation when acting. *See* Section III.A. This question is not suited for resolution without a meaningful inquiry into those circumstances, an inquiry which necessarily includes reasonable discovery.

A. *Rasul II* Does Not Foreclose Plaintiffs' ATS Claims (Counts I-V).

The facts alleged by plaintiffs preclude dismissal of their Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") claims (Counts I-V) on the basis of the Westfall Act.[7] The Westfall Act imposes the procedural requirements and exclusive remedies of the Federal Tort Claims Act ("FTCA") in those cases where the defendant federal official or employee was "acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Defendants assert that *Rasul II* settled the issue of whether the Westfall Act applies here, but they are wrong. *Rasul* held that torture and abusive interrogation techniques could be within the scope of an official's employment when applied to "suspected enemy combatants." *See Rasul I*, 512 F.3d at 658-59; *see also Rasul II*, 563 F.3d at 529 (reinstating with no analysis holding of *Rasul I* as to application of Westfall Act). But here defendants engaged in abuse and mistreatment of people whom their employer, the United States, had formally determined were not enemy combatants. That is a distinction that makes all the difference, and one which the defendants do not address at all.[8] Abusive and inhumane treatment of individuals determined not to be enemy

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[7] Plaintiffs assert ATS claims based on defendants' violations of international law and treaties proscribing prolonged arbitrary detention (Count I), torture (Count II) and cruel, inhumane or degrading treatment or punishment (Count III). Plaintiffs also claim defendants' conduct violates the Geneva Conventions (Count IV) and the Vienna Convention on Consular Relations (Count V). The *Rasul* plaintiffs did not assert a Vienna Convention claim.

[8] Defendants also fail to address the difference between the Geneva Conventions claim in *Rasul* and the Vienna Convention claim for denial of access to consular officials asserted here. *See* Mot. at 12. There was no Vienna Convention claim asserted in *Rasul*. Here, Mr. Sen and Mr. Mert both repeatedly asked to see consular officials from their country of origin, Turkey. *See* SAC at ¶¶ 83, 119. Their requests were ignored (although the United States apparently acceded to requests from security services from Algeria and Uzbekistan to access other detainees for purposes of interrogation). *See id.* at ¶¶ 137, 168.

Unlike the Geneva Conventions, the Vienna Convention does confer enforceable individual rights. *See Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007); *see also Medellin v.*

combatants is outside the scope of employment; at the very least, that is a fact question that cannot be determined without discovery.

1. The Attorney General's Certification Does Not Establish that Defendants Were Acting Within the Scope of Their Employment.

As a preliminary matter, the Attorney General's certification that the defendants were acting within the scope of their employment neither binds this Court nor provides any real insight into the actual nature of the defendants' jobs or conduct. Certification merely works to create a rebuttable presumption which the plaintiff can dispel. *See Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003). As the Supreme Court has observed, in cases where a certification, if accepted by the court, would foreclose the plaintiff's claim – in other words, in cases like this one – "[t]he impetus to certify becomes overwhelming." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995). The need for meaningful judicial review of the facts in these cases is therefore heightened. *See id; Stokes*, 327 F.3d at 1214 ("the plaintiff cannot discharge this burden without some opportunity for discovery.").

Here, the certification is wholly conclusory: "On the basis of the information now available, I find that at the time of the conduct alleged in the complaint the individual

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Texas, 552 U.S. 491, n.4 (2008) (assuming, without deciding, that Vienna Convention confers individually enforceable right on foreign nationals); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (*per curiam*) (Vienna Convention "arguably confers on an individual the right to consular assistance following arrest."); *but see, e.g.*, *Gandara v. Bennett*, 528 F.3d 823, 827 (11th Cir. 2008). Further, United States policy is to comply with the Vienna Convention. Defendants' denial of Mr. Sen and Mr. Mert's requests for access to consular officers was therefore without authority and outside the scope of the defendants' employment. *Cf.* Br. for U.S. as *Amicus Curiae* in Supp. of Pet'r., *Medellin v. Texas*, 552 U.S. 491, No. 06-984, at 7-8.

defendants … were acting within the scope of their employment as employees of the United States." Certification of Scope of Employment, Docket No. 43-1. The Court must therefore determine independently whether solitary confinement, sleep deprivation, exposure, shackling, blindfolding, forcible shaving, body cavity searches, disruption and mockery of religious practices, and all the other abuses inflicted on the plaintiffs after the government's own CSRT process established that they were not enemy combatants were so clearly within the scope of the defendants' employment that no reasonable juror could find otherwise. *See Lamagno*, 515 U.S. at 434; *see also Rasul I*, 512 F.3d at 655 (collecting cases).

2. Employees Act Within the Scope of Their Employment Only When They Are Performing Acts of a Kind They Are Employed to Perform.

In determining whether the abusive treatment of detainees at Guantanamo falls within the scope of employment – and, thus, under the Westfall Act – courts have applied the law of the District of Columbia, which has adopted the Restatement (Second) of Agency, Section 228 (1957). *See Rasul I*, 512 F.3d at 655; *Rasul v Rumsfeld*, 414 F. Supp. 2d 26, 32 (D.D.C. 2006); *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 430 (D.C. 2006). The Restatement provides that the "[c]onduct of a servant is within the scope of employment …only if**:**

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master."

Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 663 (D.C. Cir. 2006), *quoting* Restatement (Second) of Agency § 228(2) (emphasis added).

The test's four parts are not factors to be weighed but separate, conjunctive criteria, each one of which must be satisfied for conduct to fall within the scope of employment. *See Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006) (ending analysis upon concluding one factor not met); *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995), *abrogated on other grounds by Osborn v. Haley*, 549 U.S. 255 (2007) (existence of job-related dispute may support jury verdict that employee's threats of violence were intended to further employer's interest, but cannot in itself establish that employee acted within scope of employment). Moreover, the test is "an objective one, based on all the facts and circumstances." *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986) (*Johnson II*). Its application requires evaluation of events and relationships that are complex and often open to interpretation, thus scope of employment issues are questions of fact. *e.g. Brown v. Argenbright*, 782 A.2d 752, 757 (D.C. 2001); *see also Majano*, 469 F.3d at 141 (collecting cases); *Kimbro v. Velten*, 30 F.3d 1501, 1509-10 (D.C. Cir. 1994) (remanding for determinations of fact). Of the four parts of the test, two are especially significant here: Section 228(a), requiring that the conduct be of the kind that the defendant was employed to perform, and Section 228(c), which inquires into the defendants' motivation.

3. Unlike in *Rasul*, Defendants Abused Persons Who Were Not Enemy Combatants, and So Were Not Performing Acts of a Kind They Were Employed to Perform.

Because *Rasul I* evaluated only the use of "torture and abuse" in interrogating "suspected enemy combatants," it provides no basis for dismissing as a matter of law this

case, which involves individuals who were not enemy combatants. *See Rasul I*, 512 F.3d 658-60.[9] Despite the heavy tilt of the CSRT procedure in favor of the United States, *see Parhat v. Gates*, 532 F.3d 834, 845, 848 (D.C. Cir. 2008), Mr. Hasam and Mr. Muhammad were determined not to be enemy combatants. SAC ¶¶ 141, 145, 164, 171. Yet after that determination the defendants subjected them to a range of physical and psychological abuses and arbitrary detention that continued for almost two more years. SAC ¶¶ 141-47, 163-73. In those circumstances, at least two of the conditions required for defendants' conduct to have been within the scope of employment were absent.

First, subjecting individuals determined not to be enemy combatants to abuses and inhumane treatment, as detailed in the SAC, is not action "of the kind" that defendants were employed to perform. The authority to detain and interrogate people at Guantanamo derives from the Authorization for Use of Military Force ("AUMF") enacted by Congress in the wake of the September 11, 2001 attacks. AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001), codified at 50 U.S.C. § 1541, note; *see also Boumediene v. Bush*, 128 S. Ct 2229 at 2240-41 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 588-89 (2004)). The AUMF authorizes the President "to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

[9] *See also In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 114 (D.D.C. 2007) (detaining and interrogating suspected enemies within scope of military officials' obligations); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 34 (D.D.C. 2006) (torture within scope of CIA officers' employment because undertaken "not for personal benefit, but was foreseeable action conducted for the purpose of gathering information and intelligence"), *aff'd Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008).

persons, in order to prevent any future acts of international terrorism against the United States." AUMF § 2(a) (emphasis added).

The United States' determination that plaintiffs were not enemy combatants, explicitly in the case of Mr. Hasam and Mr. Muhammad and implicitly in the case of Messrs. Celikgogus, Sen, and Mert, whom it released to their country of origin, is critical to the determination of the scope of defendants' employment. Once the United States determined the plaintiffs were not enemy combatants and therefore outside the purview of the authority granted by the AUMF, it had nothing left to do but release them – and certainly could not continue to abuse them. *See Parhat v. Gates*, 532 F.3d 834, 854 (D.C. Cir. 2008) (government must "expeditiously" release or transfer detainees not proven to be enemy combatants).[10] And, by extension, the defendants had quite literally no business doing anything other than promptly making the necessary arrangements for that release. Their employer, itself lacking the authority to detain or interrogate the plaintiffs, could not have authorized the individual defendants to detain or interrogate them, let alone to engage in activities such as depriving the plaintiffs of sleep, exposing them to cold, forcibly shaving them, and harassing them in the practice of their religion. The defendants have not pointed to, and indeed could not point to, any policies or procedures

[10] Even if the government argues it continued to hold the plaintiffs because it was searching for a place to which they might be transferred, that would not answer the question at hand – that is, whether the defendants' conduct was within the scope of their employment. At most, it would raise an issue of fact as to what that scope might have been, warranting not dismissal but discovery into the policies and procedures on treatment of persons determined not to be enemy combatants, and into whether defendants unnecessarily prolonged plaintiffs' detention through lack of diligence in arranging their release.

authorizing such treatment for persons who are not enemy combatants. In short, they had no authority to continue holding and abusing the plaintiffs for nearly two more years.

Second, those activities could not have been brought into the scope of the defendants' employment as somehow "incidental" to the performance of their duties. Unauthorized conduct can be within the scope of employment if the employee engages in it as a method of carrying out his legitimate responsibilities – or, as courts sometimes term it, if it is a direct outgrowth of his job. *See Rasul I*, 512 F.3d at 658; *see also*, *e.g.*, *Lyon v.Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (resolution of customer dispute through violence); *Howard Univ. v. Best*, 484 A.2d 958, 987 (D.C. 1984) (dean's interaction with faculty member at faculty meetings and university functions part of job responsibilities); *Weinberg*, 518 A.2d at 992 (resolution of customer dispute through violence). However, for the challenged activity to be within the scope, "D.C. law . . . requires that the alleged tort arise from the employee's authorized duties." *See Haddon*, 68 F.3d 1420 at 1425 (emphasis in original). Conversely, if a particular goal or outcome is not part of the employee's job, the means he uses to accomplish it are not part of his job either – even if his conduct was connected to or made possible by his employment. *See id.* at 1425 (electrician's effort to induce chef to withdraw complaint against supervisor not within scope of employment); *see also Penn. Central Trans. Co. v. Reddick*, 398 A.2d 27, 32 (D.C. 1979) (railroad brakeman's assault of taxi driver for not promptly providing transportation from station to railyard not within scope of employment).

Here, once the United States determined plaintiffs were not enemy combatants, the defendants' legitimate job responsibilities no longer included treating them as

suspected terrorists under the special authority conferred by the AUMF. Thus, the only employment-related end – the detention and interrogation of suspected enemy combatants – for which the abuses and inhumane treatment at issue could possibly have served as a means no longer applied. *See Rasul I*, 512 F.3d at 658-60. Certainly, deliberate infliction of pain, psychological distress and humiliation are not accepted (or acceptable) conduct by members of the United States military in other contexts. *See, e.g.*, 10 U.S.C. §§ 893, 928, 934 (Uniform Code of Military Justice Arts. 93 (forbidding cruelty and maltreatment), 128 (forbidding assault), & 134 (misconduct in general)); *also Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (Uniform Code of Military Justice incorporates American common law of war and law of nations, including the Geneva Conventions). Simply put, treating individuals who were not enemy combatants like terrorists was not, objectively, a way for the defendants to do their jobs.

Rasul I underscores this point. Although that case involved many of the same defendants, none of the *Rasul* plaintiffs received CSRT determinations that they were not enemy combatants. The *Rasul* complaint, rather, focused on the relentless interrogation at the outset of their detention. On those facts, the Court of Appeals concluded that the "plainly criminal" conduct involved was within the defendants' scope of employment not as a general matter but because it was used for the "detention and interrogation of suspected enemy combatants." *See Rasul I*, 512 F.3d at 658 (emphasis added). (*Rasul II* reinstated this holding without conducting any additional analysis. *See* 563 F.3d at 528-29.) Again, in the case at hand, two of the plaintiffs were expressly determined not to be enemy combatants. The factual predicate that led the Court of Appeals in *Rasul* to

conclude that abusive conduct was "incidental to the defendants' legitimate employment duties" is thus entirely lacking here. *See* 512 F.3d at 659.

4. Unlike in *Rasul*, Plaintiffs Allege That at Least Some Defendants Acted Out of Animus, and Not in Order to Serve Their Employer.

Not only do the defendants' actions fail to satisfy the first criterion for conduct within the scope of employment – which in itself disposes of their contention that the ATS claims are barred – at least some fail to satisfy the third criterion, that they were motivated by a purpose to serve the employer. *See Majano,* 469 F.3d at 140; Restatement § 228(c). The moment the employee begins pursuing his own ends, the employee is no longer within the scope of his employment even though he may appear to be on the job. *See Schecter*, 892 A.2d at 42; *Boykin v. Dist. of Columbia*, 484 A.2d 560, 562 (D.C. 1984) (school employee's assault of blind student he was assigned to guide not within scope of employment). Intentional torts, which more readily suggest personal motivation, are especially difficult to resolve as a matter of law in favor of the employee. *See Majano,* 469 F.3d at 142 (reversing holding that Westfall Act applied because reasonable jury could conclude defendant did not forcibly pull co-worker's building access card from lanyard around co-worker's neck out of desire to serve government); *cf. M.J. Uline Co .v. Cashdan*, 171 F.2d 132, 134 (D.C. Cir. 1949) (reversible error to instruct jury that assault by hockey player was within the scope of employment because player "may have been, at the moment he struck the blow, completely indifferent to the work he was employed to do and actuated only by anger or hostility toward the man he tried to injure").

Plaintiffs have alleged a series of acts, each one of which violated their rights. Senior officers approved the cruel and inhumane practices used on the plaintiffs, and they

instructed and encouraged subordinates in the use of those practices. Junior personnel, including guards, beat, mocked, imprisoned and otherwise abused the plaintiffs. The motivations of these defendants at the time they engaged in these acts – acts directed toward individuals who were known not to be enemy combatants – are, at a minimum, a question that cannot be resolved as a matter of law. Indeed, plaintiffs have plausibly alleged that defendants acted out of animus toward the plaintiffs, including, in particular, their religious beliefs. *See, e.g.*, SAC ¶¶ 88, 114, 143, 167 and 187. On this ground alone, at this stage of the case, the ATS claims may not be dismissed.

5. At a Minimum, Plaintiffs Have Alleged Facts Sufficient to Warrant Limited Discovery into the Scope of the Defendants' Employment.

At the very least, plaintiffs' allegations mandate discovery and an evidentiary hearing on the limited "scope of employment" issue. This is not discretionary. "If there is a material dispute as to the scope issue the district court must resolve it at an evidentiary hearing." *Kimbro*, 30 F.3d at 1509 (emphasis added); *accord Osborn v. Haley*, 549 U.S. 225, 247 (2007). To warrant such a hearing, the plaintiffs are "not required to allege the existence of evidence [they] might obtain through discovery" at the pleading stage. *Stokes*, 327 F.3d at 1216. They need only allege facts that, taken as true, could rebut the government's certification. *See id*.

Plaintiffs have more than met this standard. The SAC is replete with allegations that bear on whether the defendants were acting within the scope of their employment, beginning with the critical fact, ignored by the defendants, that certain plaintiffs were

expressly determined not to be enemy combatants.[11] Plaintiffs have alleged a broad range of abuses and inhumane treatment, ordered, encouraged or implemented by the defendants. They have also alleged that defendants felt and acted on animus against the plaintiffs. *See* SAC at ¶ 187; *see also, e.g.*, *id.* at ¶¶ 88, 114, 143, 167. As discussed above, these facts would be enough to establish that defendants' conduct was outside the scope of their employment on not one but two separate grounds. Having raised a material dispute over the validity of the government's self-serving, boiler-plate certification, the plaintiffs cannot now be turned out of court on the strength of that certification alone. *See Stokes*, 327 F.3d at 1216.

If the defendants assert that they were following policies and procedures, plaintiffs should have some opportunity to discover what the specific policies and procedures were that related to the treatment and confinement of persons who were not enemy combatants. If the defendants assert that the prolonged detention was necessary for some reason, plaintiffs should be allowed to gather evidence on what efforts in fact were made to arrange for their release – and when. Resolving the scope of employment issue would require only limited discovery; the Court should, at a minimum, allow the plaintiffs to gather and present the relevant evidence before deciding whether the Westfall Act applies. *See Kimbro*, 30 F.3d at 1509.

[11] For the reasons discussed in text, the prolonged detention and abuses that occurred after the CSRT determinations of certain plaintiffs distinguish this case from *Rasul I*. Thus, *Rasul I*'s conclusion that no discovery was warranted does not apply here. *See Rasul I*, 512 F.3d at 662. On the contrary, the government's CSRT finding that the plaintiffs were not enemy combatants raises unprecedented questions as to the policies and procedures defendants should have been following, as well as the motivations for their actions.

B. Plaintiffs Have Adequately Pled First and Fifth Amendment Claims (Counts VI and VII).

Although *Rasul II* rejected Fifth and Eighth Amendment *Bivens*[12] claims brought by non-resident aliens detained at Guantanamo, it should not bar the *Bivens* claims here (Counts VI-VII). *Rasul II* held that such claims were barred by the doctrine of qualified immunity, because the constitutional rights of non-resident alien detainees outside the United States, and at a location not within its *de jure* sovereign control, to not be abused or tortured were not "clearly established" at the time of the constitutional violations. *See*, 563 F.3d at 530-31.[13] Having determined that the defendants enjoyed qualified immunity, the *Rasul II* court chose not to address the substantive question – whether U.S. officials violated plaintiffs' constitutional rights – thereby reversing the typical sequence for analyzing such claims. *See Saucier v. Katz*, 533 U.S. 194 (2001).

This Court should reach a different result for the following reasons: First, the *Rasul II* court was not required to perform the "clearly established" analysis before determining whether government officials violated the Constitution. Nor did the *Rasul II* court mandate that other courts similarly invert the analysis. This Court is therefore free to, and should, follow the traditional rule and undertake the substantive legal analysis first. Second, considering the substantive question first, this Court can find that non-resident aliens detained abroad at a location within U.S. jurisdiction and control, and who are not enemy combatants, are entitled to basic constitutional protections – certainly

[12] *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).
[13] As the *Rasul II* court put it, courts had not previously held that the Fifth Amendment "extend[s] to aliens or foreign entities without presence or property in the United States." *Rasul II*, 563 F.3d at 531.

protections that preclude torture and other inhumane treatment. And third, "special factors" do not counsel against recognizing a *Bivens* claim here.[14]

1. Substantive Legal Analysis Should Precede Consideration of Whether Constitutional Rights Were "Clearly Established."

In *Saucier*, 533 U.S. at 200-01, the Supreme Court restated the two-step inquiry employed in a *Bivens* case to determine whether a government official has a qualified immunity defense. Under the analysis, courts typically first determine whether the alleged facts make out a violation of a constitutional right. If the plaintiff satisfies the first step, then the court determines whether the asserted right was clearly established at the time of the violation. *See id*. at 201. *Saucier* made this sequence mandatory because of its critical importance to the development of constitutional doctrine:

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[14] Defendants assert in a footnote that the SAC's allegations are insufficient to meet the requirements of *Iqbal*, 129 S. Ct. 1937. Mot. at 8, n.6. *Iqbal*, however, does not insulate senior officials – or the defendants here – from *Bivens* liability. *See Iqbal*, 129 S. Ct. at 1949 (official may be liable for violations arising from his or her superintendent responsibility). Defendants remain responsible for their own misconduct, including their roles in instigating, encouraging, or attempting to shelter unlawful actions. *See id.*; *see also Vance v. Rumsfeld*, No. 06 C 6964, 2010 WL 850173 at *7 (N.D. Ill. Mar. 5, 2010) (allegations of memoranda approving harsh interrogation techniques and of similar instructions to a subordinate plausibly state defendant Rumsfeld's personal involvement in cruel and inhumane treatment of detainees in Iraq); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009) (allegations that official was involved in decision to detain Padilla and in drafting memoranda designed to justify abusive treatment, plausibly stated official's personal involvement in violation of plaintiff's rights).

Plaintiffs have also alleged more than enough facts showing defendants' personal involvement in wrongdoing at Guantanamo to plausibly state claims against them, including allegations about Messrs. Dunlavey and Miller's requests to treat detainees more harshly, *see* SAC at ¶ 182; Mr. Rumsfeld's repeated approvals of cruel and inhumane treatment, *id*. at ¶¶ 182-83; and the remaining named defendants' encouragement to subordinates to actually use abusive techniques as well as their failure to prevent, investigate, or punish abuses. *Id.* at ¶¶ 182-86. Plaintiffs have further alleged that the defendants' conduct was intended to create an environment in which the plaintiffs would be disadvantaged and punished because of their religion. *See id*. at ¶¶ 186-87. As for the Doe defendants, their personal involvement can hardly be an issue,

> This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Id. at 201.

The Supreme Court in *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808 (2009), revisited *Saucier* and held that in certain cases – particularly those "in which the constitutional question is so fact-bound" – lower courts could exercise their discretion to first decide the more narrow "clearly established" issue "in light of the circumstances in the particular case at hand." *Id*. at 818. Although *Pearson* recognized that the *Saucier* sequence is often beneficial, and did not repudiate its basic rationale, in those unique or "one-off" cases, undertaking the substantive analysis first may "provide[] little guidance for future cases." *Pearson*, 129 S. Ct. at 819.

Because this is not such a case, the traditional *Saucier* sequence should be employed. The question of whether non-enemy aliens detained at areas within the exclusive jurisdiction and control of the United States (but outside its borders) enjoy constitutional protections is of fundamental importance, and is likely to arise again. *See Boumediene*, 128 S. Ct. at 2252. Indeed, the very fact that this case, which presents issues in that regard similar to those in *Rasul II*, is now before this Court illustrates that these issues can and do recur. *Rasul II*'s exercise of discretion to invoke the optional *Pearson* sequence – and, thus, its implicit assumption that no guidance was required for

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given that they personally meted out the inhumane treatment. *See id*. at ¶ 185; *see also generally id.* at ¶¶ 35-171.

future cases – was evidently wrong. An analysis of the substantive issue here – whether plaintiffs can claim the protections of the First and Fifth Amendments – will thus provide valuable direction in future cases involving similarly-situated plaintiffs. *See Pearson*, 129 S. Ct. 818 (traditional *Saucier* sequence is crucial for "the development of constitutional precedent").

In contrast, the approach followed in *Rasul II* – and endorsed by defendants – ensures there will never be development of constitutional principles in this area. Because (according to *Rasul II*) neither the Supreme Court nor the D.C. Circuit had previously found that the Fifth and Eighth Amendments extended to non-resident aliens outside the *de jure* sovereignty of the United States, those rights were not clearly established at the time of any constitutional violation. *See Rasul II*, 563 F.3d at 530-31. But that, of course, makes certain that the rights at issue will *never* be clearly established. Not only is this contrary to *Saucier* and to *Pearson*, *see* 129 S. Ct. 818, it renders meaningless the "functional approach" to determine the extraterritorial application of the Constitution called for in *Boumediene*, 128 S. Ct. at 2253 (a long line of prior decisions "undermine the . . . argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends"); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) (application of fundamental rights abroad depends upon conditions and consideration of whether application would be consistent with nature of location and the case). Going to the "clearly established" step first freezes the law in this critical area.

Although the court in *Rasul II* exercised its discretion to decide the "clearly established" issue first, it did not require that lower courts do the same. *See id*. at 530

("Considerations of judicial restraint favor exercising the *Pearson* option . . . ."). This Court is therefore free to use and – for the reasons discussed in this Section – should use the traditional *Saucier* sequence, which has been employed for decades and continues to be used after *Pearson*, including in this Circuit. *See, e.g, Navab-Safavi v. Broad. Bd.*, 650 F. Supp. 2d 40, 53 (D.D.C. 2009); *Pearson v. District of Columbia*, 644 F. Supp. 2d 23, 36 (D.D.C. 2009).

2. The First and Fifth Amendments Apply to Non-Resident, Non-Enemy Aliens Detained by the United States at Facilities Under Its Complete Control.

A finding that non-resident aliens who are not enemy combatants and who were held by U.S. officials at Guantanamo have First and Fifth Amendment rights is consistent with the Supreme Court's decision in *Boumediene*, 128 S. Ct. 2229.[15] There, the Court held that the Suspension Clause extends to Guantanamo (an area outside U.S. sovereignty), and struck down the jurisdiction-stripping provision of the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241 & note) as an unconstitutional suspension of the writ of *habeas corpus*. Although the *Boumediene* court confined its holding to the extraterritorial reach of the Suspension Clause, *see id*. at 2275, and indicated that it "d[id] not address the content of the law that governs petitioners' detention," *id*. at 2277, it also ranged far and wide

[15] Plaintiffs assert that defendants adopted, promulgated and/or implemented policies intended to deny plaintiffs the ability to practice and observe their religion, thereby violating their right to free exercise of religion guaranteed under the First Amendment. SAC ¶¶ 217-21; *see also id.* ¶¶ 50, 68, 89, 113, 143, 167 (describing abuses that prevented plaintiffs from practicing their religion). No First Amendment claim was presented in *Rasul II*. Thus, the *Rasul II* court never addressed the application of these rights at Guantanamo nor whether their extension to non-resident aliens was clearly

through earlier cases, concluding that they did not demonstrate that sovereignty is the only relevant consideration in determining the geographic reach of the Constitution. *See id*. at 2258.

The result in *Boumediene* follows from earlier decisions in which the Supreme Court, in a variety of contexts, recognized that determining the extraterritorial application of the Constitution involves more than the mere assessment of sovereignty, and requires a functional approach. A century ago, the so-called *Insular Cases* extended "fundamental" personal rights (including due process, freedom of religion, and immunity from cruel and unusual punishments) to inhabitants of the "unincorporated" territories of the United States (those not anticipated or destined from the outset to become States), such as Puerto Rico, Guam, and the Philippines. *See generally Dorr v. United States*, 195 U.S. 138 (1904). Although the United States maintained complete sovereignty over these territories, these cases nevertheless support application of a functional approach to questions of the Constitution's extraterritorial reach.[16]

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established. *But see Rasul II*, 563 F.3d (rejecting RFRA claim based in part by reference to geographic reach of Constitution).

[16] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is not to the contrary. *Eisentrager* involved German soldiers fighting at the end of World War II – enemy aliens captured outside U.S. territory in an active theater of war, held in military custody as prisoners of war, and tried and convicted by a military commission for offenses committed. *See id*. at 777-78. The Court relied upon all these factors – in essentially a functional approach – to conclude that the German soldiers could not seek writs of habeas corpus. The plaintiffs here, in contrast, were not enemy combatants (several were expressly so found), were not prisoners of war and were not convicted of any offense. *Accord Boumediene*, 128 S. Ct. at 2257-58 (holding that nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution); *id.* at 2258 ("A constricted reading of *Eisentrager* overlooks what we see as a common thread [in the cases]: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.").

Reid v. Covert, 354 U.S. 1 (1957), also eschewed any bright-line rules. In a plurality decision, the Supreme Court held that civilian wives who were citizens of the United States could not be subjected to courts martial for murdering their military husbands overseas during a time of peace. The plurality rejected the argument that constitutional protections evaporate at the border. *See id*. at 14. Justice Harlan, in a concurring opinion, echoed the flexible nature of the inquiry, writing that "that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas." *Id*. at 75 (Harlan, J., concurring) (emphasis in original).[17]

Ignoring this long line of precedents, defendants limit their argument to *Rasul II* and *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated*, ___ U.S. ___, 130 S.Ct. 1235 (2010), neither of which dictate the outcome here. Because the *Rasul II* court rested its decision on the "clearly established" prong, it did not resolve the substantive question of whether portions of the Bill of Rights apply to non-resident aliens at Guantanamo. Its limited discussion of substantive law is thus *dicta*.[18] *See Rasul II*, 563 F.3d at 529.

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[17] *Verdugo-Urquidez*, 494 U.S. 259, although rejecting a Fourth Amendment challenge brought by a Mexican citizen arrested in Mexico whose property in Mexico was searched by the Drug Enforcement Agency without a warrant, is not inconsistent with a functional approach to the question of the extra-territorial application of the Constitution. *See id.* at 278 ("the Court has not decided [ ] that persons in the position of the respondent have no constitutional protection") (Kennedy, J., concurring). Further, in *Verdugo-Urquidez* the Supreme Court was careful to note that the Fourth Amendment "operates in a different manner than the Fifth Amendment, which is not at issue in this case." *Id*. at 264.

[18] "*Rasul I*," 512 F.3d 644 (D.C. Cir. 2008), relying upon the D.C. Circuit's earlier decision in *Boumediene v. Bush*, 476 F. 3d 981 (D.C. Cir. 2007), held that aliens without

As for *Kiyemba*, the D.C. Circuit there rejected application of the Due Process Clause in the context of holding that aliens could not obtain an order compelling their release into the United States. The Supreme Court granted *certiorari* in *Kiyemba*, ___ U.S. ___, 130 S. Ct. 458 (2009), but then vacated and remanded in light of changed facts, ___ U.S. ___, 130 S. Ct. 1235 (2010). Plaintiffs here do not seek entry into the United States. Due process may properly require that non-enemy aliens not be abused without creating any protectable rights relating to their post-incarceration release into the United States. *See Kiyemba* (due process does not apply because the political branches have exclusive power to admit or deny aliens); *see also Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987) ("Excludable aliens . . . have *personal* constitutional protections against illegal government action of various kinds; the mere fact that one is an excludable alien would not permit a police officer savagely to beat him, or a court to impose a standardless death penalty as punishment for having committed a criminal offense.") (emphasis in original);[19] *see also Zadvydas v. Davis*, 533 U.S. 678, 704 (2001) (Scalia, J., dissenting) ("I am sure they [excludable aliens] cannot be tortured . . . .").[20]

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property or presence in the United States lack constitutional rights. *See Rasul I*, 512 F. 3d at 663. However, *Boumediene* was subsequently reversed by the Supreme Court, *see* 553 U.S. 723, 128 S. Ct. 2229 (2008), and *Rasul I* was itself vacated by *Rasul v. Myers*, ___ U.S. ___, 129 S. Ct. 763 (2008). For the reasons set out in text, *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 98, is in error in concluding that "it is settled law that nonresident aliens must be within the sovereign territory of the United States to stake any claim to the rights secured by the Fifth Amendment."

[19] Later proceedings at *Amanullah and Wahidullah v. Cobb*, 862 F.2d 362 (1st Cir. 1988) and *Amanullah and Wahidullah v. Cobb*, 872 F.2d 11 (1st. Cir. 1989) regarding statutory issues did not disturb this discussion.

[20] The decisions cited by the D.C. Circuit in *Kiyemba* as support for its conclusion are also inapposite and do not establish that non-resident aliens have no constitutional due process rights. In *32 County Sovereignty Comm. v Department of State*, 292 F.3d 797

In cases not mentioned by the defendants, lower courts have extended fundamental rights to non-resident aliens outside U.S. sovereignty. For example, in *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), the D.C. Circuit applied the Fifth Amendment to U.S. government activities in Micronesia, a "Trust Territory" pursuant to a United Nations designation under which the United States acted as an administrator, and over which the United States was not technically sovereign, *see id*. at 619 n.71; "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law . . . ." *id*. at 618-19 (citation omitted).[21]

Furthermore, in *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993), the court, following a trial, held that Haitians fleeing Haiti, picked up by the Coast Guard and deposited at Guantanamo, and "screened in" (*i.e.*, who had made

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(D.C. Cir. 2002), and *People's Mojahedin Org. of Iran v. U.S. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), Irish and Iranian political organizations sought, unsuccessfully, to challenge their classifications as terrorist groups. In *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960) (*per curiam*), the court rejected a challenge to U.S. atomic bomb testing by U.S. citizens on standing grounds, and in a footnote wrote that "[t]he non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States." *Id*. at 254 n.3, citing *Eisentrager*. These cases do not rule out application of the Fifth Amendment to non-enemy aliens detained at facilities within the complete jurisdiction and control of the United States, but instead involve aliens with no connection at all to the United States. In *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004), the court did not decide the issue of extraterritorial application. *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), rejected application of the Fifth Amendment to claims that the alien husband of a United States citizen was tortured and murdered by foreign agents of the CIA (Guatemalan officials) abroad. But the court relied erroneously, and almost exclusively, on a misinterpretation of the Fourth Amendment case of *Verdugo-Urquidez*, *see supra*, and the alien was not within U.S. jurisdiction and control.

[21] *See also United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (holding that fundamental constitutional protections including the Due Process Clause extend to U.S.-controlled West Berlin); *id.* at 244 ("It is a first principle of American life – not only life

a preliminary showing that they had a credible fear of being returned to Haiti) enjoyed both First and Fifth Amendment rights.[22] The court found that the complete control exercised by the United States government at Guantanamo triggered the constitutional protections. *See id*. at 1040-41. Although plaintiffs here were not "screened in," they were subject to confinement, interrogation and control by the United States for many years. As an alien's ties to the U.S. grow, so too do his or her due process rights. *See Eisentrager*, 339 U.S. at 770-71.[23]

Guantanamo is a small naval base under the complete jurisdiction and control of the United States. *See Boumediene*, 128 S. Ct. at 2252. Application of constitutional protections there would not interfere with relations with other countries or operations in an active theater of war, nor would it impose peculiarities of American jurisprudence on foreign inhabitants of a territory acquired by the United States. Functional considerations dictate that fundamental constitutional protections should extend there.

(footnote continued from previous page)
at home but life abroad – that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution.").

[22] The district court decision in *Sale* was vacated by stipulation of the parties in a class action settlement. *See Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1424 (11th Cir. 1995). In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court did not have before it any constitutional claims and thus did not address the issue of the Constitution's extraterritorial application.

[23] *But cf. Christopher*, 43 F.3d 1412 (rejecting application of constitutional protections to Cuban and Haitian migrants temporarily provided safe haven at Guantanamo). The migrants there had not been "screened in," but were only temporarily at Guantanamo due to a "gratuitous humanitarian act" that did not in any way create a putative liberty interest. *See id*. at 1427. Plaintiffs here were much more than temporary humanitarian "guests" of the United States; they were its prisoners.

3. Conducting the Substantive Analysis First Informs the "Clearly Established" Prong of the Analysis.

Plaintiffs concede this Court may conclude that it is bound by the "clearly established" holding in *Rasul II*, but respectfully submit the *Rasul II* court did not undertake the proper analysis, and wish to preserve the argument that proper application of the "clearly established" test would lead to a different result.[24]

Qualified immunity attaches only where "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In making that determination, courts will consider whether the official was on notice, which is not limited to a prior ruling on identical facts. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id*.; *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances").[25] The *Hope* court rejected the requirement that prior cases be "fundamentally" similar or have "materially" similar facts. Instead, all that is required is

[24] Moreover, conducting the substantive analysis first (*see supra* Section 2) can provide important context that will assist the Court in determining whether the constitutional rights at issue were "clearly established." Because *Rasul II* did not carry out the substantive analysis first, it did not have the benefit of this context.

[25] *Cf. United States v. Lanier*, 520 U. S. 259, 271 (1997) (warning standard under 18 U.S.C. § 242 equivalent to that under § 1983 and *Bivens*; "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,'") (citation omitted).

that the defendant have "fair warning" that his activity was unconstitutional. *See id*. Implicit in the reasonable official standard is the concept of good faith.[26]

Perhaps as a consequence of performing the "clearly established" analysis first, the *Rasul II* court erroneously focused on whether any prior case had expressly extended the Fifth and Eight Amendments to non-resident aliens. But this is an overly constricted view of "clearly established," which requires only fair warning of a constitutional violation. Such warning existed here. A U.S. official at Guantanamo during the time period in question would have known the following:

1. The abuse, inhumane treatment and interference with religious practices alleged in this case would, if it had occurred within the United States, violate the First and Fifth Amendments;

2. The Supreme Court, in the *Insular Cases* and later in *Reid*, articulated the general rule that fundamental constitutional protections do extend to U.S. territories (including to aliens in those territories), and to U.S. citizens in foreign countries;

3. Excludable aliens have fundamental constitutional rights, *see Amanullah*, even though exclusion decisions are not themselves subject to a due process analysis;

4. Prior cases have extended fundamental rights to non-enemy aliens outside the area of U.S. sovereignty, *see, e.g.*, *Ralpho; Haitian Centers Council, Inc.*;

5. Those prior cases ruling out the extraterritorial application of the Fifth Amendment involved facts very different from those in the present case (*i.e.*, they involved *enemy aliens* or claims for admission into the United States); and

6. Guantanamo, which is within the complete jurisdiction and control of the United States, but not within its formal sovereignty, is as close to a United States territory as can be imagined.

[26] *See Malley v. Briggs*, 475 U.S. 335, 339, 345 (1986) (police officer in § 1983 action not entitled to qualified immunity unless he has an objectively reasonable basis for believing the facts in his warrant-supporting affidavit support probable cause); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (immunity analysis has an objective "good faith" aspect).

In light of these points, no U.S. official could have reasonably concluded that the naval base at Guantanamo Bay was constitutionally "immune."

Defendants intentionally situated plaintiffs (and others) at Guantanamo precisely because no case had expressly extended constitutional protections to "non screened-in," non-enemy aliens there, and turned a blind eye to the clear trend of the *Insular Cases* and *Reid*, and the "negative pregnant" of *Eisentrager*. This deliberate exploitation of the potential constitutional ambiguity regarding Guantanamo's status (which dissolves upon informed consideration) was in bad faith, and precludes invocation of qualified immunity. *See Harlow*, 457 U.S. at 815.

4. Special Factors Do Not Counsel Against a *Bivens* Claim Here

Finally, *Rasul II* concluded that there was an alternative ground for dismissing the *Bivens* claims at issue, namely, that federal courts cannot fashion a *Bivens* remedy when special factors counsel against doing so. *See Rasul II*, 563 F.3d at 532 n.5, quoting *Chappell v. Wallace*, 462 U.S. 296, 298 (1983). The danger of obstructing U.S. national security policy is one such factor. *See Rasul II*, 563 F.3d at 532 n.5. With very brief analysis confined entirely to a footnote, *Rasul II* concluded that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Id*., quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). Defendants here rely upon *Rasul II* and *Sanchez-Espinoza* to argue that special factors militate against any *Bivens* claim. This reliance is misplaced, for at least two reasons.

First, because two plaintiffs were expressly determined not to be enemy combatants, the Court can find, in contrast to *Rasul II*, that an inquiry into their status, and recognition of a damages remedy for their mistreatment, would not interfere with "core" executive functions or chill military effectiveness on the battlefield, nor would it call into question judgments made by the political branches regarding national security and military affairs. Specifically, an inquiry into the policies and procedures governing the treatment of certain plaintiffs after they were determined not to be enemy combatants would not expose enemy combatant detention policies, practices, and procedures, nor would it afford enemies of the United States a mechanism to obtain information about military affairs that could be used to disrupt command missions.[27]

Second, *Sanchez-Espinoza* can be distinguished. In that case, plaintiffs, who were Nicaraguan citizens, challenged the President's decision to fund insurgents seeking to overthrow the government of Nicaragua, and asserted Fourth and Fifth Amendment claims arising out of the operation of Contra forces. In rejecting a *Bivens* remedy, the court properly concluded that the judiciary should not insert itself into a political dispute between the Congress and the President over the conduct of foreign affairs. These concerns, however, are inapplicable here. The Congress and the Executive Branch have no political dispute relevant to the plaintiffs' *Bivens* claims at issue. In fact, the executive

[27] The *Eisentrager* Court's concerns about judicial interference with military commander's decisions regarding the disposition of enemy troops captured on the battlefield during wartime are simply not present here. *See Eisentrager*, 339 U.S. at 779; *see also Vance v. Rumsfeld*, 2010 WL 850173 at *17 (N.D. Ill. Mar. 5, 2010) (citizen plaintiffs' claims "do[] not require that we challenge the desirability of military control over core warmaking powers"). Moreover, the relatively modest burden associated with discovery is itself insufficient to justify foreclosing all *Bivens* claims. *See Padilla*, 633 F. Supp. 2d at 1028.

and Congress agreed in the AUMF that the government could detain enemy combatants, not others. *See* AUMF, 50 U.S.C. § 1541, note. To detain and then mistreat persons who are not enemies of the United States violates the explicit parameters of the AUMF. Nor would a decision in favor of plaintiffs embarrass the Executive Branch abroad by creating a divergent pronouncement on a question by another branch of the government. Given the United States' total *de facto* control over Guantanamo (*see Boumediene*, 128 S. Ct. at 2252 (U.S. exercises complete jurisdiction and control over Guantanamo)), for all practical purposes the activities alleged in the SAC did not take place abroad.

C. Plaintiffs Have Adequately Pled a RFRA Claim (Count VIII).

Rasul II incorrectly decided the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq*., does not apply to Guantanamo detainees. Plaintiffs concede that this Court may be bound by the *Rasul II* court's holding on this issue, but wish to preserve their argument for purposes of any appeals.

Briefly, plaintiffs allege that defendants prevented them from practicing their religion, mocked their beliefs and desecrated the Koran. *See, e.g.*, SAC ¶¶ 50, 68, 89, 113, 143, 167. Such conduct violates RFRA. Further, plaintiffs are "persons" for RFRA purposes, as Judge Brown found in her concurrence. RFRA was enacted to afford protection to a broader range of religious practices than that encompassed by the First Amendment. *See Rasul II*, 563 F.3d at 534 (Brown, J., concurring). When during drafting Congress removed the term "First Amendment" from RFRA to achieve this broader protection, it did not import back into the statute any geographic scope limitation through the word "person." Inapposite Fourth and Fifth Amendment cases, even if they constitute a relevant legislative background, do not establish that Congress intended that

"person" for RFRA purposes would not encompass non-resident aliens. Thus, nothing supports the *Rasul II* court's limitation that the term "religious exercise" as used in RFRA would not encompass plaintiffs' claims.

D. Plaintiffs Have Stated a Valid Claim Under the Federal Civil Rights Act (Count IX).

Section 1985(3) prohibits conspiracies to deprive any person of equal protection of the laws. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). As discussed above, plaintiffs have adequately alleged repeated violations by the defendants of their rights under the Constitution, treaties and other laws. They have also made specific allegations that the defendants conferred with and encouraged each other in this conduct because of a shared animus toward the plaintiffs' religion, plausibly suggesting that the defendants conspired in the violation of the plaintiffs' rights. *See* SAC ¶¶ 182-87.

For example, plaintiffs have stated with specificity that defendants Dunlavey and Miller lobbied for inhumane and unlawful treatment of detainees and that defendant Rumsfeld responded to their requests by issuing memoranda announcing that such treatment was permissible. *Id* at ¶ 182; *compare Islamic Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 60 (D.D.C. 2005) ["*IARA*"] (no allegation that Defendants conferred or acted in complicity together). Plaintiffs have alleged in detail how this treatment – from forced nudity and forced shaving to preventing prayer and desecrating the Koran - was directed at their religious beliefs. *See*, *e.g.*, SAC at ¶¶ 57, 89, 113, 136, 143, 167. Plaintiffs have also alleged that the remaining defendants then acted on Mr. Rumsfeld's encouragement to instigate or implement the treatment and further abuses, all without regard for the plaintiffs' status as individuals who were not enemy combatants. *See SAC.* at ¶¶ 182-87. The plaintiffs have done far more than "simply

alleg[ing] a government-wide conspiracy." *IARA*, 394 F. Supp. 3d. at 59 (internal quotations omitted). This is not a claim that was raised in and addressed by *Rasul*. The Court should not dismiss the plaintiffs' claim under the Federal Civil Rights Act.[28]

IV. CONCLUSION

Plaintiffs' claims are not a carbon copy of *Rasul*, nor are the facts of their detention. Unlike the plaintiffs in *Rasul*, here CSRT determinations established two years prior to their release that Mr. Hasam and Mr. Muhammad were not enemy combatants. This raises an issue of first impression that precludes dismissal of the ATS claims (Counts I-V) on the basis that defendants were acting within the scope of their employment. Moreover, this Court can find that plaintiffs detained at Guantanamo had constitutional rights (Counts VI-VII). And plaintiffs have stated a valid claim under the Federal Civil Rights Act (Count IX). The distinctive facts of this case and the novel claims asserted here – for violations of the Vienna Convention, the First Amendment, and the Federal Civil Rights Act – preclude dismissal on the basis of *Rasul II*.

For the reasons set out above, plaintiffs respectfully request that the defendants' Motion to Dismiss be DENIED.

[28] Defendants also assert that plaintiffs are not entitled to seek equitable relief. *See* Mot. at 13-14. But plaintiffs are merely seeking to have the Court address plaintiffs' damages claims on the merits. Defendants' arguments are therefore misconceived and should be disregarded.

DATED: April 19, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

YUKSEL CELIKGOGUS, *et al*, Plaintiffs, v. **DONALD RUMSFELD**, *et al*, Defendants.	**06-CV-1996 (HHK)**

[PROPOSED] ORDER

Having considered Defendants' Motion to Dismiss, the opposition to the motion and the arguments of counsel presented at the hearing, and good cause appearing therefore, the Court hereby orders the following:

ORDERED that Defendants' Motion to Dismiss is **DENIED**.

SO ORDERED

DATED: _____ BY: _____

Henry H. Kennedy, Jr.
United States District Judge