[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 06-5209, 06-5222

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

DONALD RUMSFELD, ET AL.,

Defendants-Appellees/Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES/CROSS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Appellees/Cross-Appellants certifies as follows:

A. Parties and Amici.

Plaintiffs-Appellants/Cross-Appellees are Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith. Defendants-Appellees/Cross-Appellants are former Secretary of Defense Donald Rumsfeld, Air Force General Richard Myers, Army Major General Geoffrey Miller, Army General James T. Hill, Army Major General Michael E. Dunlavey, Army Brigadier General Jay Hood, Marine Brigadier General Michael Lehnert, Army Colonel Nelson J. Cannon, Army Colonel Terry Carrico, Army Lieutenant Colonel William Cline, and Army Lieutenant Colonel Diane Beaver. No amici appeared below. Two groups of amici appear on behalf of plaintiffs-appellants in Case No. 06-5209. The first group consists of: the National Institute of Military Justice, Brigadier General (Ret.) David M. Brahms, Lieutenant Commander (Ret.) Eugene R. Fidell, Commander (Ret.) David Glazier, Elizabeth L, Hillman, Jonathan Lurie, and Diane Mazur. The second group consists of: Susan Benesch, Lenni B. Benson, Christopher L. Blakesley, Arturo J. Carillo, Roger S. Clark, Marjorie Cohn, Rhonda Copelon, Angela B. Cornell, Constance de la Vega, Martin Flaherty, Hurst Hannum, Dina Haynes, Deena Hurwitz, Ian Johnstone, Daniel Kanstroom, Bert Lockwood, Beth Lyon, Jenny S. Martinez, Carlin Myer, Noah

Benjamin Novogrodsky, Jamie O'Connell, Jordan J. Paust, Naomi Roht-Arriaza, Meg Satterthwaite, Ron Slye, Beth Van Schaack, David Weissbrodt, and Ellen Yaroshefsky.

B. Rulings Under Review.

The ruling under review in Case No. 06-5209 is the February 6, 2006 order of the United States District Court for the District of Columbia in *Rasul* v. *Rumsfeld*, Civ. No. 04-1864, dismissing counts I through VI of plaintiffs' complaint, and the court's order of July 10, 2006, entering final judgment pursuant to Fed. R. Civ. P. 54(b). The ruling under review in Case No. 06-5222 is the May 8, 2006, order of the United States District Court for the District of Columbia in *Rasul* v. *Rumsfeld*, Civ. No. 04-1864, denying the individual defendants' motion to dismiss plaintiffs' claim under the Religious Freedom Restoration Act.

C. Related Cases.

Al-Odah v. *United States*, D.C. Cir. Nos. 05-5064, 05-5095, 05-5116, currently pending before this Court, presents the issue of the application of Fifth Amendment rights to detainees held at Guantanamo. Plaintiffs Rasul and Iqbal were parties to a habeas petition seeking their release from Guantanamo. The district court dismissed their petition, and Rasul and Iqbal, and the detainees from two related cases, appealed to this Court, Nos. 02-5251, 02-5284, and 02-5288. This Court affirmed. *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003). The Supreme Court thereafter

reversed. *Rasul* v. *Bush*, 542 U.S. 466 (2004). While the case was pending in the Supreme Court, Rasul and Iqbal were released from Guantanamo. On remand from the Supreme Court, their habeas petition was amended removing them as petitioners. See Amended Petition, *Hicks v. Bush,* Civ. No. 02-299.

The undersigned counsel is aware of no other cases involving substantially the same parties and the same or similar issues, pending before this Court or any other court.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1350. The district court entered an order dismissing Counts I through VI of the complaint on February 6, 2006, and certified that decision as final under Fed. R. Civ. P. 54(b) on July 10, 2006. Plaintiffs filed a timely notice of appeal (No. 06-5209) on July 25, 2006. The district court entered its order denying the individual defendants' motion to dismiss the RFRA claim on May 8, 2006. Defendants filed a timely notice

of appeal (No. 06-5222) on July 3, 2006. This Court has jurisdiction over plaintiffs' appeal and over the individual defendants' interlocutory appeal from the denial of qualified immunity pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed plaintiffs' international law claims pursuant to the Westfall Act, 28 U.S.C. § 2679(b)(1).

2. Whether the district court correctly dismissed plaintiffs' Geneva Conventions claims.

3. Whether "special factors" preclude the creation of an implied right of action under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), with respect to plaintiffs' constitutional claims.

4. Whether the individual defendants are entitled to qualified immunity on plaintiffs' Fifth and Eighth Amendment claims.

5. Whether the individual defendants are entitled to qualified immunity on plaintiffs' claim under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq*.

STATUTES AND REGULATIONS

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (the "Westfall Act"), is reproduced in an

addendum to the Brief for Appellants. The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq*., is reproduced in the addendum attached to this brief.

STATEMENT OF THE CASE

1. In the wake of the terrorist attacks of September 11, 2001, the President took immediate action to defend the country and prevent additional assaults, and Congress swiftly approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The President ordered U.S. Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although our troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat with al Qaeda and the Taliban remains ongoing.

During these conflicts, the United States, consistent with the law and settled practice of armed conflict, seized many hostile persons and detained a small proportion of them as enemy combatants. A number of these individuals have been or are being held at the U.S. Naval Base at Guantanamo Bay, Cuba ("Guantanamo").

2. Plaintiffs are four individuals who were captured in the course of U.S. military operations in Afghanistan and later detained at Guantanamo before their

release to the United Kingdom. Plaintiffs allege that, during their confinement, they were subjected to harsh conditions, abusive interrogation techniques and other improper conduct. They brought this action against then Secretary of Defense Donald Rumsfeld and ten senior U.S. military officials. Plaintiffs alleged that defendants authorized, encouraged, or knowingly failed to prevent torture and mistreatment, in violation of plaintiffs' rights under international law, the Geneva Conventions, the Fifth and Eighth Amendments, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*

The district court granted the defendants' motion to dismiss the international law, Geneva Conventions, and constitutional claims, and certified that ruling as final under Fed. R. Civ. P. 54(b). In a subsequent decision, the district court denied the individual defendants' motion to dismiss the RFRA claim. The court held that RFRA applies extraterritorially to non-citizens held at Guantanamo, and that defendants are not entitled to qualified immunity because RFRA's application to aliens at Guantanamo was clearly established at the time of plaintiffs' detention, even though no court has ever held that RFRA applies to Guantanamo. These cross-appeals followed.

STATEMENT OF THE FACTS

A. Plaintiffs' Allegations.

Plaintiffs Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith are British citizens who were captured in Afghanistan in the months following September 11. JA12-13, 83-84. According to the allegations in the complaint, which must be taken as true at this stage (but which are not conceded), three of the plaintiffs were captured by a warlord in Afghanistan in November 2001, and turned over the United States. JA12. The fourth plaintiff alleges that he was captured initially by the Taliban, and that after his release, U.S. forces detained him. JA12-13. All of the plaintiffs were transferred to Guantanamo in 2002, and were released in 2004, returning to the United Kingdom. JA13-14, 46.

According to the complaint, in December 2002 then-Secretary Rumsfeld signed a memorandum approving certain interrogation techniques that allegedly violated international and constitutional norms. JA7-8. Among the techniques allegedly permitted were forcing prisoners to endure stress positions, disrobing prisoners, intimidating prisoner with dogs, twenty-hour interrogation sessions, forcing prisoners to wear hoods, shaving their hair, and "mild, non-injurious physical contact." JA17, 84. Plaintiffs claim that, as a result of a working group report on interrogation tactics, Secretary Rumsfeld later withdrew the memorandum. JA17.

Plaintiffs allege that they suffered from inhumane treatment, some of which they allege constituted torture, at the hands of unidentified U.S. military personnel. *See* JA13-14, 32-45. For instance, plaintiffs claim that they were "repeatedly struck with rifle butts, punched, kicked and slapped," were shackled in painful "stress positions" for many hours at a time, and were "threatened with unmuzzled dogs." JA14. They assert that they were "forced to strip naked, subjected to repeated body cavity searches, intentionally subjected to extremes of heat and cold," denied access to medical care and "deprived of adequate food" and sleep. JA14. Plaintiffs also allege that U.S. military officials harassed them during the practice of their religion, interrupted and prohibited prayer, withheld the Koran, and placed the Koran in the toilet. JA57.

After their release, plaintiffs brought this action against Secretary Rumsfeld and ten other senior Department of Defense officials (who allegedly comprised the military chain of command for Guantanamo) in their individual capacity. Plaintiffs allege that the mistreatment they suffered "was not simply the product of isolated or rogue actions by individual military personnel," but stemmed from "deliberate and foreseeable" action taken by defendants in an attempt (which plaintiffs term "misconceived and illegal") to "coerce nonexistent information regarding terrorism." JA15. The complaint goes on to allege that "[t]he torture, threats, physical and

psychological abuse inflicted upon Plaintiffs were devised, approved, and implemented by Defendant Rumsfeld and other Defendants in the military chain of command. These techniques were intended as interrogation techniques to be used on detainees." JA46. Plaintiffs further allege that defendants knew that plaintiffs were tortured or mistreated, "took no steps to prevent the infliction of torture and other mistreatment," and "authorized and encouraged the infliction of torture and mistreatment against Plaintiffs." JA50.

The complaint seeks relief under the Alien Tort Statute, 28 U.S.C. § 1350, for violation of international law (Counts I-III) and for violation of the Third and Fourth Geneva Conventions (Count IV). JA50-54. Plaintiffs also alleged violations of the Fifth and Eighth Amendments (Counts V and VI) and RFRA (Count VI). JA55-58.

B. The District Court's First Decision Dismissing The International and Constitutional Claims.

The Attorney General (through his designee) certified that, "at the time of the conduct alleged in the complaint," the individual defendants "were acting within the scope of their employment as employees of the United States," and substituted the United States for the individual defendants on the international law and Geneva Conventions Claims, pursuant to the Westfall Act. JA60; *see* 28 U.S.C. § 2679(b)(1) (a suit against the United States is the exclusive remedy for seeking money damages

for the wrongful act or omission of a Government employee acting in the scope of employment). Defendants moved to dismiss those counts because plaintiffs had not exhausted their administrative remedies. The individual defendants also moved to dismiss the constitutional and RFRA claims, asserting qualified immunity.

The district court granted the defendants' motion to dismiss, except as to the RFRA count. JA82-115. The court held that, under the Westfall Act, the United States was properly substituted for the individual defendants on the international law claims. JA89-90. Applying the *respondeat superior* law of the District of Columbia, the court held that the defendants were acting within the scope of their employment when the alleged acts occurred. The court determined that the United States had "authorized military personnel in Guantanamo to exercise control over the detainees and question the detainees while in the custody of the United States," and that "the complaint points to actions which arose specifically from authorized activities." JA95.[1] After substituting the United States, the court dismissed the claims because plaintiffs had not exhausted their administrative remedies under the FTCA. JA103-04.

[1] The district court also rejected plaintiffs' contention that the Geneva Conventions are enforceable through a private right of action, noting that this Court had recently ruled to the contrary in *Hamdan* v. *Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *reversed on other grounds*, 126 S. Ct. 2749 (2006). JA90 n.4.

On the constitutional claims, the district court held that defendants are entitled to qualified immunity. JA104-113. The court declined to determine whether plaintiffs had alleged constitutional violations, holding that the defendants are entitled to qualified immunity because any constitutional rights with respect to Guantanamo detainees were not clearly established. JA107-13.

C. The District Court's Second Decision On RFRA.

After supplemental briefing, the district court denied the motion to dismiss plaintiffs' RFRA claim. JA117. The court first rejected the contention that RFRA lacks "extraterritorial" application. Noting that the statute extends by its terms to "each territory and possession of the United States," 42 U.S.C. § 2000bb-2(2), the court held that Guantanamo is a "possession" of the United States within the meaning of the statute. JA125-26.

The district court also rejected the contention that RFRA does not apply to non-resident aliens. The court held that aliens detained at Guantanamo are "persons," and that Guantanamo is a United States "possession," under RFRA. JA130. The court then held that defendants are not entitled to qualified immunity because, by virtue of RFRA's "plain text," the rights of Guantanamo detainees were clearly established at the time of their detention. JA126, 137.

SUMMARY OF THE ARGUMENT

1. a. Plaintiffs' international law claims against Secretary Rumsfeld and the other individual defendants were properly dismissed because the defendants were acting within the scope of their employment at the time of the alleged conduct. Plaintiffs' complaint alleges that defendants acted through the chain of command, while exercising their duties to supervise the custody of detainees, and that they took action for the express purpose of eliciting information regarding terrorism. Those allegations demonstrate that the defendants' actions are "of the kind" they are employed to perform. Plaintiffs' assertion that the specific mistreatment they allege was not "authorized" reflects a misunderstanding of the Westfall Act and governing *respondeat superior* law.

b. Plaintiffs' contention that the entire case is exempt from the Westfall Act any time a party raises a *Bivens* claim is based upon a misreading of 28 U.S.C. § 2679(b)(2)(A), and would reverse decades of settled precedent. The phrase "civil action" in that section is tied to a specific claim rather than the entire case. The statute uses the same phrase in the provision requiring that a "civil action or proceeding" commenced against a defendant acting in the scope of employment "shall be deemed an action against the United States." *Id.* § 2679(d)(1). Plaintiffs'

interpretation would mean that the United States would be substituted as the defendant on all claims as to all defendants (even state officials or private parties).

2. The district court correctly dismissed plaintiffs' claim under the Third and Fourth Geneva Conventions. Plaintiffs make no effort to demonstrate that this claim falls outside the Westfall Act. In any event, the Geneva Conventions do not provide individually enforceable rights. As with the 1929 Convention, the terms of the Third and Fourth Conventions show that vindication of those terms is a matter of state-to-state relations and not domestic judicial resolution.

3. The district court correctly dismissed plaintiffs' Fifth and Eighth Amendment claims.

a. "Special factors" counsel against recognition of a *Bivens* remedy for damages against U.S. military officials for actions taken with respect to aliens detained during wartime. Allowing such an action here would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the Executive Branch. In these circumstances, a court should not imply a *Bivens* cause of action.

b. Plaintiffs' constitutional claims also fail because the rights they seek to assert are inapplicable to aliens captured abroad and held at Guantanamo. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens

are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *see, e.g., Johnson* v. *Eisentrager*, 339 U.S. 763, 781-85 (1950). The United States is not sovereign over Guantanamo; it operates a naval base there, pursuant to written agreements with Cuba, which expressly recognize Cuban sovereignty. *Rasul* v. *Bush*, 542 U.S. 466 (2004), did not overrule these settled precedents. Plaintiffs thus have no claim to constitutional rights.

c. Even if the Court concludes that the Constitution applies to aliens detained at Guantanamo, the defendants are entitled to qualified immunity because no such constitutional rights were clearly established at the time of plaintiffs' detention. At that time, no court had called into question the validity of cases such as *Eisentrager* and *Verdugo*. And, during the pendency of plaintiffs' detention, this Court held that detainees at Guantanamo were not entitled to constitutional protections.

4. The district court erred in denying defendants' motion to dismiss the RFRA claim on the basis of qualified immunity. RFRA does not provide a right of action to non-citizens at Guantanamo. The statute was enacted to restore the compelling interest test that had governed First Amendment free exercise cases before the decision in *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), and not to grant previously unrecognized rights to aliens with no substantial

connection to the United States. In light of that purpose, RFRA's application to "persons" is insufficient to show that Congress wished to take the unprecedented step of granting substantive rights to aliens captured and held abroad during an armed conflict. At the very least, RFRA's purported application to aliens at Guantanamo was not clearly established.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' INTERNATIONAL LAW CLAIMS.

A. The District Court Correctly Held That The Defendants Acted Within The Scope Of Their Employment.

The Westfall Act generally provides absolute immunity to government employees for allegedly tortious acts done within the scope of their employment. Such claims must proceed exclusively against the United States under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 2679(b)(1); *United States* v. *Smith*, 499 U.S. 160, 163 (1991).

Thus, if the Attorney General certifies that an employee was acting within the scope of his employment at the time of the relevant incident, the employee must be "dismissed from the action and the United States substituted as defendant." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995); *see* 28 U.S.C. § 2679(d)(1). The Attorney General's certification is entitled to "*prima facie* effect,"

and it is the plaintiff's burden to show that the defendant was not acting within the scope of his employment. *Kimbro* v. *Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). Unless the court determines that the plaintiff has carried this burden, "the employee becomes absolutely immune from actions for money damages arising from the same incident; plaintiff's only recourse is to proceed against the federal government under the Federal Tort Claims Act." *Haddon* v. *United States*, 68 F.3d 1420, 1422-23 (D.C. Cir. 1995). That is true even if defenses under the FTCA will preclude judgment against the United States. *United States* v. *Smith*, 499 U.S. at 166; *see* 28 U.S.C. § 2679(d)(4).

The scope of employment under the Westfall Act is determined by reference to local *respondeat superior* law. *Haddon*, 68 F.3d at 1423. The district court here held, and the parties did not contest, that in this case the District of Columbia provides the relevant local *respondeat superior* law. District of Columbia law looks to the Restatement (2d) of Agency. *Stokes* v. *Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003). Under the Restatement, conduct is within the scope of employment if: "[a] it is of the kind [the employee] 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 unexpected by the master." Restatement (Second) of Agency, § 228(1).

1. Plaintiffs address only the first factor, the "kind" of conduct the defendant is employed to perform, and therefore waive any objection to the district court's holding on the other factors. To satisfy the first requirement, the conduct must be either "of the same general nature as that authorized" or "incidental to the conduct authorized." *Haddon*, 68 F.3d at 1424. "Conduct is 'incidental' to an employee's duties if it is "a direct outgrowth of the employee's instructions or job assignment." *Id.* (citation omitted).

The alleged conduct of defendants was precisely the "kind" of conduct they were employed to perform. The Secretary of Defense, his closest advisors, and U.S. military officials were engaged in an effort to win the ongoing war against terrorism. More specifically, and in support of that larger effort, they were charged with detaining and interrogating suspected enemy combatants. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004) (plurality). Plaintiffs do not dispute this. Indeed, they expressly allege that defendants' duties included "maintaining the custody and control of the Guantanamo detainees, including plaintiffs," JA20, or "supervisory

responsibility for Guantanamo detainees." JA20-23.[2] Moreover, plaintiffs candidly acknowledge that the interrogation techniques and other alleged mistreatment were designed to obtain information thought helpful in fighting the war on terror. The complaint alleges that the mistreatment plaintiffs suffered "was not simply the product of isolated or rogue actions by individual military personnel," but stemmed from action taken in an attempt to obtain "information regarding terrorism." JA15. Plaintiffs also allege that the abuse was "devised, approved, and implemented by Defendant Rumsfeld and other Defendants in the military chain of command. These techniques were *intended as interrogation techniques to be used on detainees*." JA45 (emphasis supplied).

2. Plaintiffs make no effort to show that defendants' duties did not encompass the detention and interrogation of suspected terrorists to elicit information that would aid in winning the war on terror. Rather, plaintiffs argue only that defendants approved methods of interrogation and treatment that went beyond what was "authorized" by their master, the President. *See, e.g.*, Br. 21. This Court, however, rejected a nearly identical argument in *Council on American Islamic Relations* v.

[2] Another defendant allegedly provided a legal opinion purporting to justify mistreatment of detainees as part of her job as a Legal Advisor. JA15. It is axiomatic that providing a legal opinion is exactly the "kind" of task a Legal Advisor is employed to perform.

Ballenger, 444 F.3d 659 (D.C. Cir. 2006). In that case, the plaintiff argued that a Congressman who allegedly uttered a defamatory statement was not acting in the scope of employment because the "alleged defamatory statement *itself* was not conduct of the kind he was employed to perform." *Id*. at 664 (emphasis in original). The Court held that this contention "rests on a misunderstanding of D.C. scope-of-employment law (not to mention the plain text of the Westfall Act)." *Id*. Because speaking to the press was the kind of conduct the defendant was employed to perform, the Court found that the allegedly defamatory statement was "incidental" to that conduct. *Id*.

As *Ballenger* makes clear, the *method* an employee chooses to accomplish an assigned task need not be authorized, since D.C. *respondeat superior* law "'is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf.'" *Id*. (quoting *Weinberg* v. *Johnson*, 518 A.2d 985, 992 (D.C. 1986)). Indeed, even acts expressly *forbidden* by the employer are within the scope of employment if they are designed at least in part to accomplish the employer's purpose. Restatement (Second) of Agency, § 230; *see also* W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts, § 70 at 503 (1984) (Where "the forbidden conduct is merely the servant's own way of accomplishing an authorized purpose, the master cannot escape responsibility no

matter how specific, detailed and emphatic his orders may have been to the contrary." (footnote omitted)).

Thus, plaintiffs' contention that the specific actions alleged here were not "authorized" does not help plaintiffs here. Where high-level military officials are charged with winning the war on terror, and specifically with detaining and obtaining information from suspected terrorists, the officials' policies on detention and interrogation, and their supervision of the implementation of those policies, is at least "incidental" to those duties.

Plaintiffs' reliance (Br. 18-19) upon a State Department report stating that torture is not within the scope of employment is inapposite. The State Department does not administer the Westfall Act or have special expertise in common law *respondeat superior* jurisprudence, and it does not define the job duties of employees at other federal agencies. As the district court correctly recognized (JA93 n.5), the State Department's view cannot establish a material issue of fact concerning whether the Secretary of Defense and the military officers under his direction performed actions that were incidental to their duties and motivated at least in part by a desire to serve the United States.

The same holds true with respect to plaintiffs' reliance (Br. 22-23) on cases refusing to grant immunity for torture claims under the Foreign Sovereign Immunities

Act. Those cases do not address the central question required by the Westfall Act – whether federal employees were acting within the scope of their employment. Even if those cases establish that torture cannot be "authorized" as an act of state, as plaintiffs contend, those cases say nothing about the operation of the Westfall Act, which uses state common law of *respondeat superior*.

3. Plaintiffs' suggestion that the conduct alleged here is too egregious to fall within the scope of employment is inconsistent both with controlling D.C. law and with the Westfall Act's plain language, which grants absolute immunity for "wrongful" acts taken within the scope of employment, whether or not they are illegal or egregious. *See* 28 U.S.C. § 2679(b)(1). As this Court observed in a related context, "if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be completely abrogate[d].'" *Ramey* v. *Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (internal quotations omitted). That is no less true when immunity is claimed under the Westfall Act. *See, e.g., Johnson* v. *Carter*, 983 F.2d 1316, 1323 (4th Cir. 1993).

Numerous courts have held that the phrase "wrongful act" covers intentional torts. *See, e.g., Duffy* v. *United States*, 966 F.2d 307, 313 (7th Cir. 1992) ("We are unwilling to accept that intentional torts do not fall under the rubric of wrongful

acts."); *Waters* v. *United States*, 812 F. Supp. 166, 169 (N.D. Cal. 1993) ("[C]ourts have interpreted ['negligent and wrongful acts'] to encompass both negligent and intentional torts.").

And, under District of Columbia *respondeat superior* law, illegal and even shocking acts, such as rape and murder, may fall within the scope of employment. Thus, a mattress deliveryman acted within the scope of employment when assaulting and raping a customer during a delivery-related dispute. *Lyon* v. *Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976). And a laundry employee acted within the scope of employment when shooting a customer in a dispute over missing shirts. *Weinberg* v. *Johnson*, 518 A.2d 985, 988 (D.C. 1986). Contrary to plaintiffs' claim (Br. 20-21, citing Restatement (Second) of Agency, § 231), and act is not outside the scope of employment just because it is a serious crime.

Plaintiffs attempt to distinguish cases these cases on the ground that they involved "rogue" employees, while in this case plaintiffs allege "a deliberate decision by the Secretary of Defense and senior military officials to use torture and cruel and degrading treatment *as an instrument of policy*." Br. 27 (emphasis supplied). That distinction, if relevant at all, strongly *supports* the conclusion that defendants acted in the scope of their employment. A rogue employee on a "frolic of his own," *see* *Osborn* v. *Haley*, 2007 WL 135830, at *16 (U.S. Jan. 22, 2007), is more likely to act

outside the scope of employment, while an employee seeking to advance the employer's policy is precisely the sort of person who is deemed within that scope.

The cases upon which plaintiffs rely (Br. 27) are inapposite. Those cases address the third prong of the Restatement test (purpose to serve the master), a factor that plaintiffs do not contest in their brief. In *Boykin* v. *District of Columbia*, 484 A.2d 560, 562 (D.C. 1984), for instance, the court held that a teacher's sexual assault of a student was not within the scope of employment because employment merely afforded the employee "the *opportunity* to pursue his personal adventure." *Id*. (original emphasis). The court emphasized that the assault "was in no way committed to serve the school's interest, but rather appears to have been done solely for the accomplishment of [the employee's] "independent, malicious, mischievous and selfish purposes." *Id*.; *see also Majano* v. *United States*, 469 F.3d 138, 1142 (D.C. Cir. 2006) (question of fact as to whether alleged assault was motivated by a desire to serve the employer or instead "has the markings of an independent trespass"); *Penn Central Transp.* v. *Reddick*, 398 A.2d 27, 32 (D.C. 1979) (assault on taxi driver by railroad brakeman not within scope, because "[t]he violent and unprovoked nature of [the employee's] attack suggests a personal as distinguished from a business motive").

In any event, the complaint here expressly alleges that the defendants were motivated by a desire to serve their employer, *i.e.*, that they took action designed to elicit information regarding terrorism. JA15, 45; *see Ballenger*, 444 F.3d at 665 ("even a *partial* desire to serve the master is sufficient") (emphasis in original). And, unlike cases such as *Boykin, Penn Central*, and *Majano*, the defendants' employment did not merely provide them the "opportunity" to commit an independent criminal act for their own personal purposes. Rather, the defendants had specific responsibilities related to the custody and interrogation of detainees. Plaintiffs cite no case suggesting that an individual whose job includes interrogation and custody acts outside the scope of employment for alleged mistreatment of a detainee.

3. The conclusion that defendants acted within the scope of employment is even more justified under the circumstances here, involving high-level officials performing military functions in wartime. The "core purpose" of the Westfall Act "is to relieve covered employees from the costs and effort of defending the lawsuit, and to place those burdens on the Government's shoulders." *Osborn*, 2007 WL 135830, at *17. Westfall Act immunity implicates the same concerns as other forms of immunity – "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). Courts therefore have been wary of permitting

suits against individual federal officers, particularly high-level officials involved in military or national security functions. *See Van Tu v. Koster*, 364 F.3d 1196, 1198 (10th Cir.), *cert. denied*, 125 S. Ct. 88 (2004) (finding "availability of a *Bivens* remedy" to challenge conduct of U.S. military officers during the Vietnam War to be "questionable").

For instance, in *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 257 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 1768 (2006), the plaintiff alleged that former National Security Advisor Henry Kissinger was responsible for the "attempted kidnaping and death" of a Chilean general. Despite these alleged violations of "peremptory norms of international law," the district court found that Kissinger acted within the scope of his employment under the Westfall Act. 310 F. Supp. 2d at 265-68. The court explained that an employee is capable of committing a variety of illegal or tortious acts for which his employer may be held liable: "[Defining] scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines who may be held liable for that conduct, an employee or his boss." *Id*. at 265. In affirming the dismissal of the claims on political question grounds, 412 F.3d at 199, this Court rejected the contention that Kissinger's actions were *ultra vires*,

concluding that those actions "can hardly be called anything other than foreign policy." *See also Gonzalez-Vera* v. *Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006).

The court reached a similar conclusion in *Bancoult* v. *McNamara*, 370 F. Supp. 2d 1 (D.D.C. 2004), *aff'd on other grounds*, 445 F.3d 427 (D.C. Cir. 2006), holding that individuals at various federal agencies acted within the scope of their employment while facilitating the alleged forced relocation of residents of the Chagos Archipelago, notwithstanding claims that the conduct violated "*jus cogens* norms and fundamental human rights" and constituted "genocide, torture" and "cruel, inhuman and degrading treatment." *Id*. at 7-8. In affirming that decision on political question grounds, this Court explicitly held that the alleged actions fell within the scope of the defendants' employment *even if* the plaintiffs could demonstrate that the alleged actions "were not in conformance with presidential orders." 445 F.3d at 437. The court found "little trouble" concluding that the defendants acted within the scope of their employment under the Second Restatement, and noted that the defendants were "high-level executive officers who inherently possessed a large measure of discretion" in carrying out their duties. *Id*. at 437-38.

3. Plaintiffs' plea for discovery (Br. 17-20) illustrates why the district court's decision should be affirmed. Plaintiffs suggest that they should pursue discovery on whether Rumsfeld's actions were the type that are "commonly permitted" by the

Secretary of Defense during wartime, and whether the Secretary's "master" – the President – expected the Secretary to perform the way he did. These inquiries would entail the most intrusive of investigations, including presumably questions directed to the President himself.

Moreover, plaintiffs' own allegations demonstrate that discovery is unnecessary and that the issue of scope can and should be resolved without an evidentiary hearing. *See Haddon*, 68 F.3d at 1423. As discussed, plaintiffs allege that defendants acted within the chain of command in an effort to obtain information regarding terrorism. Where the scope of employment certification can be upheld, as here, under plaintiffs' own allegations, there is no need for discovery or an evidentiary hearing. *See Stokes*, 327 F.3d at 1216.

4. Finally, plaintiffs suggest (Br. 14, 24, 26) that the Court should depart from *respondeat superior* law because that doctrine is designed to provide recovery for plaintiffs, while the Westfall Act is designed to immunize defendants. Plaintiffs offer no case law to support this proposition, and we are aware of none. In fact, Congress was well aware of the policies behind local *respondeat superior* law when it enacted the Westfall Act, and it was certainly aware that the Act would apply to immunize federal employees. Indeed, that was the Act's "core purpose." *Osborne*, 2007 WL 135830, at *17. Congress nevertheless "intended the principles of respondeat

superior that govern FTCA actions to control decisions regarding entitlement to substitution." *Pelletier* v. *Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 876 (9th Cir. 1992) (citing H.R. Rep. No. 700, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949). As we have discussed, under those principles, plaintiffs' allegations clearly place defendants within the scope of their employment.

B. No Exceptions to the Westfall Act Apply.

Plaintiffs contend that their international law claims may be brought under the Westfall Act's exception for "a civil action against an employee of the Government– (A) which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). According to plaintiffs, including a constitutional claim in their complaint means that *every* claim in the complaint is exempt from the Westfall Act.

The district court correctly rejected this argument, which would reverse nearly two decades of case law permitting substitution of the United States in cases where common law and constitutional tort claims were raised together. *See, e.g., Simpkins* v. *District of Columbia Gov't*, 108 F.3d 366, 368 (D.C. Cir. 1997); *RMI Titanium Co.* v. *Westinghouse Elec. Corp.*, 78 F.3d 1125, 1142-44 (6th Cir. 1996); *In re Turner*, 14 F.3d 637, 639 (D.C. Cir. 1994); *Pelletier* v. *Federal Home Loan Bank of San*

Francisco, 968 F.2d 865, 867 (9th Cir. 1992); *Duffy* v. *United States*, 966 F.2d 307, 309 (7th Cir. 1992). As one court has observed: "[w]here a single case involves multiple claims, certification is properly done at least down to the level of individual claims and not for the entire case viewed as a whole." *Lyons* v. *Brown*, 158 F.3d 605, 607 (1st Cir. 1998). Plaintiffs cite *no* cases supporting their contrary interpretation.

Undaunted, plaintiffs insist that the plain meaning of the term "civil action" encompasses the entire action. Yet that phrase cannot bear the weight that plaintiffs seek to assign it. The phrase "civil action" is used several times in the Westfall Act, in contexts in which it cannot reasonably be interpreted as applying to the entire lawsuit.

Subsection (d)(1), for instance, states that, where the Attorney General certifies that the defendant was acting in the scope of employment "at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such a claim * * * shall be deemed an action against the United States * * * and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). If, as plaintiffs insist, "civil action" necessarily means the entire case, then this provision would have to mean that the assertion of one claim subject to Westfall Act immunity converts all claims in the complaint to FTCA claims against the United States, regardless of whether defendants were acting within the scope of employment on all

of the claims. Indeed, where a plaintiff names state officials or private parties as defendants, along with a federal officer, plaintiffs' argument would substitute the United States for those non-federal parties.

Plaintiffs' interpretation of "civil action" to cover the entire case also would eviscerate the exclusivity provision in subsection (b)(1), which provides that a suit against the United States "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter," and that "[a]ny other action or proceeding for money damages out of or relating to the same subject matter against the employee or the employee's estate is precluded," 28 U.S.C. § 2679(b)(1). Under plaintiffs' interpretation, only entirely separate lawsuits would be precluded, enabling plaintiffs to bypass the exclusivity provision altogether simply by including any and all claims in one suit.

As is evident from subsections (d)(1) and (b)(1), Congress plainly intended the phrase "civil action" to refer to a particular claim, and not to require the substitution of the United States on all claims. Identical phrases in the same statute must be interpreted consistently, *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 129

(1983), and plaintiffs offer no basis for interpreting "civil action" in subsection (b)(2) differently from its obvious meaning in subsections (d)(1) and (b)(1).[3]

The Supreme Court's decision in *Finley* v. *United States*, 490 U.S. 545 (1989), *superseded by statute*, 28 U.S.C. § 1367, supports this approach. In that case the Court rejected the contention that the FTCA's grant of jurisdiction for "civil actions on claims against the United States," 28 U.S.C. § 1346(b), was designed to "permit[] the assertion of jurisdiction over any 'civil action,' so long as that action *includes* a claim against the United States." 490 U.S. at 554 (emphasis in original). While Congress superseded the result in *Finley* by enacting a separate statute providing for "supplemental jurisdiction," 28 U.S.C. § 1367, it did not undermine *Finley*'s interpretation of the phrase "civil action on claims against the United States" – a phrase whose context is remarkably similar to the way the phrase is used in the Westfall Act.

[3] Plaintiffs also point to the use of the term "claim" to define exceptions to the FTCA, 28 U.S.C. § 2680. But in asserting that the use of a different term in "one part of the statute" means that the phrase must be interpreted to mean something else in a different part of the statute (Br. 30-31), plaintiffs neglect to mention that the Westfall Act (in 28 U.S.C. § 2679) was enacted separately from the FTCA (in section 2680).

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' GENEVA CONVENTIONS CLAIM.

Plaintiffs' claim under the Geneva Conventions fares no better than their international law claims. First, plaintiffs make no effort to demonstrate that their claim under the Geneva Conventions falls outside Westfall Act exclusivity. The Act expressly applies to all actions for money damages, with no exception for claims for violation of treaties, and the Supreme Court has held that additional exceptions to the *Westfall* Act may not be implied. *See Smith*, 499 U.S. at 166-67. Moreover, plaintiffs have abandoned the argument they made in the district court that this claim falls within the Act's exception for actions for "a violation of a statute of the United States." 28 U.S.C. § 2679(b)(2)(B). That argument, accordingly, is waived. *Murray* v. *Gilmore*, 406 F.3d 708, 716 (D.C. Cir. 2005).[4]

Because Westfall Act immunity is dispositive, there is no need for this Court to reach the question of whether the Geneva Conventions provide plaintiffs with

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[4] Plaintiffs also have waived any challenge to the district court's holding (JA102) that their claims under the Alien Tort Statute do not fall within the exception in section 2679(b)(2)(B). In any event, the district court's holding is clearly correct. Because the Alien Tort Statute is a "strictly jurisdictional" provision that "creates no new causes of action," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), it creates no substantive rights or duties that can be "violat[ed]" for purposes of section 2679(b)(2)(B). *E.g., Alvarez-Machain* v. *United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc) (concluding that the Westfall Act applies to actions under the ATS), *rev'd on other grounds*, 542 U.S. 692 (2004); *Bancoult*, 370 F. Supp. 2d at 9.

individually enforceable rights. If the Court reaches that issue, however, it should affirm the district court's rejection of plaintiffs' arguments.

A treaty "is primarily a compact between independent nations," and absent a clear contrary intent, "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 597 (1884); *see also Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (refusing to adjudicate the claim that U.S. policy and actions concerning Nicaragua violated the U.N. Charter). "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Restatement (Third) Of The Foreign Relations Law Of The United States § 907 cmt. a, at 395 (1987).

Thus, in *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950), the Supreme Court held that the 1929 version of the Convention did not create individually enforceable rights. Rather, those rights "are vindicated under it only through protests and intervention of protecting powers." *Id*. at 789 n.14; *accord Holmes* v. *Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972).

When the President signed and the Senate ratified the current version of the Convention in 1955, they did so with that background understanding and without any

indication that they changed the essential character of the treaty to permit alleged violations to be redressed by captured enemy forces through our judicial system. Reading the treaty to grant captured parties judicially enforceable rights in our domestic courts "could scarcely have failed to excite contemporary comment." *Eisentrager*, 339 U.S. at 784-85. Yet neither Congress nor the courts have expressed the view that the Geneva Conventions provide a private right of action. In fact, this Court expressly recognized that they do not. *Hamdan*, 415 F.3d at 39-40. And Congress recently reaffirmed this longstanding consensus. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 5(a).

Plaintiffs misrepresent the holding of *Diggs* v. *Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976), in which the Court stated that a treaty "'is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.'" *Id*. (quoting *The Head Money Cases*, 112 U.S. at 599). *Diggs* does not support plaintiffs' assertion (Br. 33-34) that a treaty gives rise to judicially enforceable individual rights merely because it contains provisions that benefit individuals. To the contrary, the *Diggs* court found the U.N. Security Council resolution at issue to be judicially *un*enforceable, stating: "the provisions here were not addressed to the judicial branch of our government. They do not by their terms confer rights upon individual citizens; they call upon

government to take certain action." *Id*. at 851 (footnote omitted). Like the resolution at issue in *Diggs*, the terms of both the Third and Fourth Conventions show that, as with the 1929 version, vindication of terms of the treaty is a matter of state-to-state relations, not domestic court resolution.[5]

Plaintiffs' contention (Br. 32-33) that the Supreme Court's decision in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006), establishes that the Geneva Conventions are judicially enforceable also is wrong. The *Hamdan* Court explicitly "assum[ed] that "absent some other provision of law," the Geneva Conventions do not "furnish[] petitioner with any enforceable right." 126 S. Ct. at 2794. The Court held only that common Article 3 of the Geneva Conventions is "part of the law of war" incorporated in Article 21 of the Uniform Code of Military Justice, and is therefore enforceable as a "condition upon which the [military commission] authority set forth in Article 21

[5] Article 1 of both Conventions provides that each party must "undertake to respect and to ensure respect for the present Convention in all circumstances." *See* 6 U.S.T. at 3318, 3518. Article 11 of the Third Convention and Article 12 of the Fourth Convention provide that "in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement." 6 U.S.T. at 3326, 3526. (In recent times, the role of the "protecting power" has been performed by the International Committee of the Red Cross. In 1949, it was typically performed by a neutral state.) Article 132 of the Third Convention and Article 149 of the Fourth Convention provide that "[at] the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention." 6 U.S.T. at 3420, 3618.

is granted." 126 S. Ct. at 2794. The Supreme Court therefore did not overrule this Court's explicit holding, 415 F.3d at 39-40, that the Geneva Conventions do *not* themselves confer judicially enforceable rights.

Here, unlike in *Hamdan*, there is no "other provision of law" that enables plaintiffs to claim that the Conventions furnish them with enforceable rights. Moreover, to the extent there is any ambiguity, the Court should defer to the view of the Executive as to whether the treaty was intended to grant those captured during an armed conflict judicially enforceable rights. *See El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999).

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CONSTITUTIONAL CLAIMS.

Plaintiffs' fifth and sixth causes of action assert *Bivens* claims for damages based upon alleged violations of the Fifth and Eighth Amendments. Those claims were properly dismissed. First, although the district court declined to rule on the issue, the "special factors" doctrine precludes the creation of a *Bivens* action against military officials for conduct taken with respect to aliens detained during wartime. Second, the district court correctly held that the individual defendants are entitled to qualified immunity.

A. Special Factors Preclude the Creation Of A *Bivens* Remedy.

A *Bivens* claim is a judicially created cause of action that courts may recognize only when there are no "special factors counseling hesitation" in doing so. *Bivens,* 403 U.S. at 396. Because the power to imply a new constitutional action for damages is "not expressly authorized by statute," *Correctional Services Corp*. v. *Malesko*, 534 U.S. 61, 68 (2001), it must be undertaken with great caution.

Accordingly, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Id*.; *see, e.g., FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983). In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and *United States* v. *Stanley*, 483 U.S. 669 (1987), the Court refused to create a *Bivens* remedy for alleged constitutional torts arising incident to military service for fear that such a claim would adversely impact order and discipline in the military. Under these decisions, there is a "'presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees.'" *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1908 (2006) (quoting *McIntosh* v. *Turner*, 861 F.2d 524, 526 (8th Cir. 1988)).

Special factors clearly counsel hesitation where, as here, the action presents a direct challenge to actions taken by the U.S. military in wartime. The Constitution

delegates authority over decisions related to military and national security affairs to the Executive Branch, *see* U.S. Const. art. II, § 2, cl. 1, and Congress, *see id.* art. I, § 8, cls. 1, 11-16. Recognizing this, the Supreme Court has traditionally been loath to interfere in such "core" executive and legislative functions. *See, e.g., Hirabayshi v. United States*, 320 U.S. 81, 93 (1943) (given that "the Constitution has placed the responsibility of warmaking [with the political branches], it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *Hamdi* 542 U.S. at 531 ("our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

The Supreme Court highlighted these concerns in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). In that case, the Court explained that extending Fourth Amendment rights to aliens outside of the United States "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," and "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id*. at 273-274. If the plaintiff could assert Fourth Amendment rights, then "aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters."

Id. at 274. The Court was unwilling to subject the political branches to the threat of suit and the restrictions imposed by the Fourth Amendment when reacting to a crisis "half-way around the globe." *Id*. at 274-275.

Allowing a *Bivens* action in contexts such as this would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the political branches. Not surprisingly, the courts have consistently refused to extend *Bivens* and other forms of tort liability into areas involving war-related functions, national security, or foreign affairs. This Court's decision in *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985), is directly applicable here. In that case, the Court refused to recognize a *Bivens* remedy for plaintiffs, including non-resident aliens, who alleged that numerous senior U.S. officials, including the President and the Secretaries of Defense and State, gave "financial, technical, and other support" to the Contras that resulted in the "summary execution, murder, abduction, torture, rape, [and] wounding" of "innocent Nicaraguan civilians." *Id.* at 205. The Court held that:

> considerations of institutional competence preclude judicial creation of damage remedies here. Just as the special needs of the armed forces require the courts to leave to Congress the creation of damage remedies against military officers for allegedly unconstitutional treatment of soldiers * * * so also the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign

> policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.

Id. at 208-09 (citations omitted). The Court went on to emphasize that "the foreign affairs implications of such suits cannot be ignored," explaining that "the danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment of whether a damage remedy should exist." *Id*. at 209 (citations omitted); *cf. Schneider*, 412 F.3d at 191, 194-97 (2006) ("whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking").

Noting the "special status of the military," *Chappell*, 462 U.S. at 303, the Supreme Court has emphasized that "intrusion of the judiciary into military affairs is inappropriate," and is a special factor counseling against creation of a *Bivens* remedy. *Stanley*, 483 U.S. at 683. In this regard, Congress has created a detailed administrative regime designed to prevent unlawful treatment of military detainees abroad, entrusting punishment of those accused of unlawful treatment of detainees to the military judicial system rather than the civilian courts. Ronald W. Reagan Nat'l Def. Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2068-71 (codified at 10 U.S.C. § 801, note §§ 1091-92). And Department of Defense

directives ensure substantive and procedural rights for detainees, and require all personnel to report possible or suspected detainee abuse. *See, e.g.,* DoD Directive 2310.01E (Sept. 5, 2006).

Courts should not imply a *Bivens* cause of action where Congress has failed to expressly provide one. *See Malesko*, 534 U.S. at 67 & n.3 (stating the Supreme Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Chilicky*, 487 U.S. at 423. This is especially true here, where creating such a remedy would involve courts in litigation over living conditions at overseas military detention facilities. Foreign detainees could subject military officials to the full range of suits brought by civilian prisoners in the United States, requiring the judiciary to pass judgment on the allocation of resources for overseas prison facilities, the command structures for carrying out official policies, the reporting structures for ensuring compliance with those policies, and (as in this case) the validity of specific interrogation techniques.

While U.S. soldiers are barred from bringing *Bivens* actions for injuries arising out of military service, *Stanley*, 483 U.S. at 682-83, aliens they capture abroad would be free to disrupt military operations with litigation. *Cf. Eisentrager*, 339 U.S. at 783 (stating that it would be a "paradox" if what the court denied "our own soldiers" it granted to "enemy aliens in unlawful hostile action against us"). The prospect of

individual liability increases the likelihood that officials will make decisions based upon fear of litigation rather than appropriate military policy. In light of the potential for intrusion into military, national security and foreign affairs, the Court should not imply a *Bivens* remedy.

B. The District Court Correctly Held That Defendants Are Entitled To Qualified Immunity.

1. Plaintiffs Have Not Asserted Constitutional Violations.

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. If at the time in question "officers of reasonable competence" could disagree on whether the alleged action violated the plaintiff's constitutional or statutory rights, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Because personal liability lawsuits against government officials exact "substantial social costs," *Harlow*, 457 U.S. at 814, entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation, and "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for

the violation of a clearly established constitutional or statutory right. *Harlow*, 457 U.S. at 818; *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996).

In adjudicating a defense of qualified immunity, first the court must decide "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert* v. *Gilley*, 500 U.S. 226, 231 (1991). If the plaintiff has asserted a constitutional violation, the inquiry focuses on the "objective legal reasonableness" of the defendants' conduct in light of clearly established law. *Harlow*, 457 U.S. at 818-19. That inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004).

a. Plaintiffs' Fifth and Eighth Amendment claims must be dismissed because the Constitution does not apply extra-territorially to protect non-resident aliens from U.S. military operations outside the country.[6] In *Eisentrager*, 339 U.S. 763, the Supreme Court addressed the question whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general (*id*. at 781), and Fifth Amendment rights in particular (*id*. at 781-85), and emphatically held that such aliens do not. The court observed that:

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[6] Plaintiffs' Eighth Amendment claim also fails because that amendment protects only convicted prisoners from cruel or excessive punishment for their crimes. *See Bell* v. *Wolfish*, 441 U.S. 520, 579 (1979). Since plaintiffs were aliens captured in the armed conflict with al Qaeda and the Taliban rather than convicted prisoners, they cannot assert an Eighth Amendment claim.

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

Subsequent decisions have reaffirmed this holding. For instance, in holding that the Fourth Amendment does not apply to searches of aliens' property conducted abroad, the Supreme Court reasoned in part that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," and, citing *Eisentrager*, it described that rejection as "emphatic." *Verdugo*, 494 U.S. at 269; *see also Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"). Plaintiffs misstated *Verdugo* as holding that fundamental rights "are guaranteed to inhabitants of territories under U.S. control, such as Guantanamo." Br. 42. In fact, *Verdugo* in no way states that "control" over an area is sufficient to guarantee fundamental rights, let alone that Guantanamo is a "territory" whose inhabitants are entitled invoke fundamental rights under the U.S. Constitution.

This Court has consistently rejected claims that aliens possess constitutional rights outside the sovereign territory of the United States. *See, e.g.*, *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); *32 County Sovereignty Comm*. v. *Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (citation omitted).

Moreover, in *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd on other grounds sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court specifically concluded that the Fifth Amendment is inapplicable to aliens held at Guantanamo. *See* 321 F.3d at 1140-44. Although the Supreme Court rejected this Court's distinct holding that habeas jurisdiction was entirely unavailable, *see Rasul*, 542 U.S. at 475-83, that Court expressly declined to address any Fifth Amendment or other substantive constitutional question, *see id.* at 485.

Under *Eisentrager* and its progeny, the applicability of the Fifth Amendment to aliens turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. *See, e.g., Verdugo*, 494 U.S. at 269 (aliens not "entitled to Fifth Amendment rights outside the sovereign territory of the

United States"). In *Eisentrager* itself, the petitioners were aliens imprisoned at a U.S. military base in Germany, which was controlled by the U.S. Army. *See* 339 U.S. at 766. Despite that control, the Court stressed that the aliens "at no relevant time were within any territory over which the United States is sovereign," *id*. at 778, and, on that basis, it held that application of the Fifth Amendment would be impermissibly "extraterritorial" (*id*. at 784). As this Court has explained, "under *Eisentrage*r, control is surely not the test. Our military forces may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany." *Al Odah*, 321 F.3d at 1143.

b. The United States manifestly is not sovereign over Guantanamo. To the contrary, it operates a naval base at Guantanamo only pursuant to the terms of written agreements between this Nation and Cuba. *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (6 Bevans 1120) (Supplemental Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682, T.S. No. 866. Under the terms of those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. Moreover, the

lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over that area, *see id.* art. II.

Courts repeatedly have concluded that provisions such as these do not effect a transfer of sovereignty. For example, in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), the Court concluded that a leased military base in Bermuda, over which, as the Court itself observed, the United States had "substantially the same" rights as it has over the base in Guantanamo (*id*. at 383), was "beyond the limits of national sovereignty." *Id.* at 390. Although the Court held the Fair Labor Standards Act applicable to the base, it did so only after discerning a specific congressional intent to apply the statute "on foreign territory." *See id.* Similarly, in *United States* v. *Spelar*, 338 U.S. 217 (1949), the Supreme Court held that the "foreign country" exception to the FTCA applied to a U.S. military base in Newfoundland because the governing lease had "effected no transfer of sovereignty." *Id*. at 221-22. The lease terms were "the same" as the ones at issue in *Vermilya-Brown*. *See id.* at 218.

With respect to Guantanamo specifically, the Eleventh Circuit has held that aliens there "have no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995); *see also id.* at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty."). In *Al Odah*, this Court similarly held that aliens at Guantanamo have no Fifth Amendment rights,

on the ground that "Cuba—not the United States—has sovereignty" there. 321 F.3d at 1143. This characterization of Guantanamo, consistent with the views of the Executive Branch, is also appropriate because the "determination of sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380.

Plaintiffs also cite *Ralpho* v. *Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977), to support their argument. Plaintiffs overlook the fact, however, that the Court in that case applied due process to Micronesia because Congress had intended it to be treated as it if were a territory, a fact that led this Court in *Al-Odah* to conclude that *Ralpho* "establishes nothing" about the existence of constitutional rights at Guantanamo. *Al-Odah*, 321 F.3d at 1144. Plaintiffs also quote a statement from *Harbury* v. *Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000), *rev'd on other ground sub nom. Christopher* v. *Harbury*, 536 U.S. 403 (2002), that "inhabitants of non-state territories controlled by the United States" are "entitled to certain fundamental rights." Yet that quotation comes from a description of the plaintiff's *argument* – an argument that the Court emphatically rejected. *See id*. at 603-04.

c. Nothing in *Rasul* overruled the settled precedents discussed above. As explained, in *Rasul*, the Supreme Court addressed only the extent to which the habeas statute (which has since been amended) applied extraterritorially, and expressly

reserved all substantive constitutional questions. *See* 524 U.S. at 485. Moreover, in discussing the particular legal status of Guantanamo, the Court expressly acknowledged that the United States exercises control, but "not 'ultimate sovereignty,'" over the leased area. *See id*. at 475. And in concluding that such control was sufficient to establish habeas jurisdiction even as to aliens, the Court focused on the distinctive language of the habeas statute, *see id.* at 480-81, as well as the scope of the writ at common law, *id.* at 482 n.12. None of that even remotely suggests what extraterritoriality principles should govern in the Fifth Amendment context, much less implicitly overrules the numerous precedents governing precisely that question.

d. Even if Guantanamo were somehow treated as sovereign United States territory, petitioners still would not have Fifth Amendment rights. In *Verdugo*, the Supreme Court held that aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 271; *see also Jifry*, 370 F.3d at 1182. The Court further held that "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" for constitutional purposes. *Verdugo*, 494 U.S. at 271. Applying that rule, the Court denied Fourth Amendment protection to an alien who was being detained in the United States

against his will, but who had "no previous significant voluntary connection with the United States." *Id*. Similarly, here, plaintiffs' presence at Guantanamo was involuntary and plaintiffs do not claim that they had any previous significant connections with this country. Such limited and involuntary contact does not trigger constitutional protections under *Verdugo*, even if Guantanamo were erroneously treated as sovereign United States territory.

2. Any Constitutional Rights Of Guantanamo Detainees Were Not Clearly Established.

Even if the Court concludes that the Constitution applies to aliens detained at Guantanamo, the defendants are entitled to qualified immunity because the plaintiffs' rights were not clearly established at the time of their detention. At the time of plaintiffs' detention, no court had called into question the validity of cases such as *Eisentrager*, *Verdugo*, *Vermilya-Brown*, and *Cuban American Bar Ass'n*. And, during the pendency of plaintiffs' detention, this Court decided *Al Odah*, holding that detainees at Guantanamo were not entitled to any constitutional protections. 321 F.3d at 1141. That holding, as discussed, has not been overturned. But, even accepting as true plaintiffs' incorrect assertion that *Rasul* has overturned all of these cases, defendants would still be entitled to qualified immunity because it is axiomatic that federal officials are only liable for the violation of rights that were clearly established

at the time of their alleged conduct and cannot be held liable based on later developments in the law.

Indeed, even after *Rasul,* district courts have disagreed regarding the application of Fifth Amendment rights at Guantanamo. *Compare Khalid v. Bush*, 335 F.Supp.2d 311, 320-22 (D.D.C. 2005) (aliens detained at Guantanamo are not entitled to constitutional protection)*, appeal pending*, No. 05-5063 (D.C. Cir.), *with In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C.) (holding that Guantanamo detainees have procedural due process rights), *appeal docketed sub nom. Al Odah v. United States*, No. 05-5064 (D.C. Cir). "If judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

Contrary to plaintiffs' characterization (Br. 42-44), the lack of clearly established law is not a "legal loophole." The issue here is whether alien military detainees can pursue private tort claims personally against the civilian and military leadership of this Nation's armed forces for the alleged violation of constitutional rights when it was (and is) far from clear that such detainees possessed the constitutional rights they assert. The fact that U.S. citizens may possess rights that aliens do not is no basis for denying qualified immunity. *See Kwai Fun Wong* v. *United States*, 373 F.3d 952, 975-97 (9th Cir. 2004) (while claims of race, ethnic and

religious discrimination in determining immigration status stated a constitutional claim, INS officials were entitled to qualified immunity due to "the constitutional uncertainty" regarding whether nonadmitted aliens have substantive constitutional rights").

Finally, plaintiffs' assertion that the alleged conduct was prohibited under military law does not show that the claimed Fifth Amendment right was clearly established. In determining whether officials "would have known that their actions violated a clearly established constitutional or statutory right, the Court may look no further than the statute or constitutional right that forms the basis for plaintiff's claim." *Tripp v. Dep't of Defense*, 173 F.Supp. 2d 58, 61 (D.D.C. 2001). *See also Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides *the basis* for the cause of action sued upon.") (emphasis added). Here, the claimed violations are asserted under Fifth and Eighth Amendments, and the application of those rights to plaintiffs was not then, and is not now, clearly established. Thus, there is a clear right to immunity.

IV. THE DISTRICT COURT ERRED IN DENYING THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY ON PLAINTIFFS' CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

The district court incorrectly denied defendants' motion to dismiss the RFRA claim. RFRA was enacted to restore the "compelling interest" test to free exercise claims as they existed prior to the Supreme Court's decision in *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), and not to create a brand new right for aliens outside the United States captured during a time of armed conflict. At the very least, any application of RFRA to non-citizens at Guantanamo was not clearly established.

A. RFRA Does Not Apply To Aliens Detained At Guantanamo.

1. RFRA provides that the "Government shall not substantially burden a *person's* exercise of religion" unless the government "demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (emphasis added). The Act applies to "all federal law" and the implementation of that law, "whether statutory or otherwise," adopted both before and after the passage of RFRA. *Id*. § 2000bb-3(a). The Act defines "government" as "a branch, department, agency, instrumentality, and

official (or other person acting under color of law) of the United States, or a covered entity." *Id*. § 2000bb-2(1). A "covered entity," in turn, "means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." *Id*. § 2000bb-2(2). RFRA also gives a "person" whose religious exercise has been burdened a statutory right of action. 42 U.S.C. § 2000bb-1(c). The statute, however, does not define the term "person" or specify that it applies outside the United States.

2. Statutes are presumed not to operate outside the sovereign jurisdiction of the United States, absent a "clear statement" to the contrary. *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 258 (1991); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949). Without such a clear statement, a court should be hesitant "to subject the political branches to the threat of suit" when reacting to a crisis "half-way around the globe." *Verdugo-Urquidez*, 494 U.S. at 274-275; *see Sanchez-Espinoza*, 770 F.2d at 209 ("the danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment of whether a damage remedy should exist").

There is no such clear statement here. The district court read the term "persons" as including aliens outside the United States, captured during an armed conflict. But the statute does not contain such a broad definition of "person," which

would be contrary to how the word is construed for purposes of constitutional law. As discussed in detail above, the Supreme Court and this Court have both recognized that the term "person" in the Fifth Amendment does not extend rights to aliens outside the United States. *See e.g., Jifry*, 370 F.3d at 1182 ("non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections"); *Peoples Mojahedin Org.* v. *United States*, 182 F.3d 17, 22 (D.C. Cir. 1999). Thus, the district court's statement (JA130) that "persons" is "a broadly applicable term, commonly including aliens" is incorrect in regard to aliens outside the United States. The general term "person" is insufficient to show that Congress wished to take the unprecedented step of granting substantive rights to aliens abroad, including those captured during an armed conflict.

3. This is especially true in light of RFRA's limited purpose. Congress enacted RFRA in response to the Supreme Court's decision in *Smith*, which held that generally applicable laws may be applied to religious exercises regardless of whether the government demonstrates a compelling interest for its rule. 494 U.S. at 884-89.

In response to *Smith*, Congress enacted RFRA to restore the free exercise rights that had been recognized under the pre-*Smith* constitutional standard. The statute itself states that its purpose is "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205

(1972)." 42 U.S.C. § 2000bb(b)(1). Indeed, the statute's legislative history indicates that Congress expected courts to look to cases predating *Smith* in construing and applying RFRA. *See* H.R. Rep. No. 103-88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 103-111, 103d Cong., 1st Sess. 9, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898; *see also* S. Rep. No. 103-111, at 9, 1993 U.S.C.C.A.N. at 1898 ("the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*"); S. Rep. No. 103-111, at 2, 1993 U.S.C.C.A.N. at 1893 (the Act "responds to the Supreme Court's decision in * * * *Smith* by creating a statutory prohibition against government action substantially burdening the exercise of religion"). The Senate Report clearly states that "the purpose of this act is *only* to overturn the Supreme Court's decision in *Smith*." *Id*. at 12, 1993 U.S.C.C.A.N. at 1902 (emphasis added).

When Congress enacted RFRA, it had long been established that aliens outside U.S. territorial jurisdiction who lacked a substantial connection to the United States are not entitled to First Amendment protection. *See, e.g., United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904); *see also Verdugo*, 494 U.S. at 265. Applying these principles, the Eleventh Circuit held that aliens at Guantanamo may not assert First Amendment rights. *Cuban-American Bar Ass'n*, 43 F.3d at 1425-27. Because RFRA merely "restore[d] the compelling interest test as set forth in *Sherbert*," 42

U.S.C. § 2000bb(b)(1), and because that test afforded no protection to aliens abroad who lacked a substantial connection to the United States, it follows that RFRA does not extend to those aliens.

At the very least, RFRA should not be construed to apply to aliens abroad who are detained by the U.S. military in wartime. Military operations during wartime have traditionally been left to the discretion of the Executive. Thus, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *see, e.g., Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). In RFRA, Congress did not provide a clear statement that it intended to expand free exercise claims to non-citizens captured by the U.S. military, and in fact expressly stated, both in the statute itself and the legislative history, that Congress's intent was limited to restoring pre-existing standards governing free exercise claims.

The district court erroneously disregarded the purpose of the statute, reasoning (JA128) that the "restorative purpose" of the statute was not necessarily the "sole motive" of Congress, because the statute also says that its purpose is "to provide a claim or defense to persons whose religious exercise is substantially burdened by

government." 42 U.S.C. § 2000bb(b)(2). That provision, however, does not purport to define which "persons" are covered by the statute. Moreover, the district court erred in stating (JA128-29) that RFRA's purpose to restore pre-existing constitutional rights should not be considered because resort to the legislative history is unnecessary. In fact, the congressional purpose to restore pre-existing free exercise rights appears on the face of the statute itself. 42 U.S.C. § 2000bb(b). This manifest expression of Congress's narrow intent undermines plaintiffs' claim that Congress provided a clear statement to extend RFRA to all aliens held abroad by the U.S. military.[7]

4. Additionally, RFRA's definition of "government" to include "each territory and possession of the United States," 42 U.S.C. § 2000bb-1(2), is not a clear statement that Congress intended the statute to apply to anyone at Guantanamo (including "persons"). Numerous statutes use phrases such as "territories and possessions," *see Vermilya-Brown*, 335 U.S. at 387 (listing statutes), and the

[7] The court's suggestion (JA129) that plaintiffs' reliance upon a post-enactment statement by an opponent of the legislation "reaffirms the notion that selective citation to legislative history are wrought with speculation" is unwarranted. The particular statement at issue, in addition to being post-enactment, did not even purport to interpret RFRA, other than to object to its application to the military. *See* 146 Cong. Rec. S7991, S7992-93 (Statement of Sen. Thurmond). And, the particular reference to religious accommodation at a military base in Saudi Arabia involved an incident that occurred long before RFRA was enacted. *Id*. at S7993.

application of those phrases depends upon the context and purpose of the statute. As the Court stated in *Vermilya-Brown*, "[t]he word 'possession' is not a word of art, descriptive of a recognized geographical or governmental entity." *Id*. at 386. What entities fall within the term "territory and possession" thus varies from statute to statute, depending upon the "motive and purpose" of the statute: "our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." *Id*. at 388.

In many contexts, the phrase "territories and possessions" has been construed to encompass only areas in which the United States exercises sovereign authority. *See, e.g.*, *People of Saipan* v. *Department of the Interior*, 502 F.2d 90, 95 (9th Cir. 1974) (holding that the Trust Territory of the Pacific Islands "is not a territory or possession, because technically the United States is a trustee rather than a sovereign"); *District of Columbia National Bank* v. *District of Columbia*, 348 F.2d 808, 812 (D.C. Cir. 1965) (recognizing that "a territory or possession may not tax the instrumentality of its sovereign without the latter's consent"); *see also* Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1988) (extending "the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana

Islands, *and any other territory or possession over which the United States exercises sovereignty*") (emphasis supplied).

Congress enacted RFRA against the general background of these cases, and RFRA's language suggests that this narrower definition is what Congress had in mind. In the statute as originally drafted, "government" was defined as including agencies and officials of the United States, a State, or a subdivision of a State. The statute then provided that "the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." 42 U.S.C. § 2000bb-2(2) (1993).[8] In this context, "territory and possession" appears in a list of sovereign governments bound by RFRA. That suggests that the phrase refers to the traditional definition of territories and possessions as areas over which the United States is sovereign.

Moreover, this interpretation is more consistent with the purpose of RFRA. As discussed, the purpose of RFRA was to create a statutory right identical to the First Amendment right that had been recognized prior to *Smith*. Yet sovereignty, and not mere jurisdiction and control, has been the benchmark for determining the

[8] After the Supreme Court invalidated RFRA as applied to the states, Congress amended RFRA to delete references to states, and instead included the "territory and possession" language in the definition of "covered entities." There is no indication, however, that Congress intended a substantive change by doing so.

geographical reach of those constitutional rights. *See, e.g., Verdugo*, 494 U.S. at 269 ("we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.); *Cuban-American Bar Ass'n*, 43 F.3d at 1425 (for constitutional purposes, "[w]e disagree that 'control and jurisdiction' is equivalent to sovereignty"). In light of the purpose of RFRA to restore pre-existing constitutional standards, the phrase "territory and possession" is more reasonably interpreted as encompassing areas over which the United States has sovereignty. In any event, such phrases is not a clear statement sufficient to overcome the presumption against extra-territorial application.

The district court incorrectly interpreted *Rasul* as controlling with respect to the purported status of Guantanamo as a "possession" under RFRA. *Rasul* addressed only the geographic bounds of the habeas statute (prior to its recent amendment), the breadth of which was largely determined by the "extraordinary territorial ambit of the writ at common law." 542 U.S. at 484-85. The Court's reasoning was specific to the habeas statute, *id*. at 476-79, and does not support a finding that Guantanamo is a "possession" within the meaning of an entirely separate statute such as RFRA.

B. Any Application Of RFRA To Non-U.S. Citizens At Guantanamo Was Not Clearly Established.

Even if this Court concludes that RFRA applies to detainees held at Guantanamo, defendants nevertheless are entitled to qualified immunity. Certainly, reasonable officials could have doubted (especially prior to *Rasul*) that RFRA granted rights to aliens captured on foreign soil during wartime and held at a facility outside the United States.

The notion that RFRA's application to Guantanamo detainees was clearly established is refuted by this Court's decision in *Al Odah*, 321 F.3d at 1144, in which the Court held that detainees at Guantanamo are not within the "territorial jurisdiction" of the United States and therefore cannot bring an action based upon alleged violations of the Constitution or federal law. While *Rasul* held that there was jurisdiction under the habeas statute, it did not address whether aliens detained at Guantanamo have any substantive rights under statute or the Constitution. 524 U.S. at 484-85. Moreover, *Rasul* was decided after the conduct at issue here. Thus, it has never been "clearly established" that detainees at Guantanamo have any substantive rights under U.S. law regarding their detention.

Nor can one find clearly established law from the Supreme Court's earlier decision in *Vermilya-Brown*. In that case, the Court held that the Fair Labor

Standards Act applied to aliens on a U.S. military base in Bermuda – and in doing so likened that base to Guantanamo. *See* 335 U.S. at 378. However, *Vermilya-Brown* also makes it clear that analysis of the geographic application of a statute "depends on the purpose of the statute." *Id*. at 390. In light of the purpose of RFRA to restore the standard governing pre-existing constitutional rights, a reasonable federal official could conclude that *Vermilya-Brown*'s discussion of the status of Guantanamo does little to establish that RFRA applies to aliens detained there.

In holding to the contrary, the district court incorrectly reversed the proper method of analysis, stating that there was nothing in *Rasul* that "called RFRA's application to GTMO into question." *See* JA135. But the qualified immunity analysis demands more: a federal official cannot be held liable unless it was clear that what he was doing violated the plaintiffs' rights. Absent such clarity, the defendant is not required to produce case law that casts doubt on the plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the decision of the district court dismissing Counts I through IV of the complaint should be affirmed. The decision of the district court denying the motion to dismiss with respect to the RFRA claim should be reversed.

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FEBRUARY 2007

BRIEF FORMAT CERTIFICATION

I hereby certify that the Brief for Appellees/Cross-Appellants complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 13,781 words.

_____

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GLOSSARY

Br.:	Brief for Appellant
FTCA:	Federal Tort Claims Act
Geneva Conventions:	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civiliams Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
Guantanamo:	U.S. Naval Base at Guantanamo Bay, Cuba
JA:	Joint Appendix
RFRA:	Religious Freedom Restoration Act
Westfall Act:	Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563